DAN GETMAN *(Pro Hac Vice)*
GETMAN, SWEENEY & DUNN, PLLC
260 Fair St.
Kingston, NY 12401
(845) 255-9370
dgetman@getmansweeney.com

SUSAN MARTIN *(Pro Hac Vice)*
JENNIFER KROLL *(Pro Hac Vice)*
MARTIN & BONNETT, P.L.L.C.
4647 N. 32nd St., Suite 185
Phoenix, AZ 85018
(602) 240-6900
smartin@martinbonnett.com
jkroll@martinbonnett.com

EDWARD TUDDENHAM *(Pro Hac Vice)*
23 Rue Du Laos
Paris, France
33 684 79 89 30
etudden@prismnet.com

HOWARD Z. ROSEN
ROSEN MARSILI RAPP LLP
3600 Wilshire Blvd., Suite 1800
Los Angeles, CA 90010
(213) 389-6050
hzrosen@rmrllp.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA -EASTERN DIVISION

SALVADOR CANAVA, individually and on behalf of others similarly situated,

Plaintiffs,

v.

RAIL DELIVERY SERVICES, INCORPORATED AND GREG P. STEFFLRE, JUDI GIRARD STEFFLRE,

Defendants.

Case No. 5:19-cv-00401-JGB (KKx)
Honorable Jesus G. Bernal
Courtroom 1

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE AND TO COMPEL INDIVIDUAL ARBITRATION

Hearing Date: September 16, 2019
Time: 9:00 a.m.
Location: U.S. Courthouse
3470 Twelfth Street
Riverside, CA 92501
Courtroom: 1

Complaint filed: March 4, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Named Plaintiff and collective action Plaintiffs (together referred to herein as "Plaintiffs") are truck drivers who drove freight for Rail Delivery Services Inc. (RDS). To be hired by RDS, Plaintiffs were required to sign two form agreements drafted by RDS - an "Interstate Transportation Agreement" ("Agreement"), Doc 42 at 6-31, and a "Vehicle Rental Agreement." Doc 42, 33-39. Both agreements contain an arbitration clause which states that any disputes related to the drivers' services "shall be arbitrated according to the terms of the Federal Arbitration Act" (FAA). Doc. 42, p. 27, §XIII; Doc. 42, p. 37 ¶17. However, as Defendants concede, the U.S. Supreme Court recently held that the FAA exempts all contracts with interstate truck drivers from arbitration, thereby precluding enforcement of the arbitration provision as written. Despite that fact, RDS now seeks to compel arbitration of claims 2, 6, 7, and 8 under the California Arbitration Act (CAA). RDS admits that arbitration is unenforceable under the CAA with respect to Plaintiffs' federal minimum wage (Count 1), California minimum wage (Count 3), and PAGA claim (Count 10) and that those claims must be heard in Court. Nevertheless, it seeks a stay of those claims during arbitration, despite providing no evidentiary support or argument explaining why the balance of hardships or the interests of justice require a stay. RDS also seeks to enforce a class action waiver contained in the agreement with respect to all claims except the PAGA claim (RDS admits the waiver is unlawful as applied to the PAGA claim). Because a class proceeding is a "significantly more effective" way to enforce the labor law claims asserted by Plaintiffs and because the class waiver drafted by RDS is unconscionable, it is unenforceable. Accordingly, RDS's entire motion must be denied.[1]

[1] Defendants make no motion with respect to Count 9 (Violation of Business Code §17200) as it is a derivative claim arising under the substantive FLSA and Labor Code violations and its treatment follows those causes of action. Doc 40 at 6. By separate motion Defendants move to dismiss counts 4 and 5 as preempted by the FMCSA which motion Plaintiffs do not oppose.

SUMMARY of ARGUMENT

Defendants' motion to compel arbitration of Counts 2, 6, 7, and 8 must be denied because the arbitration agreement states that it is to be governed exclusively by the FAA, which the Supreme Court recently held does not permit arbitration of interstate truckers' employment disputes. Even if the arbitration clause could be enforced pursuant to the CAA instead of the FAA, that CAA is preempted by §1 of the FAA which expresses Congress' clear intent to bar enforcement of arbitration agreements of interstate transportation workers. In addition, the arbitration agreement does not clearly cover statutory claims, thereby precluding an order compelling arbitration of Counts 6, 7, and 8. Finally, the entire arbitration provision is unenforceable because the many unlawful aspects of the agreement are not severable.

Defendants' effort to enforce the class action waiver provision in the agreement must also be denied. The waiver provision is both procedurally and substantively unconscionable and, in addition, it is contrary to California public policy which prohibits such waivers where, as here, they hinder enforcement of non-waivable statutory labor rights. Doc. 41, pp. 5-6. If the class action waiver is struck allowing Plaintiffs to seek class certification, then for this reason alone all claims must be heard in court as the parties did not agree to class arbitration.

I. THE MOTION TO COMPEL ARBITRATION PURSUANT TO THE CALIFORNIA ARBITRATION ACT SHOULD BE DENIED.

Defendants concede that the arbitration agreement cannot be enforced pursuant to the FAA and cannot lawfully be enforced under the CAA with respect to Counts 1 (FLSA), 3 (Cal. Min. Wage), and 10 (PAGA). Doc. 41, p. 10-11. Nevertheless, Defendants seek to use the California Arbitration Act to compel arbitration of Counts 2, 6, 7, and 8. That motion must be denied for three independent

reasons.

A. The Parties' Agreement Precludes Application of the CAA.

"[A]rbitration is a matter of contract" and "courts must 'rigorously enforce' arbitration agreements according to their terms." *Amer. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)) A motion to compel arbitration is simply a suit in equity seeking specific performance of [the arbitration] contract. *Rebolledo v Tilly's Inc.*, 228 Cal. App. 4th 900, 912-913 (2014). Specific performance can only be ordered consistent with the contract's precise language. *Id.*

Here the parties agreed that their arbitration agreement would be governed solely and exclusively by the FAA. The Agreement specifically states, "any disputes arising under or in connection with this Agreement or services rendered in connection with same shall be arbitrated pursuant to this arbitration agreement and any proceedings thereunder shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§1-16." Agreement ¶XIII. The Rental Agreement also specifies arbitration pursuant to the FAA: "Disputes arising under or by reason of the transaction reflected in this agreement shall be arbitrated under the provisions of the Federal Arbitration Act (9 USC 1, et seq.)." Rental Agreement, Doc 42 at 37 ¶17[2].

RDS conveniently omits these express references to arbitration being governed by the FAA when it quotes the arbitration provision in its motion to compel. *See* Doc 40 at 9, 10 (ECF pp. 14-15). However, those references cannot be ignored. It is a basic tenet of contract interpretation that all words in a contract are

[2] The Agreement and the Rental Agreement must be read together as a single document. They are presented to drivers as a package and each must be signed as a condition of signing the other. Declaration of Jesus Dominguez filed herewith ("Dominguez Decl.") ¶¶7,9-10; Declaration of Omar Rivera filed herewith ("Rivera Decl.") ¶¶7-8. Under these circumstances they operate as a single contract. Cal. Civ. Code §1642.

to be given meaning and none are to be treated as surplusage. *Brandwein v. Butler*, 218 Cal. App. 4th 1485, 1507 (2013) ("when interpreting a contract we strive . . . to avoid interpretations that render any portion superfluous, void or inexplicable."); Cal. Civ. Code §1641 (interpretation should give effect to all parts of a contract). Here, the specific requirement that arbitration is to be "governed by," and conducted "under the provisions" of, the FAA, along with the extensive references in the arbitration paragraph to the interstate commerce prerequisites for FAA coverage, and the absence of a single reference to the CAA, Doc 42 at 27-28 ¶XIII, reflect the parties' unambiguous intent that arbitration be governed by the FAA and not by some other body of law such as the CAA.[3]

The Supreme Court has made clear that agreements as to the law governing an arbitration provision must be enforced. "Just as [parties] may limit by contract the issues which they will arbitrate [citation omitted], so too may they specify by contract the rules under which that arbitration will be conducted." *Volt Info. Scis., Inc. v. Bd. Of Trustees,* 489 U.S. 468, 479 (1989). In *Volt,* the parties agreed to abide by California rules of arbitration with the result that the arbitration had to be stayed pursuant to applicable California procedures even though, if the agreement had been

---

[3] There are numerous reasons why RDS might have insisted arbitration be governed by the FAA. Among other things, proceeding exclusively under the FAA ensured that limitations on arbitration imposed by California law would not apply, such as the *Gentry* rule (barring class action waivers), Cal. Labor Code §229 (exempting labor claims from arbitration), Cal. Labor Code §98-98.8 (providing for a so-called Berman hearing before arbitration); and Cal. Code Civ. Pro. §1281.2 (providing for a stay of arbitration if a third party to a suit is not subject to arbitration). The fact that RDS has to admit that, under the CAA, the arbitration agreement is unlawful as written with respect to Counts 1, 3, and 10 (an admission it would not have had to make under the FAA prior to the *New Prime* decision) confirms RDS drafted the agreement to be enforced exclusively under the FAA.

enforced pursuant to the FAA, no such stay would have been permitted. *Id.* This case presents the opposite choice where the parties agreed that arbitration must be governed exclusively by the FAA not state law, but the principal of *Volt* is the same: The parties are entitled to have their contractual agreement enforced as written, not altered in favor of something they did not agree to. *See, e.g. W. Dairy Transp., LLC v. Vasquez,* 457 S.W.3d 458, 462-63 (Tex. App. 2014) (refusing to enforce arbitration provision under state law where agreement specifically stated that the agreement would be interpreted and enforced pursuant to the FAA); *J.B. Hunt Transp., Inc. v. Hartman,* 307 S.W.3d 804, 808 (Tex. App. 2010) (same).

No doubt, when RDS drafted the arbitration agreement, it did not anticipate that the Supreme Court would issue an opinion making enforcement pursuant to the FAA impossible. But that is not an excuse for the Court to ignore the language of the agreement or rewrite it in the way that Defendants now wish they had written it - altering "governed by the FAA" to mean instead "governed by any available arbitration statute." Such a rewrite is contrary to the plain language of the agreement and renders the reference to the FAA meaningless, in violation of basic principles of contract construction. *Brandwein,* 218 Cal. App. 4th at 1507; Cal. Civ. Code §1641. Defendants are bound by the language they intentionally chose.[4]

B. The FAA §1 Preempts Application of the CAA.

New Prime, Inc. v. Oliveira, 139 S. Ct. 532 (2019), holds that, in adopting §1 of the FAA, Congress intended to prohibit enforcement of arbitration agreements signed by interstate transportation workers, regardless of their status as employees or independent contractors. The FAA preempts using the CAA to compel arbitration

[4] Even if the agreements' references to the FAA were considered ambiguous, ambiguity is construed against the drafter, a rule that "applies with peculiar force in the case of a contract of adhesion." *Sandquist v. Lebo Auto., Inc.*, 205 Cal. Rptr. 3d 359, 376 P.3d 506, 514 (2016); *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 672 (9th Cir.), rev'd on other grounds, 139 S. Ct. 1407 (2017).

forbidden by §1. Under the doctrine of obstacle preemption, state laws are preempted when the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States (Arizona II),* 567 U.S. 387 (2012) at 399 (citations omitted). "To determine whether obstacle preemption exists, the Supreme Court directs courts to consider the federal statute as a whole and identify[] its purpose and intended effects." *United States v. Arizona (Arizona I),* 641 F.3d 339, 345 (9th Cir. 2011) (internal quotes omitted). In evaluating whether preemption exists, Congress's intent "is the ultimate touchstone." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

While there is no question that "passage of the [FAA] was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered," *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 220 (1985), that purpose did not "extend to *all* private contracts, no matter how emphatically they may express a preference for arbitration." *New Prime*, 139 S. Ct. at 537. To the contrary, §1 of the Act warns that "nothing" in the Act "shall apply" to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* Congress chose to exclude these workers from the FAA:

> precisely because of Congress' undoubted authority to govern the employment relationships at issue by the enactment of statutes specific to them. By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers, see Shipping Commissioners Act of 1872, 17 Stat. 262. When the FAA was adopted, moreover, grievance procedures existed for railroad employees under federal law, see Transportation Act of 1920, §§ 300-316, 41 Stat. 456, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad

> labor disputes was imminent, see Railway Labor Act of 1926, 44 Stat. 577, 46 U.S.C. § 651 (repealed). . . .
>
> As for the residual exclusion of "any other class of workers engaged in foreign or interstate commerce," Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence. **It would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation.**

Circuit City Inc. v. Adams, 532 U.S. 105, 120-121 (2001) (emphasis supplied). Plainly if Congress exempted transportation workers from compelled arbitration because it wanted to "reserv[e] for itself" the ability to adopt "more specific legislation for those engaged in transportation," then state legislation enforcing the same agreements that Congress specifically did not want enforced "would stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona II,* 567 U.S. at 399 (internal quotes omitted). It would serve little purpose for Congress to specifically exempt contracts of transportation workers from compelled arbitration if that exemption could be overridden simply by invoking a state arbitration act that contained no parallel exemption.[5] A clearer

[5] This is not a situation like the FLSA where Congress chose to extend minimum wage benefits to certain classes of workers but made clear in 29 U.S.C. §218(a), that, in exempting certain workers from the FLSA, Congress in no way intended to prevent states from adopting minimum wage laws applicable to those FLSA exempt workers. *See, e.g., Pacific Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1417-18 (9th Cir. 1990) (FLSA overtime exemption for seamen did not prevent California from extending overtime protections to such workers.).

example of obstacle preemption is difficult to imagine.

Named Plaintiff recognizes that *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004), found that the §1 exclusion did not preempt enforcement of agreements pursuant to state arbitration laws. The court reached that conclusion by focusing on the fact that "Congress enacted the FAA 'to ensure judicial enforcement of privately made agreements to arbitrate,'" *Palcko,* 372 F.3d at 595 (quoting *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 219 (1985)), and the fact that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Id.* (quoting *Volt Information Scis.,* 489 U.S. at 477.) But those are the wrong concerns. The problem is not one of field preemption, so the reference to *Volt* and the absence of an express preemptive provision in the FAA is entirely irrelevant. No one argues that the FAA preempts the entire field of arbitration enforcement. Instead, the issue here is a very specific question of conflict preemption between Congress's §1 prohibition on compelled arbitration for interstate transportation workers and state laws forcing such workers to arbitrate. In analyzing that conflict, the relevant concern is not Congress's general policy of encouraging arbitration, but Congress's specific intent to *exclude* transportation workers from that general policy. As the Court in *Circuit City* made clear, Congress adopted that provision because "it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers" and because it wanted to "reserv[e] for itself" the ability to adopt "more specific legislation for those engaged in transportation." That purpose, not a general interest in promoting arbitration, was the reason for §1 and that purpose would clearly be undermined by state laws that override §1 and compel arbitration for interstate transportation workers. Every case that has followed *Palcko* makes the same error of focusing on the wrong Congressional intent and on field preemption

instead of conflict preemption.[6] The Court should reject the obviously flawed and ill-considered analysis in these cases. *See Oliveira v. New Prime,* 857 F. 3d 7, 17-18 (1st Cir. 2017) (refusing to be swept along by a "judicial chorus" of "cascading decisions," at least 14 in number, all finding that the §1 exemption applicable only to employees, and instead considering the issue afresh to conclude that §1 applies to both independent contractors and employees – a conclusion upheld by a unanimous Supreme Court.). The inapplicability of *Palcko* and its progeny is especially clear here where the arbitration clause references only the FAA. The agreements in *Palcko* and all of the other cited cases involved arbitration agreements that explicitly referenced state arbitration laws as well as the FAA. *Palcko* viewed the reference to state arbitration laws as an important consideration in enforcing the agreement.

Accordingly, either because the parties agreed that arbitration would be exclusively governed by the FAA (which does not allow enforcement of the arbitration agreement), or because §1 of the FAA preempts enforcement by the CAA, none of Plaintiffs claims are subject to compelled arbitration.

C. Even if the CAA Applies, Plaintiffs Statutory Claims (Counts 6, 7, 8, 9) Are Not Covered by the Arbitration Agreement.

"Under California law an arbitration clause does not encompass statutory claims unless the agreement clearly and unmistakably states otherwise." *Pauley v. CF Entm't,* 646 Fed. Appx. 498, 500 (9th Cir. 2016) (citing *Hoover v. Am. Income*

[6] *See, e.g. Roberts v. Central Refrigerated Serv.*, 27 F. Supp. 3d 1256, 1260 (D. Utah 2014) (applying Utah Arbitration Act to §1 exempt drivers citing lack of field preemption provision in FAA); *Cilluffo v. Central Refrigerated Servs., Inc.*, No. EDCU 12-00886 VAP(OPX) 2012 WL 8523507 at *6 (C.D. Cal. Sept. 24, 2012) (applying Utah Arbitration Act to §1 exempt drivers because no field preemption provision and FAA's general intent to encourage arbitration); *Powell v. Carey Int'l, Inc.*, No. 05-21345-Civ-Seitz 2006 WL 8434352 *2 fn 5 (S.D. Fla. Nov. 17, 2006) (citing *Palcko*).

Life Ins. Co., 206 Cal. App. 4th 1193, 1208 (2012). In *Pauley*, the arbitration clause did not expressly cover statutory claims and, accordingly, the Court concluded that they were not subject to arbitration. *Id.* Similarly in *Hoover* the court held that an arbitration agreement covering "any dispute or disagreement arising out of or relating to this contract" and "all disputes, claims, questions, and controversies of any kind or nature arising out of or relating to this contract" did not encompass statutory claims arising under the California Labor Code because it "did not mention the arbitration of statutory claims or identify any statutes."[7] *Hoover*, 206 Cal. App. 4th at 1208. *See also Wawock v. CSI Elec. Contractors*, 649 Fed. Appx 556, 558 (9th Cir. 2016) (general agreement to arbitrate does not cover statutory claims); *Elijajuan v. Superior Court*, 210 Cal. App. 4th 15, 18, 20-24 (2012) (agreement to arbitrate disputes relating to contract's application or interpretation did not cover labor code violations); *Vaquez v. Superior Court*, 80 Cal. App. 4th 430, 434 (2000) (agreement to arbitrate "all grievances or disputes arising . . . over the interpretation or application of the terms of this [CBA]" was too broad and general to encompass employee statutory claims; to be sufficiently specific the agreement must indicate that statutory rights are covered); *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 861-62 (9th Cir. 1979) (where arbitration agreement is limited to disputes arising from the contract FLSA claims were not covered because they arise out of a statute independent of the contract).

Here, the arbitration agreement merely states that "disputes arising under or in connection with this Agreement or services rendered in connection with the same

---

[7] The reason for this rule is that statutory claims do not arise out of a contract. *See Narayan v. EGL, Inc.*, 616 F.3d 895, 899 (9th Cir. 2010) (holding that California statutory labor law violations do no arise out of an employment contract and noting that "[w]hile the contracts will likely be used as evidence to prove or disprove the statutory claims, the claims do not arise out of the contract, involve the interpretation of any contract terms, otherwise require there to be a contract.").

shall be arbitrated pursuant to this arbitration agreement. . .” Doc 42 at 28 ¶XIII. The agreement makes no mention of statutory rights, let alone the specific labor code rights at issue here. Accordingly, it does not cover Plaintiffs’ statutory claims set forth in Counts 6, 7, 8 and 9. *Pauley v. CF Entm’t, supra.*

Count 8 (violations of Labor Code § 221 and 2802), is exempt from arbitration for an additional reason. That Count seeks unpaid wages that were unlawfully deducted to cover Defendants’ business expenses. As such it falls squarely within Labor Code §229 which prohibits enforcement of arbitration agreements seeking to collect unpaid wages.

D. The Illegalities in the Arbitration Agreement Cannot Be Cured by Severance, Rendering the Entire Agreement Unenforceable.

Even if Defendants could invoke the CAA to enforce the arbitration agreement, and even if the agreement were sufficiently specific to encompass statutory claims, the agreement would still be unenforceable because severance of the unlawful aspects of the agreement is neither possible nor appropriate.

1. The Agreement is Permeated by Unconscionable Provisions.

The arbitration agreement is unlawful in an extraordinary number of ways. RDS itself admits that the agreement is unlawful as applied to Count 1 (FLSA) and Count 3 (California minimum wage) and that the class action waiver contained in the agreement renders it unenforceable with respect to Count 10 (PAGA claim). *See Securitas Security Servs. USA, Inc. v. Superior Court,* 234 Cal. App. 4th 1109 (2015) (class action waiver is unenforceable with respect to PAGA claim). The fact that RDS admits to these illegal aspects of its arbitration agreement does not in any way lessen their illegality. *See Samaniego v. Empire Today, LLC,* 205 Cal. App. 4th 1138, 1147 (2012) (rejecting employer’s argument that agreement could not be unconscionable because the employer admitted the unconscionable provision was unenforceable).

The agreement is unlawful in other respects as well. As explained below, the class action waiver in the agreement is unenforceable as to all Counts because it violates California public policy and is unconscionable. In addition, the very first sentence of the arbitration provision requires Plaintiffs to pay Rail Express's attorneys' fees if Rail Express is required "to institute or defend any action at law, or in equity, against, or by, [Plaintiff] and arising out of this Agreement. . ." even if Plaintiffs prevail. Doc 42 at 27, ¶XIII. Such a one-sided provision is facially unconscionable. *Samaniego v. Empire Today LLC,* 205 Cal. App. 4th 1138, 1147-48 (2012) (provision that grants fees to employer but not employee is unconscionable); *Ajamian v. CantorCO2e, LP,* 203 Cal. App. 4th 771, 798 (2012) (provision awarding fees to prevailing employer but not prevailing employee is unconscionable). The Agreement contains numerous other unconscionable provisions.[8] Drivers indemnify RDS for attorneys' fees, but not vice versa. Agreement, Doc 42 at 27 ¶13. The Rental Agreement is also substantively unconscionable because, while it requires Plaintiffs to arbitrate pursuant to the FAA, Doc 42 at 37 ¶17, RDS reserves the right to "proceed to court action to enforce performance by [Plaintiff] and to recover costs or expenses we incur." *Id.* at 36 ¶8g. No possible justification exists for such a lack of mutuality in remedies. *See*

---

[8] For example, the Agreement imposes a 6-month limitation period for a driver to contest payment or contract termination, Doc. 42 at 12, § III(e). *See Ingle v. Circuit City Stores,* 328 F.3d 1165, 1175 (9th Cir. 2003) (shortened limitations periods unconscionable). It contains multiple one-way indemnification provisions for driver but no corresponding RDS obligations, *id.* p. 13,§ III (h), p. 15, §V(b); p. 17 § VI(e), p. 18 §VII(a), (d)-(f),(h), p. 20 §VIII(h); p. 25 §IX(a), p. 27 XII (a); doc. 42, p. 36 §9 compare with carrier payment obligations under §III,(a); p. 27 § (c) unilateral right of carrier to terminate Agreement without notice upon breach, p. 35-36 §1, and unilateral right to terminate rental agreement, *Ingle,* 328 F.3d at 1179 (unilateral termination provisions unconscionable).

Armendariz v. Foundation Health Psychcare Servs., Inc., 24 Cal. 4th 83,117-118 (2000). *See e.g. Carmona v. Lincoln Millennium Car Wash, Inc.*, 266 Cal. App. 4th 74 (2014) at 634 (allowing employer access to court for claims employer is most likely to bring while requiring employee to arbitrate is substantively unconscionable); *Serafin v. Balco Props. Ltd., LLC*, 235 Cal. App. 4th 165 (2015) at 181 (same).

These unconscionable provisions cannot be severed to allow the agreement to be enforced for at least three independent reasons: (1) the arbitration agreement prohibits severance, (2) curing the illegality in the agreement would require re-writing the agreement, not just severing the offending language, and (3) the unlawful provisions are so pervasive as to render the agreement as a whole unenforceable.

(1) The Agreement Precludes Severance

Section XVI of the Agreement provides that: "This Agreement constitutes the entire Agreement and understanding between the parties and shall not be modified, altered, change [*sic*] or amended in any respect unless in writing signed by both parties." Doc 42 at 29, ¶XVI. Severance of an unlawful provision would necessarily "modif[y], alter[], change or amend[]" the Agreement by means other than a writing signed by both sides. Accordingly, even if the only unlawful aspects of the Agreement are those RDS admits to, the inability to sever those provisions renders the entire Agreement unenforceable.[9] *See, e.g. Securitas Security Servs. Inc.*, 234

[9] That the parties intended to prohibit severance is further illustrated by ¶XX of the Agreement which very specifically authorizes severance of references to 49 C.F.R. §376.12 as an exception to ¶XVI but conspicuously mentions no other exception. Unlike other savings clauses that generally allow unlawful or inapplicable provisions to be disregarded, this savings clause is quite limited. Defendants knew how to provide for severance when they wanted to. The express inclusion of such a provision only for the cited regulation coupled with language of ¶XVI precludes its

Cal. App. 4th 1109 (2015) (where contract prohibited severance, unlawful PAGA waiver rendered entire agreement unenforceable).

(2) The Agreement Would Require Reformation Not Just Severance

A court is not authorized to affirmatively add terms in order to "reform" a contract and make it lawful; if a contract cannot be cured through severance, it cannot be enforced. *Id.* at 125. *See Armendariz,* 24 Cal. 4th at 125 (courts have no authority to reform contracts through augmentation); *Jackson v. S.A.W. Entm't. Ltd.,* 629 F. Supp. 2d 1018, 1029-32 (N.D. Cal. 2009) (same).

Here there is no way grammatically to sever the portions of the contract that unlawfully require arbitration of the FLSA, California Minimum Wage Act, and PAGA claims (assuming, *arguendo*, that the agreement covers statutory claims) without adding terms (e.g. the court would have to add after "any disputes arising under this . . . agreement . . . shall be arbitrated" the phrase "*except for PAGA claims and claims covered by Cal. Labor Code §229"*). Nor can the class action waiver be severed as to some claims and not others without adding language to the agreement (e.g. the court would have to add after "class action and collective action procedures shall not be asserted" the phrase "*except that this provision shall not apply to PAGA claims and claims for which a class action waiver would be unconscionable or contrary to public policy"*). Because the Court does not add language to cure the illegal aspects of the agreement, the entire agreement falls.

(3) Pervasive Illegality Precludes Severance

Finally, even if the illegal aspects of the arbitration agreement could be cured by severance, California law gives the Court the discretion to choose between severing the unconscionable provisions or, where the agreement is "permeated" by

---

application elsewhere. *Murphy v. DirecTV, Inc.,* 724 F.3d 1218 (9th Cir. 2013) (relying on principal of *expressio unius est exclusio alterius* to interpret an arbitration agreement).

unconscionability, refusing to enforce the entire agreement. *Armendariz,* 24 Cal.4th at 122. "An employment arbitration agreement can be considered to be permeated by unconscionability if it 'contains *more than one* unlawful provision. . . Such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage.'" *Murray v. Check'N Go of Cal., Inc.,* 156 Cal. App. 4th 138, 149 (citing *Armendariz,* 24 Cal. 4th at 124-125). Here, the agreement is even more permeated with illegality than the agreements in *Murray* and *Armendariz.* RDS admits to two illegal provisions (the PAGA waiver and the violation of §229 with respect to the FLSA and the CMWA). As discussed above, Plaintiffs have identified numerous other illegal provisions. RDS' imposition of multiple, facially unlawful provisions in an arbitration agreement on unsophisticated drivers who were unlikely to be aware of these illegalities evidences a systematic effort to overreach that merits treating the agreement as unenforceable. *See Ortolani v. Freedom Mortg. Corp.,* No. EDCU 17-W62 JGB (KKx) 2017 WL 10518040 (C.D. Cal. Nov. 16, 2017) (finding arbitration agreement unenforceable because permeated with unconscionable terms); *Jackson v. S.A.W. Entm't. Ltd.,* 629 F. Supp. 2d 1018, 1029-32 (N.D. Cal. 2009) (same).

II. THE CLASS WAIVER PROVISION OF THE AGREEMENT IS CONTRARY TO PUBLIC POLICY AND UNENFORCEABLE.

Although Defendants admit that the class action waiver in the agreement is unlawful with respect to Count 10 (PAGA), they seek to enforce the waiver with respect to the other Counts regardless of whether those Counts are heard in court or arbitration. However, the waiver is unenforceable for two independent reasons.

A. The Class Action Waiver is Contrary to Public Policy.

In *Gentry v. Superior Court* the California Supreme Court held that in certain cases a prohibition on classwide relief "would undermine the vindication of the

employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws." *Gentry v. Superior Court.* 42 Cal. 4th 443, 450 (2007). The court concluded that when an employer is alleged to have systematically denied labor rights to a class of employees and a class action is requested despite the employee's agreement to a class action waiver,

> the trial court must consider . . . the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration. If it concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can "vindicate [their] unwaivable rights in an arbitration forum."

Id. at 463-4. Although the "*Gentry* rule" would be preempted if the FAA applied, where, as here, the FAA is inapplicable, the *Gentry* rule barring class waivers remains good law. *Muro v. Cornerstone Staffing Sols., Inc.*, 20 Cal. App. 5th 784, 792 (2018) (affirming application of *Gentry* to strike class action waiver in arbitration agreement exempt from FAA); *Garrido v. Air Liquide Indus. U.S. LP*, 241 Cal. App. 4th 833, 844-45 (2015) (noting that "the *Gentry* rule likewise may be asserted in matters governed by the CAA and not the FAA.").

Applying the four *Gentry* factors, the class action waiver in Plaintiffs'

employment agreements is clearly unenforceable with respect to Plaintiffs' unwaivable labor law rights (Counts 1, 3, 6, 7, 8). As to the first *Gentry* factor, the Declaration of Dan Getman filed herewith ("Getman Decl."), indicates that, even making liberal assumptions, Plaintiff Canava's labor claim damages are estimated to be less than $27,000.00. Getman Decl. ¶10. This is a "modest recovery" within the meaning of *Gentry*. *Gentry* itself cited to *Bell v. Farmers Ins. Exch.,* 115 Cal. App. 4th 715, 745 (2004), which indicated that a potential award of $37,000 did not necessarily "provide[] 'ample incentive for an individual lawsuit." *Gentry,* 42 Cal. 4th at 458. *See also Muro,* 20 Cal. App. 5th at 793 (estimated recovery of $26,000 is a modest recovery under *Gentry*). Indeed, the *Gentry* court observed that "wage and hour cases will generally satisfy the 'modest' recovery factor because they 'usually involve[ ] workers at the lower end of the pay scale.' " *Garrido,* 241 Cal. App.4th at p. 846 (quoting *Gentry, 42* Cal. 4th at 457–458). That is certainly true here where Plaintiffs sue for minimum wage violations, not overtime.

Second, Plaintiff Canava's declaration and those of Opt-in Plaintiffs Dominguez and Rivera indicate that they did not feel able to bring a lawsuit while working for RDS because they feared they would be fired or retaliated against. Declaration of Salvador Canava filed herewith ("Canava Decl.") ¶18, Dominguez Decl. ¶13, and Rivera Decl. ¶13. Canava's fears were echoed by other RDS drivers he spoke to. Canava Decl. ¶19. Given RDS's right to terminate the Agreement at will, *see* Doc 42 at 26 ¶XI b., drivers certainly have good reason to fear retaliation. Comparable evidence has been found adequate to support the factual determination of the potential for retaliation. *See Muro v. Cornerstone Staffing Sols., Inc.,* 20 Cal. App. 5th 784, 794 (2018) (affidavit of plaintiff expressing his fear of retaliation is sufficient to satisfy second *Gentry* factor); *Garrido,* 241 Cal. App. 4th at 846 (same); *Franco v. Athens Disposal Co., Inc,* 171 Cal. App. 4th 1277, 1296 (2009) (same).

As for the third factor—whether absent class members might be ill-informed

about their rights—the Plaintiffs' declarations make clear that drivers are highly likely to be uninformed because (1) the job did not require more than a high school education; (2) many drivers speak Spanish as their first language and have a limited understanding of English; (3) RDS made no effort to inform Plaintiffs or other drivers of their rights under California law; (4) the fact that the Agreement labeled drivers like Plaintiffs "independent contractors" was bound to lead drivers to think that they were not covered by statutes designed to protect employee rights. Canava Decl. ¶¶2, 3, 8; Dominguez Decl. ¶5; Rivera Decl. ¶6. This evidence is more than sufficient to satisfy the third element of Gentry. *Garrido,* 241 Cal. App. 4th at 846; *Muro,* 20 Cal. App. 5th at 794-795.

With regard to the fourth factor, *Gentry* reasoned that a "requirement that numerous employees suffering from the same illegal practice each separately prove the employer's wrongdoing is an inefficiency that may substantially drive up the costs of arbitration and diminish the prospect that the overtime laws will be enforced." *Gentry,* 42 Cal. 4th at 459. Here Plaintiffs allege that all drivers who signed RDS' Agreement were erroneously labeled as independent contractors and deprived of the protections afforded to employees under California and federal labor laws. The class action waiver that RDS imposed on this large class of drivers suffering from the same illegal practice is precisely the kind of waiver that, if enforced, would drive up costs and diminish the prospects that labor laws will actually be enforced. It would, in effect, make violating labor protections financially advantageous for an employer even if a few workers pursued individual claims. *See Garrido,* 241 Cal. App. 4th at 847. Prosecuting Plaintiffs' labor claims as a class would undoubtedly be a significantly more effective way to enforce these drivers' statutory rights. *Muro,* 20 Cal. App. 5th at 505-506. Accordingly, the class action waiver is unenforceable with respect to Counts 1, 3, 6, 7, and 8.

B. The Class Action Waiver is Unconscionable.

The class action waiver is also unenforceable as to all counts of the complaint, including Plaintiffs' common law claim in Count 2, because the waiver is unconscionable. Under California law, courts may refuse to enforce any contract found "to have been unconscionable at the time it was made," or may "limit the application of any unconscionable clause." Cal. Civ. Code Ann. §1670.5(a). Unconscionability involves both a 'procedural' and a 'substantive' element. The procedural element of an unconscionable contract exists in any contract of adhesion, "which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Discover Bank v. Superior Court,* 36 Cal. 4th 148, 159-161 (2005). "Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided." *Id.*; *accord Armendariz v. Foundation Health Psychcare Servs. Inc,* 24 Cal. 4th 83, 114 (2000); *Gentry,* 42 Cal. 4th at 468. Procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause as unconscionable. "But they need not be present in the same degree. Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves. In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz,* 24 Cal. 4th at 114 (internal quotations omitted). *See Gentry,* 42 Cal. 4th at 468-469.

There is no question that Plaintiffs' employment agreement is procedurally unconscionable. The agreement is a form contract unilaterally drafted by RDS that was presented to Plaintiffs on a take it or leave it basis. Canava Decl. ¶¶10, 11, 12, 14, 15; Dominguez Decl. ¶¶7, 9, 10; Rivera Decl. ¶¶7, 8, 9. *Chavarria v. Ralphs*

Grocery Co., 733 F.3d 916, 923 (9th Cir. 2013) ("a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it" is procedurally unconscionable under California law); *Nagrampa v. MailCoups, Inc.*, 4698 F.3d 1257, 1281 (9th Cir. 2006) (contract of adhesion is procedurally unconscionable). But the degree of procedural unconscionability here goes far beyond the fact that the agreement was adhesive. RDS gave Plaintiffs no advance warning of the terms of the Agreement. The recruiting staff said nothing about the extraordinarily one-sided and oppressive terms in the Agreement such as the fact that RDS could terminate Plaintiffs at will and thereby unilaterally put them in default on their leases—which effectively gave it the ability to change the contract at-will.[10] Canava Decl. ¶¶6, 7, 14, 15; Dominguez Decl. ¶¶3, 4, 9; Rivera Decl. ¶¶4. Nor did anyone give Plaintiffs any warning about the required class action waiver, the arbitration agreement, or the fact that Plaintiffs would owe fees to RDS for any court action even if Plaintiffs won.[11] Canava Decl. ¶¶6, 10; Rivera Decl. ¶7. The circumstances under which Plaintiffs were required to sign the agreement were also oppressive and procedurally unconscionable: RDS did not explain the meaning of arbitration, Plaintiffs' liability for Defendants' fees, the class waiver, or any other provision of the Agreement. Canava Decl. ¶10; Dominguez Decl. ¶7; Rivera Decl. ¶7. Plaintiff Canava was simply given the agreement while he was attending a class held by RDS for new drivers and was expected to sign it while the teacher continued with his orientation. Canava Decl. ¶10.

The class waiver provision is also substantively unconscionable. In *Discover Bank,* 36 Cal.4th 148, the California Supreme Court found a class arbitration waiver in a credit cardholder agreement substantively unconscionable for two reasons. First,

---

[10] Agreement Doc 42, at 26 ¶11; Rental Agreement, Doc 42, at 34, 35, 36 ¶¶4, 8

[11] Agreement, Doc 42, at 27 ¶13.

because consumer contracts typically involve small amounts, the effect of the waiver was to insulate the credit card company from class actions, which often provide "the only effective way to halt and redress" alleged wrongful conduct against a large group. *Id.* at 161. Second, the waiver was unfairly one-sided "because credit card companies typically do not sue their customers in class action lawsuits." *Id. Discover Bank* thus stands for the proposition that class action waivers that effectively exempt a defendant from responsibility for its own willful injury to another or that are unreasonably one-sided are unconscionable. *Id.* 162-163. In *Gentry* the California Supreme Court made clear that the reasoning of *Discover Bank* was not limited to consumer class action waivers but also applied to class action waivers in the employment context where the result of the waiver would tend to "make it very difficult for those injured by unlawful conduct to pursue a legal remedy." *Gentry,* 42 Cal. 4th at 457. That is the situation here.

As explained above, Plaintiffs' labor law claims involve relatively small damages. Getman Decl. ¶¶6, 7, 10. They are unlikely to attract counsel working on a contingency basis. Getman Decl. ¶¶9, 10. His FLSA claims overlap with the California claims and are similarly small and unlikely to be pursued by an attorney on an individual basis. The unconscionability claim (Count 2) which seeks rescission of the contract and the damages sought under that count also overlap with the California labor law violations. Getman Decl. ¶6.

Fear of retaliation is a very real concern that deters employee from bringing individual claims, but it is a particular concern for drivers like Plaintiffs, given RDS's ability to place drivers in default of their leases for any or no reason, take their trucks away, stop assigning them loads, and charge them attorneys' fees and other costs that flow from a lease default. Rental Agr. ¶8-9. In addition, drivers are unlikely to know their rights, particularly in light of the terms of the contract stating (falsely in Plaintiffs' view) that drivers are independent contractors with no right to

invoke the protections of California's labor statutes. For all of these reasons, the class action waiver in this case is likely to be just as exculpatory as the class waiver in *Discover Bank*. It is also just as one-sided. Although worded as a mutual waiver (as was the waiver in *Discover Bank*), an employer is no more likely to file a class suit against its at-will employees than a credit card company is to file a class action against its customers. In both cases the waiver severely restricts the ability of employees and credit card users to vindicate their rights while imposing no real restrictions on the companies involved. Thus, under *Discover Bank,* the class waiver in this case is substantively unconscionable both because it is exculpatory and because it is grossly one-sided.

The high degree of procedural unconscionability in the agreement coupled with the substantive unconscionability of the class action waiver renders that waiver unenforceable with respect to all of Plaintiffs' claims. *See Olvera v. El Pollo Loco, Inc.*, 173 Cal. App. 4th 447, 456-457 (2009) (finding class action waiver in employment agreement to be unconscionable and unenforceable without reaching the question of whether it was contrary to public policy under the *Gentry* rule); *Vu v. Superior Court,* No. B213988 2009 WL 3823383 *5 (Cal. App. Nov. 17, 2009) (class action waiver in employment agreement is substantively unconscionable).

Finally, if the class waiver is found to be unlawful with respect to any of Counts 2, 6, 7, or 8, that illegality cannot be cured by severance;[12] striking the entire arbitration clause is the only way to cure an unlawful class waiver. *See Mackall v. Healthsource Glob. Staffing, Inc.,* No. 16-cv-3810-WHO 2016 WL 6462089 (C.D. Cal. Nov. 1, 2016) (finding entire arbitration agreement unenforceable because severing unlawful class waiver would not cure the illegal class waiver problem);

[12] *Stolt-Neilsen* and its progeny preclude striking the waiver and ordering class arbitration because the parties did not specifically agree to engage in class arbitration.

Thoma v. CBRE Grp., Inc., No. CV 16-6040-CBM-AJWx 2017 WL 10699611, at *2-3 (C.D. Cal. Mar. 9, 2017) (same).

III. RDS'S MOTION FOR A STAY SHOULD BE DENIED.

Defendants seek to stay litigation of Plaintiffs' FLSA, California minimum wage and PAGA claims pending individual arbitration of Counts 2, 6, 7, and 8. For the reasons set forth above arbitration cannot be ordered with respect to any of those claims rendering the stay motion moot. Even assuming, *arguendo,* that some claims could be sent to arbitration, a stay is not warranted.

In determining whether to grant a stay, "the competing interests which will be affected by the granting or refusal to grant a stay must be weighed." *Lockyer v. Mirant Corp.,* 398 F.3d 1098, 1110 (9th Cir. 2005). These interests include: (1) the possible damage caused by granting a stay; (2) the hardship or inequity which a party may suffer if required to proceed; (3) the orderly course of justice measured in terms of simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay. *Landis v. N. Am. Co.,* 299 U.S. 248 (1936) at 255; *Lockyear,* 398 F.3d at 1109-1110.

RDS, as the party seeking the stay, has the burden of showing that the circumstances of this case justify a stay. It has failed to supply any evidence of hardship or inequity and so has failed to carry that burden. Its motion merely asserts in conclusory fashion that Plaintiffs will not be injured by a stay and Defendants will be in the absence of a stay. RDS makes no effort to explain or justify either of those conclusions. Doc 41 at 17-18. It cites one case, *Reyes v. Macy's, Inc.,* 202 Cal. App. 4th 1119, 1122 (2011), in which a stay of non-arbitrable PAGA claims was granted in favor of arbitration of the plaintiffs individual claims, but the case does not discuss the reasons for granting the stay. That is the sum and substance of Defendants' stay argument and it is inadequate to carry their burden.

That Defendants have failed to carry their burden is clear when the actual

circumstances of this case are considered. Defendants concede that Plaintiffs' primary claims, FLSA, CMWA, and PAGA, must be litigated in district court. Granting a stay of those claims will injure Plaintiffs because it will delay resolution of the bulk of Plaintiffs' potential "minimum wage" and other damages. Indeed, it is likely that if Plaintiffs are successful on the FLSA or CMWA claims the ensuing damages will render moot some or all of the damages arising under the other claims. The Ninth Circuit has recognized that in wage cases, given the "urgent nature of the statutory right to minimum compensation and strong congressional policy favoring prompt payment of wages," a stay of such claims should only be granted if it will be concluded in a "reasonable" time. *Leyva,* 593 F.2d at 864. The harm to Plaintiffs is even greater with respect to the PAGA claim (and the FLSA and CMWA claims if the Court agrees that *Gentry* requires elimination of the class action waiver). A stay of those claims would "increase the difficulty of reaching class members and increase the risk that evidence will dissipate." *Edwards v. Oportun, Inc.,* 193 F. Supp. 3d 1096, 1101 (N.D. Cal. 2016); *Reed v. Autonation, Inc.,* No. CV 1608916 BROAGRX, 2017 WL 10592157 at *3 (C.D. Cal. Mar. 6, 2017) (same).

On the other hand, Defendants will suffer no hardship from a denial of the stay. Arbitration of Claims 2, 6, 7, and 8 will not resolve any of the issues with respect to Plaintiffs FLSA and CMWA claims so that, with or without a stay, Defendants will have to defend those claims in court. For that same reason the Court's interest in managing its docket counsels in favor of proceeding with the non-arbitrable claims.

For all of these reasons, RDS has failed to carry its burden of proving that a stay of the non-arbitrable claims is appropriate. *See, e.g., Winfrey v. Kmart*, 692 Fed. Appx. 356 (9th Cir. 2017) (court acted within its discretion in denying stay of Mr. Winfrey's nonarbitrable PAGA action pending arbitration of his Labor Code claims); *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059,

1066-67 (9th Cir. 2007) (concluding a stay was improper where the district court did not provide any "specific deadline when the stay [would] terminate").[13]

CONCLUSION

For all of the foregoing reasons, Defendants motion to compel arbitration must be denied because the wording of the arbitration agreement precludes Defendants from relying on the California Arbitration Act and, even if it could invoke that Act, the CAA is preempted as an obstacle to enforcement of the FAA §1 exemption from arbitration. The arbitration agreement is also unenforceable because severance of the unlawful aspects of the agreement is neither possible nor appropriate. Defendants motion to enforce the class action waiver in the parties' employment agreement should be denied as unconscionable and contrary to California public policy. Finally, Defendants request for a stay of the non-arbitrable claims must be denied because it is either moot or Defendants have failed to carry their burden of demonstrating that such a stay is appropriate.

Respectfully submitted this 9th day of August, 2019.

By: /s/ Susan Martin
SUSAN MARTIN
JENNIFER KROLL
MARTIN & BONNETT, P.L.L.C.
4647 N. 32nd St., Suite 185
Phoenix, AZ 85018

[13] *See also, United States v. Aerojet Rocketdyne Holdings, Inc., 381 F*. Supp. 3d 1240 (E.D. Ca. 2019) (denying stay for non-arbitrable claim); *Blair v. Rent-a-Center*, No. C 17-02335 WHA, 2017 WL 4805577 *6 (N.D. Cal. Oct. 25, 2017) (denying stay where only one claim was sent to arbitration even if there was some factual overlap between two claims); *Glob. Live Events v. Ja-Tail Enters. LLC*, No. CV 13-8295 SVW 2014 WL 1830998 (C.D. Cal. May 8, 2014) (denying stay of non-arbitrable claims because, despite overlap with arbitrable claims, the triable claims "will resolve a broader range of legal and factual issues involving the relevant actors.).

(602) 240-6900
Admitted Pro Hac Vice

DAN GETMAN
GETMAN, SWEENEY & DUNN, PLLC
260 Fair St.
Kingston, NY 12401
(845) 255-9370
Admitted Pro Hac Vice

EDWARD TUDDENHAM
23 Rue Du Laos
Paris, France
33 684 79 89 30
Admitted Pro Hac Vice

HOWARD Z. ROSEN
ROSEN MARSILI RAPP LLP
3600 Wilshire Blvd., Suite 1800
Los Angeles, CA 90010
(213) 389-6050
hzrosen@rmrllp.com

ATTORNEYS FOR PLAINTIFFS