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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

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S CLASS ALLEGATIONS (FED. R. CIV. P. 12(F), 23(d)(1)(D)), AND TO COMPEL ARBITRATION OF PLAINTIFF'S SECOND, SIXTH, SEVENTH AND EIGHTH CAUSES OF ACTION

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

Codes and Statutes

Defendants Rail Delivery Services, Incorporated ("RDSI"), Greg P. Stefflre, and Judi Girard Stefflre (collectively "Defendants") hereby reply in support of their Motion to Strike and to Compel Individual Arbitration and respond to the opposition of Salvador Canava and the collective action plaintiffs (collectively "Plaintiffs").

I. ARGUMENT

A. The ICA Does Not Preclude Application of the CAA

It is indisputable that the parties signed an agreement to arbitrate any disputes arising out of the Independent Contractor Agreement ("ICA").[1] (See Plaintiffs' Opposition Brief ("Opp.") [Doc. 51], p. 10, ll. 10-11). RDSI does not deny that the arbitration clause states that it would be governed by the Federal Arbitration Act ("FAA"). When the ICAs were signed,[2] the FAA was the primary law for arbitration clauses among parties engaged in interstate commerce and the Section 1 exclusion had not been interpreted to apply to independent contractors. It stands to reason then that at that time the parties would prioritize the FAA as the governing law for the ICA. The subsequent decision in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019), holding that the FAA § 1 exemption applied to truck drivers regardless of classification came well after Plaintiffs' had signed their ICAs. In moving to enforce the arbitration clause of the ICA, Defendants do not ask this Court to ignore *New Prime* nor ask the Court to re-write the ICA. Rather, Defendants only ask this Court to enforce under California law the terms of the ICA by which the parties agreed to arbitrate their disputes.

B. The FAA §1 Does Not Preempt Application of the CAA

Under the guise of "conflict preemption," Plaintiffs argue that § 1 of the FAA prohibits "compelled arbitration for interstate transportation workers" and that all

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[1] The ICA and Rental Agreement deal with different transactions and not all drivers sign Rental Agreements. They are generally presented and executed on separate days. (Declaration of Antonio Saavedra ("Saavedra Dec.") ¶¶ 11, 12) Plaintiff Canava signed the ICA on 9/6/17 and the Rental Agreement on 9/15/2019. (Saavedra Dec. ¶¶ 7, 11.)

[2] Plaintiff Canava signed his ICA on September 6, 2017 (Stefflre Dec. [Doc. 42], p. 30 of 40) Plaintiff Rivera signed his ICA on June 22, 2018. (Stefflre Reply Dec. Ex. 7.) Plaintiff Dominquez signed his ICA on March 30, 2016. (Stefflre Reply Dec. Ex. 8.)

"state laws forcing such workers to arbitrate" are subject to federal preemption. Though calling it "conflict preemption," Plaintiffs contend that § 1 preempts the entire field of arbitration for interstate transportation workers.[3] However, there is nothing in § 1 of the FAA, or in *New Prime* indicating Congress sought "field preemption."

"[F]or field preemption to be applicable, 'congressional intent to supersede state laws must be 'clear and manifest.'" *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336 (3d. Cir. 2009)). The FAA does not manifest such intent. As the Supreme Court explained in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Id.* at 477 (citing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), which upheld application of state arbitration law to an arbitration provision in a contract not covered by the FAA); accord *Palcko v. Airborne Express, Inc.*, 372 F. 3d 588, 595-596 (3d. Cir. 2004). The *Volt* Court, in determining whether to enforce an arbitration agreement using a California procedural rule that had no counterpart in the FAA, stated that "there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt, supra,* 489 U.S. at 476.

Contrary to Plaintiffs' assertion, "conflict preemption" is not applicable with respect to § 1 of the FAA and state arbitration statutes. Conflict preemption exists when (1) "compliance with both state and federal law is impossible," or where the (2) "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989). The requisite elements of conflict preemption cannot be met. First, *New Prime* held that §1 of the FAA prohibits application of the FAA to truck drivers but it

[3] Plaintiffs' argument on this point is confusing. They argue that "[i]t 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 state statutes." (Opp. [Doc. 51], p. 14, ll. 18-12.) But they also state "[n]o one argues that the FAA preempts the entire field of arbitration agreement." (Opp. [Doc. 51], p. 15, ll. 12-13.)

did not say their arbitration agreements were not enforceable under state law. Therefore, compliance with both the FAA and California Arbitration Act ("CAA") is not impossible. Second, Plaintiffs cannot demonstrate that the CAA stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congressional intent for the FAA, which favors the enforcement of valid arbitration agreements. *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 97 (2000). There is no question that "passage of the [FAA] was motivated, first and foremost, by a congressional desire to enforce agreements into which the parties had entered." *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 220 (1985). The parties agreed to arbitrate, and it would be by contrary to the very intent of the FAA if the FAA were used to block efforts to proceed under the CAA.

C. Plaintiffs' Statutory Claims Are Subject to Arbitration

At its core, this is a "misclassification" case. Plaintiffs allege that they were misclassified as independent contractors and were entitled to protections conferred upon employees by the Labor Code. (Plaintiffs' First Amended Complaint [Doc. 31], ¶3 at 20-27) The resolution of Plaintiffs' claims first requires an initial determination of the nature of their relationship with RDSI before there can be any assessment of whether Labor Code or FLSA violations occurred. That relationship is based on the ICA and the conduct of the parties pursuant to the ICA. Therefore, this dispute concerns a controversy or claim between the parties "*arising out of or relating to their Agreement*." Given the broad language of the ICA's arbitration clause and that Plaintiffs' claims that the Labor Code governs their compensation can exist only if they were misclassified, Plaintiffs' statutory non-wage Labor Code claims (Claims 6, 7, and 8) fall within the ambit of the ICA's arbitration clause.

This issue was addressed in *Khalatian v. Prime Time Shuttle, Inc.*, 237 Cal.App.4th 651 (2015). There, defendants operated an airport shuttle business. Plaintiff, a shuttle driver, entered into an independent contractor agreement with Defendant. *Id*. at 655. Plaintiff sued alleging 11 counts for Labor Code violations. *Id*.

The independent contractor agreement called for arbitration of "any controversy or claim between the parties arising out of or relating to this agreement or any alleged breach hereof . . ." *Id.* The trial court denied defendant's motion to compel arbitration. *Id*. at 656. The appellate court reversed the finding that the FAA applied to the parties' arbitration agreement and that pursuant to the language of the agreement all of plaintiff's claims, including the statutory claims, were arbitrable. *Id*. at 655. The *Khalatian* court explained "[t]he language "arising out of or relating to" as used in the parties' arbitration provision is generally considered a broad provision." *Id.* at 659 (citing *Larkin v. Williams, Wooley, Cogswell, Nakazawa & Russell*, 76 Cal.App.4th 227, 230 (1999) (holding complaint for dissolution of partnership arises out of and relates to partnership agreement)). "Broad arbitration clauses such as this one are considered interpreted as applying to extracontractual disputes between the contracting parties." *Khalatian, supra,* 237 Cal.App.4th at 660.

Also instructive is *Performance Team Freight Systems, Inc. v. Aleman*, 241 Cal.App.4th 1233 (2015). There, truck drivers entered independent contractor agreements with a freight company. *Id.* After the drivers filed wage claims, the company petitioned to compel arbitration based on clauses in the agreements. The trial court denied the petition. The Court of Appeal reversed finding that the arbitration clauses, which stated "[a]ny dispute between the parties with respect to the interpretation or the performance of the terms of this Agreement may be submitted to arbitration . . .," were broad enough to cover the statutory claims. *Id*. at 1244-1245.

Like *Khalatian* and *Performance Team Freight*, the ICA's arbitration clause is similarly broad and provides that "any disputes arising under or in connection with this Agreement or services rendered in connection with the same shall be arbitrated pursuant to this agreement . . ." (ICA [Doc. 42], p. 28 ¶XIII). Given this broad language, Plaintiffs' statutory claims fall within the ambit of the arbitration clause.

D. The Arbitration Agreement is Not Unconscionable

To invalidate an agreement on grounds of unconscionability, both procedural

and substantive unconscionability must be shown; the court applies a "sliding scale," whereby the more procedural unconscionability exists, the less substantive unconscionability need be present to invalidate an agreement, and vice versa. *Armendariz v. Found. Health Psychcare Services, Inc.* 24 Cal.4th 83, 99, 113-114 (2000). Other than conclusory assertions, Plaintiffs do not meet their burden to show that any of the provisions are unconscionable. *Condee v. Longwood Management Corp*. 88 Cal.App. 215, 219 (2001) (the party opposing arbitration bears the burden of providing evidence supporting a defense to enforcement).[4]

1. Substantive Unconscionability

Plaintiff contends that the attorney's fees provision contained within the arbitration provision is one-sided and facially unconscionable. (Opp. [Doc 51], p. 19, ll. 4-8). Plaintiff's sole argument is that the one-sided nature of the provision renders it facially unconscionable. (Opp. [Doc. 51], p. 19, ll. 4-8). However, while the one-sided nature of the provision may contribute to the finding of unconscionability, it is not dispositive. *Samaniego v. Empire Today LLC*, 205 Cal.App.4th 1138, 1147 (2012). Further, the facially one-sided nature of the provision is not one-sided in actual effect. Cal. Civ Code §1717(a) states in part:

> [i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. Cal. Civ Code §1717(a).

This statute renders the attorneys' fees provision in the parties' arbitration agreement mutual by operation of law and so there is no actual substantive unconscionability.

Plaintiff also argues that the class action waiver contained in the agreement is

[4] Contrary to Plaintiffs assertions, RDS does not concede that the agreement is unlawful or illegal as to Counts 1 (FLSA), 3 (Cal. Min wage), and 10 (PAGA). (Opp. [Doc. 51], p. 18, ll. 17-20). California's Labor Code do not allow arbitration of wage claims (Counts 1 and 3) and class waivers have been found unenforceable as to PAGA claims. *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014). Not seeking arbitration of these claims does not constitute an admission that the arbitration provision is "illegal."

substantively unconscionable. (Opp. [Doc 51], p. 18, ll. 19-20). As addressed below, the class waiver is not substantively unconscionable. (See, *infra*, § I.E.2.)[5]

2. Procedural Unconscionability

"Procedural unconscionability focuses on the factors of surprise and oppression with surprise being a function of the disappointed reasonable expectations of the weaker party." *Harper v. Ultimo*, 113 Cal. App. 4th 1402, 1406 (2003) (citations omitted).) Adhesion, per se, does not render an arbitration provision procedurally unconscionable. *Id*. at pp. 1408-09. Even adhesion contracts are fully enforced according to their terms. *Keating v. Superior Court*, 31 Cal. 3d 584, 595 (1982), revd. in part on other grounds *sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984). Plaintiffs contend that they were presented with "a lot of paperwork" and did not have time to read the agreement and signed it without reading it or read it quickly. (Canava Dec. [Doc. 53], ¶12, ll. 1-3; Rivera Dec. [Doc. 55], ¶7, ll. 16-17; Dominguez Dec. [Doc. 54], ¶9, ll. 9-12.) In fact, Plaintiffs had every opportunity to read understand the ICA before signing. (Declaration of Antonio Saavedra ("Saavedra Dec.") ¶¶ 4-5.)

With respect to Plaintiff Canava, who according to his application had not previously been an owner-operator, careful steps were taken to ensure he was fully aware of his rights, duties and obligations under the agreement. (Reply Declaration of Greg Stefflre ("Stefflre Reply Dec.") ¶ 4.)[6] Plaintiff Canava completed an application

[5] In footnote 8, Plaintiffs argue that the Agreement's "6 month limitation period to contest, multiple indemnification provisions, right of carrier to terminate agreement provision and right to terminate rental agreement provision" are all unconscionable (Opp. [Doc 51], p. 19 at fn. 8) Plaintiffs provide no authority or explanation that any of these provisions are substantively or procedurally unconscionable. Plaintiff further argues that the Default and Remedies provision of the Rental Agreement is unconscionable. (Opp. [Doc 51], p.19, lines 14-19). The Rental Agreement is a separate document which governs the truck rental by RDS to Plaintiff. Plaintiffs' misclassification claim does not arise from the Rental Agreement.

[6] Plaintiff Canava presented himself to RDSI as being unfamiliar with owner-operator status. In his declaration he states. "He [Tony Saavedra] did not explain the terms of the contract or what my rights as an independent contractor would be. Nor did I understand what the difference is between a contractor and an employee." (Canava Dec. [Doc. 53], ¶8). However, Canava had previous experience both as an owner-operator truck driver and as an Opt-in Plaintiff in a federal misclassification suit prior to working for RDSI. (See Consent to Sue, Exhibit 8 to the Declaration of Victor J. Cosentino in support of Request for Judicial Notice filed concurrently herewith ("Cosentino Dec.").)

with RDS on August 28, 2017. He was called in for an interview on August 30, 2019, with Greg Stefflre and during that interview, the differences between an employee and a contractor were discussed at length. (Stefflre Reply Dec. ¶ 4.) Plaintiff Canava was then asked to read and sign a document titled "Representations & Agreement (Employee / Independent Contractor Conversion)" which also explained the differences between an employee and contractor. (Stefflre Reply Dec. ¶ 4.)

On September 6, 2019, Plaintiff Canava attended an initial orientation session ("Orientation 1") conducted by Tony Saavedra, RDSI's Manager Owner-Operator Relations & Recruitment Supervisor. (Saavedra Dec. ¶¶ 1, 4-5.) Mr. Saavedra is bilingual and can conduct the session in English or Spanish with no language barrier. (*Id*. ¶ 4.) During Orientation 1, Mr. Saavedra went through the ICA with Plaintiff Canava page by page including all exhibits attached to the ICA and asked him to initial each page as they went through it including the arbitration clause. (*Id*. ¶ 5.) While reviewing the ICA with Plaintiff Canava, Mr. Saavedra explained to him that he was not going to be a company driver or employee. (*Id*. ¶ 5.) Mr. Saavedra, having been an owner-operator himself for many years, wanted to make sure that Plaintiff Canava understood the arrangement he was entering with RDSI. (*Id*. ¶ 5.) Orientation 1 lasts between three to five hours depending on how many questions are asked by the applicant. (*Id*. ¶ 4.) At no time was Plaintiff Canava rushed through the signing of the documents presented at Orientation 1. (*Id*. ¶¶ 4-5.)

In Brookwood v. Bank of America 45 Cal.App.4th 1667 (1996), the court noted that "[n]o law requires that parties dealing at arm's length have a duty to explain to each other the terms of a written contract, particularly where . . . the language of the contract expressly provides for the arbitration of disputes arising out of the contractual relationship." *Brookwood*, *supra*, 45 Cal.App.4th at 1674. Plaintiffs cite no authority for their conclusion that procedural unconscionability was present because "the details of the agreement" including the arbitration clause "were not explained." Moreover, the factual premise is false, as shown above. The documents were explained in detail.

Despite the fact that Plaintiff expressly represented to RDSI that he understood the arbitration clause by initialing it, he now argues that he simply did not read the contract and therefore should be excused from its terms. Plaintiffs' failure to use reasonable diligence to understand the ICA before signing, when they had ample opportunity to do so, does not present a defense to its enforcement. *Id*.

Because Plaintiffs cannot establish that the arbitration provision contained elements of "surprise" or "oppression," they fail to demonstrate procedural unconscionability. Plaintiffs must do more than show the arbitration clause was present in an adhesion contract to prove it is procedurally unconscionable.

E. The Class Action Waiver Should be Enforced.

1. The class waiver is not contrary to public policy.

Where the FAA does not apply, the factors that might justify invalidating a class waiver are: "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' rights to overtime pay through individual arbitration." *Gentry v. Superior Court*, 42 Cal.4th 443, 463 (2007).

Plaintiffs argue that each factor favors class treatment. But Plaintiffs' arguments ignore the goal of *Gentry* which was to allow class proceedings only where: "class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation" and where "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." *Id*. Through this lens, class treatment becomes less attractive.

On the first factor Plaintiffs' counsel, Dan Getman, estimates Plaintiff Canava's damages at up to $27,000 and claims this is a "modest" recovery warranting class treatment. While counsel may find this modest, claims in this range are routinely asserted against employers in state court and before California's Office of the Labor

Commissioner ("Labor Commissioner"). Plaintiffs fail to consider the one-way awards of attorney's fees available under the Labor Code which allow full recovery of attorney's fees any damages are awarded. Cal. Labor Code § 1194. The Labor Commissioner is also very active in the area of driver misclassification and provides comprehensive legal services without cost to drivers and recovers significant awards when misclassification is found. (*E.g.*, see News Release from Department of Industrial Relations, Cosentino Dec. Exhibit 5.) Thus, drivers like Canava can get their attorney's fees paid or even get free enforcement of their rights.

In contrast, as participants in a class action, members of the class will likely get only a token recovery. Recently, Plaintiffs' legal team settled a class action brought on behalf of a class of independent contractor truck drivers in Arizona alleging they were employees and asserting claims similar to those brought here. That case, *Van Dusen, et al. v. Swift Transportation Co. of Arizona, LLC, et al.*, United States District Court for the District of Arizona, Case No. CV 10-899-PHX-JWS, settled for $100,000,000 and has obtained preliminary approval. (See Cosentino Dec. Exhibit 6.) There were 19,407 class members. (*Id.*) According to the settlement agreement, plaintiffs' counsel may request up to $33,333,333 for attorney's fees. Approximately $1,000,000 more would go to all other costs, leaving $65,666,667 for the class. (*Id.*) This means that the average recovery for the 19,407 class members is only $3,383.66.[7] Despite the massive settlement, is it hard to imagine that the *Van Dusen* class settlement was the most effective practical means of vindicating the rights of workers who actually had valid claims. Class treatment here would have the same effect of substantively diminishing the value of claims for drivers who might be able to establish actual status as an employee and consequent damages.

In California, where the Labor Commissioner is active and effective and the Labor Code provides for one-way fee awards, there are far better ways for workers

[7] The motion in support of preliminary approval indicates that plaintiffs will only seek $29,000,000 million in fees. (See Cosentino Dec. Ex. 7.) If this actually comes to pass it would increase the average recovery for each driver by about $223.

with actual grievances to resolve their claims than class action. Class treatment is neither practical, nor comprehensive, because it results in token recoveries for individuals with valid claims and relative windfalls for those without.

On the second factor, the subjective fear alleged by Plaintiff Canava and the Opt-in Plaintiffs is untestable. However, their fear is irrelevant since they had left RDSI before they asserted claims in this case. And, Canava's assertions about the fears of other drivers he "heard from" is pure hearsay. (Canava Dec. [Doc. 53], p. 6, ll. 9-12.) Further, Labor Code § 98.6 prohibits retaliation for asserting claims with the Labor Commissioner or under the Labor Code. Untestable claims of fear of patently prohibited conduct do not justify refusing to enforce the class waiver.

The third *Gentry* factor, that absent members of the class may be ill-informed about their rights has not been established. As discuss above, drivers actually had extensive conversations with bilingual RDSI staff where the differences between contractors and employees were explained in detail. Drivers signed written documents explaining those differences. They were given ample time to review the documents before signing. (Stefflre Reply Dec. at ¶¶ 4-13 Saavedra Dec. ¶¶ 4-9.) Plaintiffs' claims are insufficient to conclude that absent class members are ill-informed.

Plaintiffs argue that the because all drivers for RDSI were "erroneously labeled" as independent contractors, enforcing the waiver would "drive up costs and "diminish the prospects that labor laws will actually be enforced." But as shown, the push for cost efficiency here will not benefit the drivers, who are unlikely to ever see the anything remotely close to full benefit of their claims through class treatment (assuming their claims have merit). Moreover, the threshold issue in this case will be worker classification. This is a factually intensive, individualized inquiry, not susceptible to resolution on a class-wide basis. Enforcement of the class waiver recognizes that efficiency will not be achieved here through class treatment and it preserves for drivers the full array of rights available under California law rather than compromising them for a token amount. In California, employment claims are well-

suited for effective individual litigation.

2. The class waiver is not unconscionable.

Plaintiffs' arguments regarding procedural unconscionability repeat their earlier attack on the arbitration clause and are addressed above in section I.D.2. With regard to substantive unconscionability, Plaintiffs rely on *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005). That case actually underscores the difference between this case and one with an unconscionable class waiver. The *Discover Bank* court wrote:

> We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably **involve small amounts of damages**, and when it is alleged that the party with the superior bargaining power has carried out a **scheme to deliberately cheat large numbers of consumers out of individually small sums of money**, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." *Discover Bank*, 36 Cal.4th at 162-163 (emphasis added).

Central to the court's reasoning were very small individual claims at issue, with the court citing the example of $29 late payment fees. (*Id*. at 160). In contrast, Plaintiff Canava's estimate of $27,000 in damages is nearly 1000 times greater (and that is before any statutory attorney fees). Further, there is no evidence that Defendants "carried out a scheme to deliberately cheat" the drivers. In short, the facts surrounding the class waiver in our case are completely different from those in *Discover Bank* and not substantively unconscionable. As a result, the class waiver is not unenforceable under the sliding scale described in *Armendariz, supra*, 24 Cal.4th at 114.[8]

F. The Court Should Stay Those Claims Not Subject to Arbitration.

Defendants seek a stay of the court proceedings as to the First (FLSA) and Third (California minimum wage) and Tenth (PAGA) Causes of Action pending arbitration of Causes of Action 2, 6, 7 and 8. The stay would only be relevant if the

[8] Defendants concur with Plaintiffs that the parties to the ICA did not agree to and do not seek class or collective arbitration. (Opp. [Doc. 51], p. 29 of 33, n.12.) The arbitration clause itself bars class or representative actions in arbitration. (ICA [Doc. 42], p. 28 ¶XIII). Defendants disagree on the issues of severance, however. Should the Court deny the motion to compel arbitration, it can still strike the class allegations on the basis of the class waiver.

Court sends these claims to individual arbitration. In determining whether to grant a motion to stay, a court weighs the competing interests affected by the stay, including: (1) possible damage resulting from the grant of a stay; (2) the hardship or inequity which a party may suffer by going forward; and (3) the orderly course of justice, including the simplifying or complicating of issues, proof, and questions of law which could be expected to result. *Lockyer v. Mirant Corp*., 398 F.3d 1098, 1110 (9th Cir. 2005). Here, Plaintiff has identified no real and specific harm to Plaintiffs from granting a stay. Indeed, there is none. In contrast, absent a stay the parties are at risk of hardship from litigating and arbitrating simultaneously because of (1) the increased legal costs associated with doing so, and (2) the risk of inconsistent determinations from the Court and arbitrator on the key question of Plaintiff's classification. Staying the non-arbitrable claims would avert such risks. As to PAGA claim, this is a derivative claim dependent on the other substantive claims. Determining driver classification in arbitration as well as the non-minimum wage claims may provide the parties and the Court with guidance as to how to resolve the PAGA claim, again without the potential for inconsistent resolutions of driver classification.

II. CONCLUSION

Defendants respectfully request that this Court strike the class and collective action allegations in the First Amended Complaint (excluding the PAGA claims), compel Plaintiffs to submit the non-wage claims (Claims 2, 6, 7, and 8) to individual arbitration and stay the proceedings as to Claims 1, 3, and 10 pending arbitration.

Dated: August 30, 2019

By: /S/ *Victor J. Cosentino*
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Salvador Canava v. Rail Delivery Services, Incorporated, et al
United States District Court, Central District of California
Case No.: 5:19-cv-00401-JGB (KKx)

CERTIFICATE OF SERVICE

I, Nicole Padget, declare as follows:

I am over the age of eighteen years and not a party to the case. I am employed in the County of Los Angeles, California. My business address is: 200 S. Los Robles Avenue, Suite 530, Pasadena, CA 91101.

On the date below I electronically filed with the Court through its CM/ECF program and served through the same program the following document(s):

On the interested parties in said case addressed as follows:

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S CLASS ALLEGATIONS (FED. R. CIV. P. 12(F), 23(d)(1)(D)), AND TO COMPEL ARBITRATION OF PLAINTIFF'S SECOND, SIXTH, SEVENTH AND EIGHTH CAUSES OF ACTION

[ ] (BY E-MAIL) I caused such document(s) to be electronically served addressed to all parties appearing on the electronic service list for the above-entitled case.

[X] (ELECTRONICALLY) Pursuant to the CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[X] (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury, under the laws of the United States of America that the foregoing is true and correct.

I declare under penalty under perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 30, 2019, at Pasadena, California.

/S/ Nicole Padget