IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 82556

Uber Technologies, Inc.; Rasier, LLC;
and Rasier-CA, LLC,
Appellants

v.

Megan Royz;
and Andrea Eileen Work,
Respondents

Appeal
Eighth Judicial District Court
Case No. A-20-810843-C

APPELLANTS' APPENDIX
VOLUME 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

MEGAN ROYZ; and ANDREA EILEEN WORK,

Plaintiffs,

vs.

MARK ANTHONY JACOBS; MARCO ANTONIO HEREDIA-ESTRADA; UBER TECHNOLOGIES, INC.; RAISER, LLC; RAISER-CA, LLC; DOES 1-10; and ROE CORPORATIONS 1-10, inclusive,

Defendants.

Case No.: A-20-810843-C
Dept. No.: XVI

DEFENDANTS UBER TECHNOLOGIES, INC., RASIER, LLC, AND RASIER-CA, LLC'S MOTION FOR LEAVE AND MOTION TO RECONSIDER THE COURT'S ORDER DENYING DEFENDANTS UBER TECHNOLOGIES, INC., RASIER, LLC, AND RASIER-CA, LLC'S MOTION TO COMPEL ARBITRATION AND STAY ACTION ON ORDER SHORTENING TIME

HEARING REQUESTED

Date/hearing: October 27, 2020
Time/hearing: 1:15 p.m.
TELEPHONIC HEARING

Defendants Uber Technologies, Inc., Raiser, LLC, and Rasier-CA, LLC (collectively, "Rasier and Uber") seek leave of Court pursuant to EDCR 2.24 to move for reconsideration of the Court's Order Denying Rasier and Uber's Motion to Compel Arbitration and Stay Action based on the following Memorandum of Points and Authorities.

Dated this 29th day of September, 2020.

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

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ORDER SHORTENING TIME

Good cause appearing, it is ordered that the hearing on **Defendants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC's MOTION FOR LEAVE AND MOTION TO RECONSIDER the Court's Order Denying Defendants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC's Motion to Compel Arbitration and Stay Action ON ORDER SHORTENING TIME** shall be heard telephonically on the 27th day of ~~September~~ October, 2020 in Dept. 16 at 1:15 ~~a.m.~~ / p.m. Blue Jeans Dial-in Information: Call: 1-408-419-1715 Meeting ID 458 575 421#

DISTRICT JUDGE ZJ

Submitted by:

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DECLARATION OF COUNSEL IN SUPPORT OF ORDER SHORTENING TIME

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

D. Lee Roberts, Jr., being first duly sworn, deposes and says:

1. I am over the age of eighteen, of sound mind, and give the following Declaration based on my personal knowledge.

2. I am a partner with Weinberg, Wheeler, Hudgins, Gunn, and Dial, LLC, and counsel of record in this matter for Defendants Uber Technologies, Inc., Raiser, LLC, and Raiser-CA, LLC (collectively, "Rasier and Uber"). I have been specially retained as appellate counsel in this action.

3. On August 6, 2020, this Court issued a minute order denying Rasier and Uber's Motion to Compel Arbitration. *See* Minute Order re: Motion to Compel and Joinder attached as **Ex. 1** ("Order"). No written order has been filed and no notice of entry of order has been served. Thus, this motion for leave to seek reconsideration is timely filed under EDCR 2.24.

4. Pursuant to the Federal Arbitration Act, 9 U.S.C.A. § 16(a)(1)(C), Raiser and Uber have a right to immediately appeal the Court's Order denying their motion to compel arbitration. Similarly, a right of appeal is also granted by NRS § 38.247(1)(a).

5. Pursuant to the Nevada Rules of Appellate Procedure, Rasier and Uber must file their appeal within 30 days of notice of entry of order denying their motion to compel arbitration. Pursuant to EDCR 2.24 the filing of this motion does not stay the time for appeal.

6. It is preferable to have the trial court correct any error in its order because this is a quicker, easier and less expensive method of correcting error than an appeal. *See, e.g., Osman v. Cobb*, 77 Nev. 133, 136, 360 P.2d 258, 259 (1961) (denying costs because Rule 60 relief was not sought first with the trial court). It is likewise preferable for the Court to correct error in its minute orders prior to entry of a signed order.

7. Although this motion does not raise any new arguments, it does contain newly cited authority supporting the arguments made in the original motion papers. Most importantly,

this motion cites to binding United States Supreme Court authority which requires this Court to leave issues of scope of the arbitration agreement and the arbitrability of a particular dispute to the arbitrator if the arbitrator is delegated this power by the clear language of the arbitration agreement. *See, e.g., Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019).

8. In fairness, this Court should be given an opportunity to consider this newly cited authority before a final order is entered and an appeal is taken.

9. If the Court does not grant an Order Shortening Time the hearing on the motion for reconsideration may not be held before Rasier and Uber are required to file their Notice of Appeal.

10. This request for an Order Shortening Time is made in good faith and without dilatory motive.

11. I declare that the foregoing is true and correct under the penalty of perjury under the laws of the state of Nevada

Dated this 29 day of September, 2020.

D. LEE ROBERTS, JR.

WEINBERG WHEELER HUDGINS GUNN & DIAL

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its Order denying Rasier and Uber's motion to compel arbitration, the Court concluded that the Arbitration Agreement[1] did not apply to either Plaintiff Megan Royz or Plaintiff Andrea Eileen Work because it "[did] not clearly or unmistakably provide that the parties have agreed to submit a motor vehicle dispute to arbitration." Ex. 1. With respect to Royz, the Court further concluded that there was not an enforceable agreement to arbitrate because she "did not use the Uber app to request transportation." *Id.*

Yet, in reaching these conclusions, the Court missed a critical step in the required analysis. Under *Henry Schein*, after addressing whether the Federal Arbitration Act ("FAA") applies, the Court should have determined who has the authority to decide these threshold questions of arbitrability under the Arbitration Agreement's delegation clause ("Delegation Clause"): the Court or the arbitrator. Without addressing this issue, the Court declined to compel arbitration. Respectfully, this was clear error.

Rasier and Uber request that the Court grant a rehearing to examine this issue. Once considered, it is clear that the Arbitration Agreement's Delegation Clause clearly and unmistakably delegated threshold questions of arbitrability to the arbitrator, including whether the scope of the Arbitration Agreement encompasses the subject dispute as to both Plaintiffs and whether Royz entered into an enforceable agreement to arbitrate. Under binding United States Supreme Court precedent, only the arbitrator, and not this Court, has the authority to decide these issues.

Accordingly, Rasier and Uber respectfully request that the Court grant leave, reconsider its Order, and grant Rasier and Uber's motion to compel arbitration. In accordance with the Delegation Clause, the Court should have left all threshold questions of arbitrability to the arbitrator, including the two at issue here, and stayed this case pending the arbitrator's decision.

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[1] As used herein, Arbitration Agreement refers to Section 2 of the November 21, 2016 Terms & Conditions attached to Rasier and Uber's Motion to Compel Arbitration and Stay Action ("Motion") as Exhibit 1-E.

II. ARGUMENT

Under EDCR 2.24, a party may move for reconsideration of a ruling of the court. Here, reconsideration is warranted.

A. The Court's inquiry should have been: (1) does the FAA apply, and, if so, (2) does the Court or the arbitrator decide threshold questions of arbitrability?

The Supreme Court of the United States recently addressed the inquiry for compelling arbitration under the FAA in two January 2019 opinions: *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019) and *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537, 202 L. Ed. 2d 536 (2019). The Supreme Court's interpretation of the FAA, as expressed in these opinions, is binding on all courts if the FAA applies. *See Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) ("But the Oklahoma Supreme Court must abide by the FAA, which is 'the supreme Law of the Land,' U.S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law."); *U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 188, 415 P.3d 32, 40 (2018) ("The Supreme Court has made unmistakably clear that, when the FAA applies, it preempts state laws that single out and disfavor arbitration.").

To begin, *New Prime* makes it clear that the first question a court should ask when faced with an arbitration agreement is: (1) does the FAA apply? *See* 139 S. Ct. at 537. As stated by the Court, "[a]fter all, to invoke [the FAA's] statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2." *Id.*

Next, *Henry Schein* makes it clear that a court should ask: (2) does the Court or the arbitrator have authority to decide threshold questions of arbitrability? There, the arbitration agreement at issue contained a "delegation clause," meaning a clause that transferred the power to decide gateway questions of arbitrability from the courts to an arbitrator. 139 S. Ct. at 528. In discussing the "delegation clause," the Court stated that "we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.* The Court ultimately held that a delegation clause must be

enforced according to its terms, ***even if the district court thinks that the argument that the arbitration agreement applies to the particular dispute is "wholly groundless***." *Id.* at 529 (emphasis added).

Here, this Court did not follow the approach required by *New Prime* and *Henry Schein*[2]. To be clear, the Court implicitly concluded (rightly) that the FAA applies by relying on Supreme Court precedent. *See* Ex. 1; *see also* Ex. 1-E to the Motion at p. 2 (Arbitration Agreement) ("[T]he parties agree and acknowledge that this Arbitration Agreement evidences a transaction involving interstate commerce and that the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ('FAA'), will govern its interpretation and enforcement and proceedings pursuant thereto.").

Yet, when it came to the second question—does the Court or the arbitrator decide threshold questions of arbitrability—the Court misapplied this inquiry and decided these issues rather than referring them to the arbitrator. *See* Ex. 1. Specifically, the Court relied on *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) for the proposition that it should decide whether the Arbitration Agreement encompasses the subject dispute "'unless the parties clearly and unmistakably provide[d] otherwise.'" Ex. 1 (quoting *Howsam*, 537 U.S. at 83). The Court concluded that this was not the case because "the arbitration provision does not clearly or unmistakably provide that the parties have agreed to submit a motor vehicle dispute to arbitration." Ex. 1. As a result, the Court concluded (i) it could determine whether the Arbitration Agreement applied to the subject dispute; and (ii) that the Arbitration Agreement did not apply to the subject dispute for the same reason. *Id.* Thus, the Court effectively boiled down its inquiry of two issues—whether "the parties clearly and unmistakably provide[d] otherwise" and whether the Arbitration Agreement encompasses the subject dispute—into one question: does the Arbitration Agreement apply to the subject dispute?

The Court's approach ignored the Arbitration Agreement's Delegation Clause and directly contradicts Supreme Court precedent, including, most recently, *Henry Schein*. The

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[2] Uber and Rasier acknowledge that this brief contains newly cited authority which was not before the Court at the time the Court issued its minute order.

Court's inquiry should have been two-fold: (1) did the parties "clearly and unmistakably provide otherwise," meaning did they "clearly and unmistakably" delegate the authority to decide threshold questions of arbitrability, including the scope of the Arbitration Agreement to an arbitrator, and, if not (and only if not), (2) does the Arbitration Agreement apply to the subject dispute. *See, e.g., Henry Schein*, 139 S. Ct. at 530 ("This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so."); *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 845 (6th Cir. 2020) (applying this approach—"[t]he question for us is whether that's 'clear and unmistakable' evidence that Piersing agreed to arbitrate arbitrability"); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (applying this analysis); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (applying this analysis); *Rent-A-Ctr., Inc. v. Ellis*, 827 S.E.2d 605, 613 (W. Va. 2019) (applying this analysis).[3]

The Court's misapplication warrants reconsideration. Under the correct approach, as explained below, the Court would have reached the opposite result on the first inquiry and never addressed the second inquiry.

B. Under the correct inquiry, the Delegation Clause transferred the power to decide threshold questions of arbitrability to the arbitrator, including whether the Arbitration Agreement encompasses the subject dispute and whether Royz entered into an enforceable agreement to arbitrate.

When an effective delegation clause exists, "a court possesses no power to decide the arbitrability issue[s]." *Henry Schein*, 139 S. Ct. at 529. In this scenario, the court "must respect the parties' decision [to delegate arbitrability questions to an arbitrator] as embodied in the contract." *Id.* at 531.

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[3] The Court's error in blending these two inquiries is further exemplified by the principle that in interpreting the scope of an arbitration clause, "[d]oubts should be resolved in favor of coverage." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). Yet, in interpreting the scope of the Arbitration Agreement, the Court required it to be "clear and unmistakable," which is the opposite of resolving doubts in favor of coverage.

Here, given the procedural posture, the analysis for addressing the second question—does the Court or the arbitrator decide threshold questions of arbitrability—is three fold. One, is there a delegation clause? Two, is the delegation clause effective (i.e., did it "clearly and unmistakably" delegate threshold questions of arbitrability to the arbitrator)? And three, if it is effective, did the Court invade the arbitrator's province when it decided that the Arbitration Agreement did not encompass the subject dispute and that Royz did not enter into an enforceable agreement to arbitrate? The answer to all three is yes.

1. There is a delegation clause.

The Arbitration Agreement contains a delegation clause. The Delegation Clause provides that AAA Rules apply and that the arbitrator has exclusive authority to resolve any disputes relating to, among other things, the interpretation, applicability, enforceability, or formation of the Arbitration Agreement and all threshold arbitrability issues, including voidness or unconscionability:

> The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the AAA's Consumer Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this Arbitration Agreement. The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.
>
> **The parties agree that the arbitrator ("Arbitrator"), and not any federal, state, or local court or agency, shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement, including any claim that all or any part of this Arbitration Agreement is void or voidable. The Arbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel.**

Ex. 1-E to the Motion at p. 2 (emphasis added).

In addition to the above language from the Delegation Clause, the incorporation of the AAA Rules in the first paragraph also mandates the same result. The AAA Consumer Arbitration Rules, incorporated into the Delegation Clause by reference, also include a clear delegation of authority to the arbitrator to determine any disputes as to the scope and applicability of the

Arbitration Agreement:

> R-14. Jurisdiction
>
> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
>
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
>
> (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection . The arbitrator may rule on such objections as a preliminary matter or as part of the final award.[4]

2. The Delegation Clause is effective.

For a delegation clause to be effective, "there must be 'clear and unmistakable' evidence that the parties agreed to have an arbitrator decide such issues." *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 844 (6th Cir. 2020) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).[5] Here, that is the case.

Courts have universally held that the reference to AAA rules, like that in the Delegation Clause's first paragraph, provides "clear and unmistakable" evidence that the parties agreed to arbitrate threshold questions of arbitrability. *See Blanton*, 962 F.3d at 846. This is for two reasons. One, "the AAA Rules clearly empower an arbitrator to decide questions of 'arbitrability'—for instance, questions about the 'scope' of the agreement." *Id.* And two, parties

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[4] *See* current AAA Consumer Arbitration Rules at Page 17 (effective September 1, 2014), *available at*: https://www.adr.org/sites/default/files/Consumer_Rules_Web_1.pdf (Page 17 attached as **Ex. 2**). (Last retrieved on September 10, 2020).

[5] This is the same "clear and unmistakable" test from *Howsam* that the Court relied upon in reaching its conclusion. In *Howsam*, the Supreme Court relied on the same precedent as *Blanton*: the Supreme Court's decision in *First Options of Chicago*. *See Howsam*, 537 U.S. at 592.

can incorporate the AAA rules into the agreement, as done here. *Id.*

In *Blanton*, the Sixth Circuit faced this exact issue. There, the delegation clause was less clear than the one at issue here. It simply provided that "[t]he American Arbitration Association ('AAA') will administer the arbitration and the arbitration will be conducted in accordance with then-current [AAA Rules]." *Id.* at 844-45. The court determined that this was sufficient on both its own terms—"[o]n its own terms, that's pretty compelling evidence that Piersing agreed to arbitrate arbitrability"—and under the case law—"[w]hat the text suggests the case law confirms." *Id.* at 845. Indeed, to resolve any doubt, the court noted that "every one of our sister circuits to address the question—eleven out of twelve by our count—has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable' evidence that the parties agreed to arbitrate arbitrability." *Id.* at 846 (citing to decisions from each circuit and explaining that the one yet to adopt this rule "has precedent suggesting that it would join this consensus").

Although the incorporation of the AAA Rules in the Delegation Clause's first paragraph is enough, the Delegation Clause's second paragraph drives the point home. It provides that the arbitrator decides, among other things, questions of "interpretation" and "applicability" and "all threshold arbitrability issues." Ex. 1-E to the Motion at p. 2.

It is for these reasons that courts across the country have found "Uber's delegation provision dispositive" and effective. *Heller v. Rasier, LLC*, No. CV178545PSGGJSX, 2020 WL 413243, at *12 (C.D. Cal. Jan. 7, 2020); *see Mohammed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016); *Lathan v. Uber Techs., Inc.*, 266 F. Supp. 3d 1170, 1173-74 (E.D. Wis. 2017); *Olivares v. Uber Techs., Inc.*, No. 16 C 6062, 2017 WL 3008278, at *3-4 (N.D. Ill. July 14, 2017) (citing additional cases); *Lee v. Uber Techs., Inc.*, 208 F. Supp. 3d 886, 892 (N.D. Ill. 2016) ("This Court agrees with the Ninth Circuit and the numerous district courts that have found this delegation clause clear and unmistakable in delegating the question of arbitrability to an arbitrator."). For instance, in *Heller*, the court concluded that the plaintiffs "clearly and unmistakably agreed to delegate gateway issues of arbitrability exclusively to the arbitrator" under the "Riders' arbitration provision" because it provided, like here, that "the arbitrators

'shall . . . be responsible for determining *all threshold arbitrability issues*.'" *Id.* (emphasis in original).

Thus, given the delegation clause's wording and this precedent, there is "clear and unmistakable" evidence that the parties agreed to have an arbitrator decide threshold questions of arbitrability.

3. The Court invaded the arbitrator's province when it decided that the Arbitration Agreement did not encompass the subject dispute and that Plaintiff Royz did not enter into an enforceable agreement to arbitrate.

Through a delegation clause, parties can delegate all threshold issues to an arbitrator. Pertinent here, parties can delegate the issue of whether the arbitration agreement applies to the dispute at issue and whether there is an enforceable agreement to arbitrate between the parties. *See Henry Schein*, 139 S. Ct. at 527 ("Applying the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (providing that the "two 'gateway' issues: (1) whether there is an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute" can be delegated to the arbitrator).

Here, whether the Arbitration Agreement encompassed the subject dispute and whether Plaintiff Royz entered into an enforceable agreement to arbitrate should have been left to the arbitrator.

First, the Court invaded the arbitrator's province when it decided that the Arbitration Agreement did not encompass the subject dispute as to both Plaintiffs Royz and Work. *See* Ex. 1. Given the Delegation Clause, this Court did not have authority to decide this issue as to either Plaintiff. *See* Ex. 1-E to the Motion at p. 2 (AAA Rules cited above and "arbitrator . . . shall have exclusive authority to resolve any disputes relating to the interpretation, applicability . . . of this Arbitration Agreement"); *Henry Schein*, 139 S. Ct. at 530 ("[I]f the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.").

Second, the Court invaded the arbitrator's province when it decided that Plaintiff Royz

did not enter into an enforceable arbitration agreement. *See* Ex. 1. Specifically, the Court concluded that Royz "did not use the Uber app to request transportation [unlike Plaintiff Work]. Thus, Plaintiff Royz did not enter into a contract that could compel her claims to arbitration." *See id.*

Like the prior issue, the Delegation Clause delegates to the arbitrator the authority to decide whether there is an enforceable agreement to arbitrate. It does so by both its plain terms and by incorporating the AAA Rules. *See* Ex. 1-E to the Motion at p. 2 (providing that the arbitrator has exclusive authority to resolve any "dispute relating to the . . . enforceability or formation of this Arbitration Agreement, including any claim that all or any part of this Arbitration Agreement is void or voidable" and the arbitrator "shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel"); AAA Consumer Arbitration Rules, Rule 14, *supra*, n. 2 ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."); *see also Brennan*, 796 F.3d at 1130 (concluding that enforceability was delegated by incorporation of the AAA Rules because one rule provided that the "'arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the . . . validity of the arbitration agreement.'").

A court can honor a delegation clause without deciding whether an enforceable agreement to arbitrate exists because the enforceability of the delegation clause is severable from the enforceability of the arbitration agreement and, for that matter, the agreement containing the arbitration agreement. This has been the law of the land (at least) since the Supreme Court addressed the issue in *Rent-A-Center, West, Inc. v. Jackson. See* 561 U.S. 63, 72 ("Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2 [of the FAA], and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator."). The California Court of Appeal's explanation of this

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severability principle from *Rent-A-Center* is instructive:

> A delegation clause requires issues of interpretation and enforceability of an arbitration agreement to be resolved by the arbitrator. Delegation clauses have the potential to create problems of circularity. For example, suppose an arbitration agreement delegates the issue of enforceability to the arbitrator. If the arbitrator concludes that the arbitration agreement is, in fact, not enforceable, this would mean that the entire agreement, including the delegation clause, is unenforceable—a finding that would undermine the arbitrator's jurisdiction to make that finding in the first place. For this reason, courts have treated the delegation clause as a separate agreement to arbitrate solely the issues of enforceability. In other words, courts have separately enforced an enforceable delegation clause; thus, it has been held that whether the arbitration agreement as a whole is ultimately held to be unenforceable will have no bearing on the enforcement of the delegation clause itself. (*Bruni*, *supra*, 160 Cal.App.4th at p. 1287, 73 Cal.Rptr.3d 395.)
>
> For this reason, when a party is claiming that an arbitration agreement is unenforceable, it is important to determine whether the party is making a specific challenge to the enforceability of the delegation clause or is simply arguing that the agreement as a whole is unenforceable. If the party's challenge is directed to the agreement as a whole--even if it applies equally to the delegation clause--the delegation clause is severed out and enforced; thus, the arbitrator, not the court, will determine whether the agreement is enforceable. In contrast, if the party is making a specific challenge to the delegation clause, the court must determine whether the delegation clause itself may be enforced (and can only delegate the general issue of enforceability to the arbitrator if it first determines the delegation clause is enforceable). (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 70 [177 L.Ed.2d 403, 130 S.Ct. 2772, 2778].)

Malone v. Superior Court, 173 Cal. Rptr. 3d 241, 246–47 (Cal. App. 2014). Thus, the issue of whether Plaintiff Royz entered into an enforceable arbitration agreement should have been left to the arbitrator.[6]

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[6] Under *Henry Schein*, the Court must leave this question to the arbitrator even if the district court thinks that the argument that the arbitration agreement applies to Royz is "wholly groundless. Nevertheless, there is a compelling argument that Plaintiff Royz is bound by the arbitration agreement. A party to an agreement with an arbitration clause may enforce that arbitration agreement against a third-party beneficiary. *Epitech, Inc. v. Kann,* 204 Cal.App.4th 1365, 1372 (2012). Whether a third party is an intended beneficiary to the contract involves construction of the parties' intent based upon interpreting the contract in the light of the circumstances under which it was entered. *Id.*, 204 Cal.App.4th at pp.1371-1372. A non-signatory may be considered a third party beneficiary if he or she is a member of a group the parties intended to benefit. *Id.*, at p.1372.

C. Reconsideration is appropriate.

Under these circumstances, this Court should exercise its power "to correct erroneous rulings at any time prior to the entry of final judgment." *See Insurance Co. of the West v. Gibson Tile Co., Inc.*, 134 P.3d 698, 705 (2006) (Maupin, J., concurring); *see also Harlow v. Children's Hosp.*, 432 F.3d 50, 55 (1st Cir. 2005) (providing that "interlocutory orders, including denials of motions to dismiss, remain open to trial court reconsideration, and do not constitute the law of the case").

1. Reconsideration is favored as an efficient alternative to appeal.

A motion to reconsider is preferred over an appeal as a quicker, easier and less expensive method of correcting error. *See, e.g., Osman v. Cobb*, 77 Nev. 133, 136, 360 P.2d 258, 259 (1961) (denying costs because Rule 60 relief was not sought with the trial court). As one court explained:

> In doing what he did here [moving for relief from judgment under Rule 60(b) rather than proceeding directly to appeal], it would appear that he followed what we deem ordinarily to be the better practice of bringing to the attention of the trial court at some appropriate time before appeal the errors which it is claimed have been committed. The district court already familiar with the case is thereby given an opportunity to correct any mistakes it might have made and the parties will avoid the expenses and delays involved in appeals.

Beshear v. Weinzapfel, 474 F.2d 127, 130 (7th Cir. 1973). Where the district court can correct an error on a motion for reconsideration, it should.

2. Reconsideration is appropriate to avoid error even where the circumstances have not changed.

"[A] district court may reconsider a previously decided issue if . . . the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). *See also* EDCR 2.24. Reconsideration is appropriate "[a]lthough the facts and the law [are] unchanged [if] the judge [is] more familiar with the case by the time the second motion [is] heard, and [she is] persuaded by the rationale of the newly cited authority." *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 218, 606 P.2d 1095, 1097 (1980).

Reconsideration is warranted in many circumstances, including:

> … when (1) the matter is presented in a 'different light' or under 'different circumstances;' (2) there has been a change in the governing law; (3) a party offers new evidence; (4) 'manifest injustice' will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

Wasatch Oil & Gas, LLC v. Reott, 263 P.3d 391, 396 (Utah Ct. App. 2011). It is appropriate whenever the Court may have overlooked or misapprehended pertinent facts or law or for some other reason mistakenly arrived at its earlier decision. *See by analogy* NRAP 40(c)(2); *see also Nelson v. Dettmer*, 46 A.3d 916, 919 (Conn. 2012); *Viola v. City of New York*, 13 A.D.3d 439, 441 (N.Y. App. Div. 2004).

3. Supplemental points and explanations are proper.

Every point Rasier and Uber has raised in this motion merely expounds on its previous papers. Therefore, because everything in this motion would be suitable to raise in an appeal from the Court's prior ruling, it is appropriate to raise now. *See Western Technologies, Inc. v. All American Golf Center*, 122 Nev. 869, n.8, 139 P.3d 858, n 8. (2006) (while new issues may not be raised on appeal, additional authorities and arguments are appropriate); 4 C.J.S. Appeal and Error § 309 (updated Dec. 2011) ("On appeal, a party may bolster his preserved issues with additional legal authority or make further arguments within the scope of the legal theory articulated to the trial court, but may not raise an entirely new legal theory."). Certainly, a trial court may consider any points on reconsideration that the moving party could raise in an appeal from the trial court's prior order. Any other rule would be unfair to the trial court.

III. CONCLUSION

For the foregoing reasons, the Court should reconsider its order denying Rasier and Uber's motion to compel arbitration. Under *Henry Schein*, binding precedent interpreting the Federal Arbitration Act, this Court should have addressed whether it or the arbitrator had authority to decide threshold questions of arbitrability under the Arbitration Agreement's Delegation Clause. After performing this inquiry, it is clear that the Delegation Clause delegated such authority to the arbitrator, including the authority to decide whether the Arbitration

Agreement encompasses the subject dispute and whether Plaintiff Royz entered into an enforceable agreement to arbitrate. Thus, the Court should grant Rasier and Uber's motion to compel arbitration and leave these issues to the arbitrator.

Dated this 29th day of September, 2020.

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2020, a true and correct copy of the foregoing **DEFENDANTS UBER TECHNOLOGIES, INC., RASIER, LLC, AND RASIER-CA, LLC'S MOTION FOR LEAVE AND MOTION TO RECONSIDER THE COURT'S ORDER DENYING DEFENDANTS UBER TECHNOLOGIES, INC., RASIER, LLC, AND RASIER-CA, LLC'S MOTION TO COMPEL ARBITRATION AND STAY ACTION ON ORDER SHORTENING TIME** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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EXHIBIT 1

EXHIBIT 1

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A-20-810843-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	COURT MINUTES	August 06, 2020

A-20-810843-C Megan Royz, Plaintiff(s)
vs.
Marc Jacobs, Defendant(s)

August 06, 2020 **8:00 AM** **Minute Order re: Motion to Compel and Joinder**

HEARD BY: Williams, Timothy C. **COURTROOM:** Chambers

COURT CLERK: Christopher Darling

JOURNAL ENTRIES

- After a review and consideration of the record, the points and authorities on file herein, and oral argument of counsel, the Court determined as follows:

Although the U.S. Supreme Court has long recognized and enforced a liberal federal policy favoring arbitration agreement, it has clearly carved out an exception where the dispute focuses on whether the parties have submitted a particular dispute to arbitration. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002). Such a determination is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." Id. *quoting* AT & T Technologies, Inc v. Communications Workers, 475 U.S. 643, 649 (1986). A court must determine whether a party has agreed to submit a particular dispute to arbitration before requiring a party to submit to arbitration. Id.

In the instant matter, Section 6 states: "You agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof or the use of the Services (collectively, "*Disputes*") will be settled by binding arbitration between you and Uber…." The Court finds that the arbitration clause focuses on the terms of service under the contract—not motor vehicle accidents. Because the arbitration provision does not clearly or unmistakably provide that the parties have agreed to submit a motor vehicle dispute to arbitration, this Court determines the issue. Accordingly, after reviewing the contract, the Court does not find that the parties have waived their rights to a civil trial in favor of arbitration, for a motor vehicle accident dispute. Further, Plaintiff Megan Royz did not use the Uber app to request transportation. Thus, Plaintiff

Royz did not enter into a contract that could compel her claims to arbitration. Consequently, the **Defendant's** Motion to Compel Arbitration and Stay Action as well as Defendant Mark Anthony Jacob's Joinder is **DENIED**.

Plaintiff shall prepare a detailed Order, Findings of Facts, and Conclusions of Law, based not only on the foregoing Minute Order, but also on the record on file herein. This is to be submitted to adverse counsel for review and approval and/or submission of a competing Order or objections, prior to submitting to the Court for review and signature.

CLERK'S NOTE: This Minute Order has been served to counsel electronically through Odyssey eFile.

EXHIBIT 2

EXHIBIT 2

that clause is only an administrative determination by the AAA and cannot be relied upon or construed as a legal opinion or advice regarding the enforceability of the arbitration clause. Consumer arbitration agreements may be registered at: **www.adr.org/consumerclauseregistry** or via email at **consumerreview@adr.org.**

For more information concerning the Consumer Clause Registry, please visit the AAA's website at **www.adr.org/consumerclauseregistry.**

The Registry fee to initially review a business's agreement and maintain the clause registry list is a yearly, non-refundable fee for the business's arbitration agreement. Any different arbitration agreements submitted by the same business or its subsidiaries must be submitted for review and are subject to the current review fee.

If the AAA declines to administer a case due to the business's non-compliance with this notification requirement, the parties may choose to submit their dispute to the appropriate court.

R-13. AAA and Delegation of Duties

When the consumer and the business agree to arbitrate under these Rules or other AAA rules, or when they provide for arbitration by the AAA and an arbitration is filed under these Rules, the parties also agree that the AAA will administer the arbitration. The AAA's administrative duties are set forth in the parties' arbitration agreement and in these Rules. The AAA will have the final decision on which office and which AAA staff members will administer the case. Arbitrations administered under these Rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-14. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

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Steven D. Grierson
CLERK OF THE COURT

OPPM
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DISTRICT COURT OF THE STATE OF NEVADA

FOR THE COUNTY OF CLARK

MEGAN ROYZ, an individual; and ANDREA EILEEN WORK, an individual Plaintiffs, v. MARK ANTHONY JACOBS, an idividual, MARCO ANTONIO HEREDIA-ESTRADA, an individual, UBER TECHNOLOGIES, INC., a corporation; RASIER, LLC., a corporation, RASIER-CA, LLC, an individual; DOES 1 through 10 and ROE Corporations 1 through 10, Inclusive, Defendants	Case No.: A-20-810843-C Dept.: XVI **PLAINTIFFS' OPPOSITION TO DEFENDANTS UBER TECHNOLOGIES, INC., RASIER, LLC, AND RASIER-CA, LLC'S MOTION FOR LEAVE AND MOTION TO RECONSIDER THE COURT'S ORDER DENYING DEFENDANTS' UBER TECHNOLOGIES, INC., RASIER, LLC, AND RASIER-CA, LLC'S MOTION TO COMPEL ARBITRATION AND STAY ACTION ON ORDER SHORTENING TIME**

COMES NOW, Plaintiffs MEGAN ROYZ ("ROYZ") and ANDREA WORK ("WORK"), by and through their attorney of record, Trevor Quirk, Esq. of Quirk Law Firm, LLP hereby submits Plaintiffs' Opposition to Defendants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC's Motion for Leave and Motion to Reconsider the Court's Order Denying Defendants'

Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC's Motion to Compel Arbitration ("Uber") and Stay Action on Order Shortening Time.

This Opposition is made and based upon the following Memorandum of Points and Authorities, the exhibits attached hereto, the papers and pleadings on file herein, and any oral argument this Court may allow.

DATED this 13th day of October, 2020.

QUIRK LAW FIRM, LLP

_____

Trevor Quirk, Esq.

Attorneys for Plaintiffs

Megan Royz & Andrea Eileen Work

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Uber's Motion is a regurgitation of law and facts and is a literal cut and paste of a Declaration and Motion for Reconsideration filed on September 14, 2020 in Department XXII in the matter styled as *Yolanda Hauff v. Kevin Heward, Rasieer, LLC d/b/a Uber, Case No. A-20-809538-C.*

Like Department XXII, this Court should deny Uber's Motion again because the *only* argument Uber raises-an Arbitrator, not a Judge should determine whether this matter should be arbitrated, was already raised, briefed, heard, argued, considered and denied by this Court and Department XXII.

Indeed, page 12 of Uber's initial Motion to Compel Arbitration contains the following:

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B. Threshold Question of Arbitrability Must Be Decided By the Arbitrator.

After determining that the FAA applies, the Court must examine the underlying contract to determine whether the parties agreed to a delegation clause and thereby committed threshold questions of arbitrability to the arbitrator. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010)

This Court's August 6, 2020 minutes reflect the Court already decided this issue "[a] Court must determine whether a party has agreed to submit a particular dispute to arbitration before requiring a party to submit to arbitration:"

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A-20-810843-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	COURT MINUTES	August 06, 2020
A-20-810843-C	Megan Rovai, Plaintiff(s) vs. Marc Jacobs, Defendant(s)	

August 06, 2020 8:00 AM Minute Order re: Motion to Compel and Joinder

HEARD BY: Williams, Timothy C. COURTROOM: Chambers

COURT CLERK: Christopher Darling

JOURNAL ENTRIES

- After a review and consideration of the record, the points and authorities on file herein, and oral argument of counsel, the Court determined as follows:

Although the U.S. Supreme Court has long recognized and enforced a liberal federal policy favoring arbitration agreements, it has clearly carved out an exception where the dispute focuses on whether the parties have submitted a particular dispute to arbitration. Id. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002). Such a determination is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." Id. quoting AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986). A court must determine whether a party has agreed to submit a particular dispute to arbitration before requiring a party to submit to arbitration. Id.

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This Court may only "reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.,* (1997) 113 Nev. 737, 741, 941 P.2d 486, 489. Substantially different evidence is not being introduced. In fact, no new evidence is being introduced. Uber's 15-page Motion regurgitates arguments already made, cites no new facts, but does cite to a new case-*Henry Schein*-a Supreme Court case decided January 18, 2019, over a year before Uber filed its initial Motion to Compel Arbitration. Uber's Motion fails to explain why it cites to this case now and why this Court's decision was "clearly erroneous."

The reason Uber's Motion fails to explain why this Court's decision was "clearly erroneous" is because Uber cannot. The Court's prior decision was clearly right. The Court correctly decided Uber's alleged arbitration agreement of motor vehicle accidents, hidden in the terms and conditions of its App, "focuses on the terms of service under the contract-not motor vehicle accidents." The Court's Minute clearly states whether the parties have submitted a particular dispute to arbitration is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." The Court determined the parties did not "clearly and unmistakably" provide otherwise. Such an argument might be made if this matter concerned terms of service rather than motor vehicles accidents, as this Court correctly pointed out.

As Uber's Motion fails to introduce "substantially different evidence" and this Court's prior ruling was not "clearly erroneous," Uber's Motion should be denied, again.

II. STATEMENT OF FACTS & PROCEDURAL HISTORY

This is a personal injury case arising from a February 22, 2018 motor vehicle crash involving two Uber drivers.

Plaintiffs Megan Royz ("Royz") and Andrea Eileen Work ("Work") were passengers in a vehicle being driven by Defendant Marco Antonio Herida-Estrada ("Estrada"). Estrada was transporting Plaintiffs as an Uber driver at the time of the crash.

While in Mr. Estrada's vehicle, Plaintiffs were struck by Defendant Mark Anthony Jacobs' ("Jacobs") vehicle. Mr. Jacobs was operating his vehicle while under the influence of intoxicating substances. Defendant Jacobs was also operating his vehicle as an Uber driver. Plaintiffs filed suit

against both drivers.

On June 11, 2020, Uber filed its Motion to Compel Arbitration based on an alleged arbitration agreement within Uber's Terms of Use ("Uber Contract"), which Uber claims Plaintiffs agreed to when they signed-up for the Uber App.

On June 25, 2020, Plaintiffs filed their Opposition to Uber's Motion to Compel Arbitration.

On July 9, 2020, the Court entered its Minute Order re: Hearing on 7/16/20.

On July 16, 2020, the Court heard oral argument concerning Uber's Motion to Compel Arbitration. The Court denied Uber's Motion.

On October 2, 2020, Plaintiffs submitted an Order concerning the hearing.

On October 5th and 7th, 2020, Uber filed a Motion for Reconsideration.

III. ARGUMENT

A. Uber's Motion For Reconsideration Should Be Denied As it Fails to Introduce Any New Evidence and this Court's Decision Denying Uber's Motion to Compel Arbitration Was Not Clearly Erroneous.

"No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, **unless by leave of the court granted upon motion therefor..."** ***See EDCR 2.24(a).*** The Nevada Supreme Court holds that "[o]nly in **very rare instances** in which **new issues of fact or law** are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976).

A District Court may only "reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd*., (1997) 113 Nev. 737, 741, 941 P.2d 486, 489 see also *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984) ("Where there is no evidence in support of the lower court's findings, they are clearly erroneous and may be reversed.").

And especially important here-the "citation of additional authorities for a proposition of law already set forth and adequately supported by reference to relevant authorities in the earlier

motions" does not merit rehearing, is "superfluous," and it is "an abuse of discretion for the district court to entertain it." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Moreover, "[p]oints or contentions not raised in the original hearing cannot be maintained or considered on rehearing." *Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996). Ultimately, a motion for reconsideration must be filed "within 14 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order." EDCR 2.24(b)

Here, there is no legitimate basis to reconsider the Court's Order denying the Motion to Compel Arbitration. Uber's counsel admits "this motion does not raise any new arguments" and fails to explain why it did not include *Henry Schein* in its originally filed brief. *Henry Schein* was issued over one-and-a-half years before the subject hearing.

There has been no intervening change in controlling law, no newly discovered evidence, nor was the Court's decision clearly erroneous. All parties had a full and fair opportunity to brief and argue the issues, including the threshold question of arbitrability, which the Court considered and decided upon in rendering its decision. It is inappropriate for this Court to allow Uber to hire new counsel and then take a second bite at the apple it already lost. Even if the Court does, which it should not, the Court's decision was appropriate as discussed more fully below.

The dispute at issue in this case sounds in tort and arises from negligence concerning a motor vehicle collision (i.e. transportation services) and therefore the alleged Uber Contract has nothing to do with the dispute at issue. In fact, the Uber Contract expressly excludes such matters, specifically asserting that UBER does not provide transportation services and is not a transportation carrier, stating as follows:

> YOU ACKNOWLEDGE THAT YOUR ABILITY TO OBTAIN TRANSPORTATION, LOGISTICS AND/OR DELIVERY SERVICES THROUGH THE USE OF THE SERVICES **DOES NOT ESTABLISH UBER AS A PROVIDER OF TRANSPORTATION**, LOGISTICS OR DELIVERY **SERVICES OR AS A TRANSPORTATION CARRIER.**[1]

1 See Uber Terms of Use on file.

Uber makes a point to emphasize, in capital letters, that it is not a transportation carrier. Uber's alleged "Services" consist of providing an app with which users can locate other people who provide "transportation services."2 Neither the Uber Contract, arbitration agreement nor delegation clause include any provisions encompassing claims concerning the "other people" or "transportation services."

This Court already correctly determined Plaintiffs' claims in this matter do not relate to their "Contractual Relationship" with Uber under the Uber Contract as the Uber Contract concerns "mobile applications and related services," not transportation services. Thus, because Plaintiffs' claims do not involve the Uber Contract whatsoever, the scope of the arbitration agreement within said Uber Contract is irrelevant, thereby necessarily rendering the purported delegation clause within the arbitration agreement entirely inapplicable. Further analysis of the "Services" and "Terms" encompassed by the Uber Contract can be located within Plaintiffs' Opposition to Defendants' Motion to Compel Arbitration and Stay Action. This Court already rendered a decision on this issue and given that it is not the focus of the Motion for Reconsideration, Plaintiffs will not usurp the Court's precious time rehashing arguments already made and ruled upon concerning the scope of the Uber Contract. However, Plaintiffs are happy to provide further briefing on this issue if the Court wishes.

B. This Dispute Does Not Arise From The Uber Contract, Thereby Rendering The Arbitration Agreement And Delegation Clause Inapplicable.

"'Whether a dispute arising under a contract is arbitrable is a matter of contract interpretation…'" *Tallman v. Eighth Jud. Dist. Ct.* (2015), 131 Nev. 713, 720, 359 P.3d 113, 118–19 (2015) (quoting *State ex rel. Masto v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, (2009)125 Nev. 37, 44, 199 P.3d 828, 832); *See also Johnson v. Newmont USA Ltd.,* (2011)127 Nev. 1149, 373 P.3d 930.

As a matter of contract, "a party cannot be required to submit to arbitration any dispute

2 Uber Terms of Use, 1, 4. (The Uber Contract defines services as follows: "The Services comprise **mobile applications** and **related services** (each, an '**Application**'), which **enable users to arrange and schedule transportation**, logistics and/or delivery services and/or to purchase certain goods, including with third party providers of such services and goods under agreement with Uber or certain of Uber's affiliates…'").

which he has not agreed so to submit." *AT & T Techs., Inc. v. Commc'ns Workers of Am.,* (1986) 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648. Thus, "arbitration clauses 'must not be so broadly construed as to encompass claims and parties that were not intended by the original contract.'" *Johnson v. Newmont USA Ltd*., 127 Nev. 1149, 373 P.3d 930 (2011) (quoting *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 634, 189 P.3d 656, 660 (2008)).

The Federal Arbitration Act ("FAA") expressly asserts that an arbitration agreement within a contract can be enforced only where the "controversy… aris[es] out of such contract." *Henry Schein, Inc. v. Archer & White Sales, Inc*., 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019) (quoting 9 U.S.C. § 2)("'A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'").

As stated by the United States Supreme Court in *Schein*, "[u]nder the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract." *Henry Schein, Inc. v. Archer & White Sales, Inc*., 139 S. Ct. 524, 527, 202 L. Ed. 2d 480 (2019). [A]bsurd results would inevitably ensue if [] courts began compelling arbitration of claims that are substantively and temporally unmoored from the agreements containing the arbitration provisions."3 Thus, the key requirement to implicate an arbitration

3 Hearn v. Comcast Cable Commc'ns, LLC, 415 F. Supp. 3d 1155, 1164 (N.D. Ga. 2019) (while the parties had a contract that contained an agreement, the plaintiff's claims at issue were outside the scope of the agreement; thus, arbitration could not be compelled. The court ruled that no reasonable customer would expect to waive their right to sue the defendant with regard to a claim unrelated to the parties' agreement. Similarly, the court went on to state that no reasonable company in the defendant's position could expect the plaintiff to absolutely waive their right to sue in court); See also Setlock v. Pinebrook Pers. Care & Ret. Ctr., 56 A.3d 904, 910 (Pa. Super. Ct. 2012) (although there existed a valid agreement to arbitrate in a contract between the plaintiff and the defendant, because the dispute at issue arose out of a wrongful death claim that was neither contemplated nor encompassed within the underlying contract, the defendant's motion to compel arbitration was denied); See also Wexler v. AT & T Corp., 211 F. Supp. 3d 500, 505 (E.D.N.Y. 2016) (while the parties had a contract that contained an arbitration agreement, the court determined that the plaintiff's claims were outside the scope of the contract and, thus, that arbitration could not be compelled. "The Court's reliance on the lack of mutual intent, by contrast, is entirely consistent with the FAA because '[a]rbitration under the Act is a matter of consent, not coercion.' Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Indeed, the FAA explicitly limits itself to agreements 'to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof.' 9 U.S.C. § 2)); See also Revitch v. DirecTV, LLC, No. 18-CV-01127-JCS, 2018 WL 4030550, at *17 (N.D. Cal. Aug. 23, 2018) (although the parties had an agreement that contained an arbitration provision, the plaintiff's claims at issue did not arise from said agreement; therefore, arbitration could not be compelled).

agreement, including a delegation clause and the FAA, is that the dispute/controversy at issue must arise out of the contract in which the arbitration agreement exists. If the dispute/controversy at issue does not arise from the underlying contract, then the FAA is not implicated and an arbitration agreement/delegation clause therein cannot be enforced.

Moreover, even where a delegation clause exists, "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."4 Thus, this Court must first determine whether the dispute/controversy at issue here arises out of the underlying contract. If the answer is no, then the FAA is not implicated and the arbitration agreement, including the delegation clause, is not applicable and cannot be enforced in this matter.

Here, the dispute/controversy at issue in this case is a negligence claim that does not arise out of the Uber Contract; therefore, the corresponding arbitration agreement and purported delegation clause do not apply and cannot be enforced. This Court has already properly decided this initial inquiry. As this Court already determined corectly, the parties' "Contractual Relationship" that is subject to the "Terms," "Services" and arbitration agreement does not apply to the dispute at issue in this case (i.e. negligence claims arising from a motor vehicle collision/transportation services). In other words, the dispute at issue does not arise from the Uber contract; therefore, the contract, including the arbitration provision and delegation clause, do not apply and cannot be enforced as this Court already correctly concluded. This is true regardless of the breadth of the delegation clause.

In each of the cases cited by Uber in the Motion for Reconsideration, the disputes at issue undisputedly arose from the underlying contracts, which included arbitration agreements. The question at issue in each case was only whether the arbitration clause encompassed the particular claims that undisputedly arose out of the contracts. Therefore, provided the delegation clauses were valid and enforceable, questions regarding arbitrability of the disputes that did in fact arise from the contracts could be sent to the arbitrator. More specifically:

- **Henry Schein, Inc. v. Archer & White Sales, Inc.:** The issue in *Schein* involved claims for antitrust violations that undisputedly arose from the underlying contract.

4 Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530, 202 L. Ed. 2d 480 (2019).

"The relevant contract between the parties provided for arbitration of any dispute arising under or related to the agreement…"5 Additionally, part of the relief sought by the plaintiff was likewise undisputedly subject to the arbitration agreement (i.e. money damages). It was merely one type of relief that was sought – injunctive relief – that the plaintiff asserted was not subject to the arbitration agreement per the express language of the agreement and, thus, the plaintiff claimed that the entire dispute was barred from arbitration. Said proposition was not clear by the plain verbiage of the arbitration agreement. The agreement also contained a delegation clause. Therefore, because the dispute arose from the contract that was subject to an arbitration agreement, the United State Supreme Court remanded the case to the Court of Appeals with direction to determine whether there was "clear and unmistakable evidence" that the parties intended to delegate the threshold questions at issue to the arbitrator.

- **First Options of Chicago, Inc. v. Kaplan:**6 The underlying dispute at issue involved breach of a "workout" agreement where payments of debts were not paid; thus, the claims arose from the underlying contract. The agreement from which the dispute arose included an arbitration clause.
- **New Prime Inc. v. Oliveira:**7 Dispute at issue arose out of an operating agreement, which contained an arbitration agreement, where a contracted truck driver claimed the trucking company denied its drivers lawful wages.
- **Brennan v. Opus Bank:**8 Dispute arose out of an employment contract, which contained an arbitration agreement, wherein an employee pursued claims for breach of employment agreement, wrongful termination, and unlawful withholding of wages (i.e. contractual claims, not negligence claims).
- **Rent-A-Center, W., Inc. v. Jackson:**9 Dispute arose out of an employment

5 Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 526, 202 L. Ed. 2d 480 (2019).
6 First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 940, 115 S. Ct. 1920, 1922, 131 L. Ed. 2d 985 (1995).
7 New Prime Inc. v. Oliveira, 139 S. Ct. 532, 534, 202 L. Ed. 2d 536 (2019).
8 Brennan v. Opus Bank, 796 F.3d 1125 (9th Cir. 2015).
9 Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).

contract, which contained an arbitration agreement, wherein employee brought a claim for employment discrimination. The contract even specifically "provided for arbitration of all 'past, present or future' disputes arising out of Jackson's employment with Rent–A–Center, including 'claims for discrimination' and 'claims for violation of any federal law.'"10

- **Blaton v. Domino's Pizza Franchising LLC:**11 Dispute arose out of a franchise agreement, which contained an arbitration provision, where employee pursued claims arising from said agreement.
- **Heller v. Rasier, LLC:**12 Dispute arose out of rideshare driver and rider contracts, which included an arbitration agreement, wherein employees and riders brought claims concerning a security data breach that resulted in personal information being stolen from Uber's software application system that was the subject of the contracts.
- **Mohammed v. Uber Techs., Inc.:**13 Dispute arose out of Uber driver employment contracts, which included an arbitration provision, wherein drivers asserted claims concerning their employment.
- **Lathan v. Uber Techs., Inc.:**14 Dispute arose out of Uber driver's contract, which included an arbitration provision, wherein the plaintiff driver agreed that his claims were within the scope of the arbitration provision, including tortious interference with prospective business relations, breach of contract, unjust enrichment, conversion, unfair completion, fraud and misrepresentation, and violations of state minimum-wage and labor statues and administrative code provisions.
- **Olivares v. Uber Techs., Inc.:**15 Dispute arose out of Uber driver's contract,

10 Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 65–66, 130 S. Ct. 2772, 2775, 177 L. Ed. 2d 403 (2010).
11 Blaton v. Domino's Pizza Franchising LLC, 962 F.3d 842 (6th Cir. 2020).
12 Heller v. Rasier, LLC, No. CV178545PSGGJSX, 2020 WL 413243 (C.D. Cal. 2020).
13 Mohammed v. Uber Techs., Inc., 848 F.3d 1201 (9th Cir. 2016).
14 Lathan v. Uber Techs., Inc., 266 F. Supp. 3d 1170 (E.D. Wis. 2017).
15 Olivares v. Uber Techs., Inc., No. 16 C 6062, 2017 WL 3008278 (N.D. Ill. July 14, 2017).

which included an arbitration provision, wherein driver asserted claim for insufficient wages concerning his employment.

- **Lee v. Uber Techs., Inc.:**16 Dispute arose out of Uber drivers' contracts, which included an arbitration provision, wherein drivers asserted claims concerning their employment including, but not limited to, tortious interference with prospective business relations and breach of contract.

Each of the foregoing cases involved claims arising out of the underlying contracts that included arbitration agreements; therefore, the arbitration provisions, including delegation clauses, could potentially apply. As the claims implicated the subject-matter of the contract, the parties could rely on the contract's delegation-of-arbitrability-questions-to-the-arbitrator provision. Here, the dispute at issue involves personal injury claims arising from a motor vehicle collision having nothing to do with the Uber Contract, thereby rendering that contract and the related arbitration agreement, including the purported delegation clause therein, inapplicable and unenforceable in this context. If the dispute at issue here concerned Uber's App, then the assessment may be different, but that is not the dispute at issue. It would be wholly improper to enforce the delegation clause against Plaintiffs in this negligence action when the dispute/controversy at issue does not concern the contract within which said clause appears whatsoever.

In short, even assuming Plaintiffs and Uber had agreed to delegate to an arbitrator questions about the arbitrability of claims related to the "Terms" and "Services," the parties did not agree to arbitrate – much less delegate to an arbitrator questions of the arbitrability of –Plaintiffs' tort claims unrelated to the parties' contract concerning Uber's app, which expressly excludes transportation services. Moreover, Uber's presumed conduct for years where it did not seek to enforce its alleged arbitration agreement in motor vehicle collision cases demonstrates its inapplicability to such claims.17 Simply put, a contract does not exist that is applicable to the

16 Lee v. Uber Techs., Inc., 208 F. Supp. 3d 886 (N.D. Ill. 2017).

17 UBER has also arguably waived its right to arbitrate by virtue of its litigation-conduct not only in this case, but also via its conduct for years where it failed to raise the defense concerning the purported arbitration agreement; *See* Nevada Gold & Casinos, Inc. v. Am. Heritage, Inc., 121 Nev. 84, 90, 110 P.3d 481, 485 (2005) ("a waiver may be shown when the party seeking to arbitrate (1) knew of his right to arbitrate, (2) acted inconsistently with that right, and (3) prejudiced the other party by his inconsistent acts."); *See generally* Principal Invs. v. Harrison, 132 Nev. 9, 366 P.3d 688 (2016).

claims at issue in this case, including the arbitration clause; thus, there is not a contract that can be enforced here, period. This is the first and foremost question to be answered, which is for the Court to decide. The Court has in fact already determined that Plaintiffs' claims do not arise from the Uber Contract and are not encompassed by the arbitration agreement. Therefore, as the Uber Contract does not apply to the claims at issue, Uber's motion must be denied, again.

C. The Delegation Clause Is Not Clear, Unmistakable Nor Applicable.

The Federal Arbitration Act provides it is the court's role to determine: (1) "whether a valid arbitration agreement exists[;]" and, (2) "whether the agreement [to arbitrate] encompasses the disputes at issue."18 While the parties may choose to delegate threshold arbitrability questions to the arbitrator, the parties' agreement must do so by "'clear and unmistakable' evidence."19 This is because giving arbitrators the power to make such a decision "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."20 "Accordingly, the question of arbitrability is left to the court unless the parties clearly and unmistakably provide otherwise. Such '[c]lear and unmistakable 'evidence' of agreement to arbitrate arbitrability might include ... a course of conduct demonstrating assent ... or ... an express agreement to do so.'"21

Moreover, "a delegation clause is merely a specialized type of arbitration agreement and is enforceable… only if it appears in a contract consistent with" the FAA.5022 Thus, as arbitration will only be compelled under the FAA where the "controversy… aris[es] out of [the] contract" at issue,23 a delegation clause likewise can only be enforced where the dispute at issue arises out of

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18 Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175 (9th Cir. 2014); *See also* 9 U.S.C.A. § 2.

19 Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530, 202 L. Ed. 2d 480 (2019) (*quoting First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 939, 115 S. Ct. 1920, 1921, 131 L. Ed. 2d 985 (1995)).

20 First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945, 115 S. Ct. 1920, 1925, 131 L. Ed. 2d 985 (1995).

21 Momot v. Mastro, 652 F.3d 982, 988 (9th Cir. 2011) (Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 79, 130 S. Ct. 2772, 2783, 177 L. Ed. 2d 403 (2010)(Stevens, J., dissenting)).

22 New Prime Inc. v. Oliveira, 139 S. Ct. 532, 534, 202 L. Ed. 2d 536 (2019) (*citing* 9 U.S.C. § 2).

23 Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019) (*quoting* 9 U.S.C. § 2)("'A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter *arising out of such contract* ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'").

the contract in which the clause appears. Moreover, as with other contracts, the agreement must be "clear on its face from the written language[,]"24 and ambiguities must be construed against the drafter.25 "A contract is ambiguous when it is subject to more than one reasonable interpretation."26

Here, the purported delegation clause does not delegate the arbitrability question in this case to an arbitrator because the arbitration agreement and corresponding delegation clause do not apply to the dispute at issue in this case whatsoever as discussed above and as already ruled on by this Court. Moreover, the delegation clause expressly limits "delegated" matters to those that are subject to the arbitration agreement. More specifically, the purported delegation clause provides as follows:

> The parties agree that the arbitrator… shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formatting of this Arbitration Agreement, including any claim that all or any part of this Arbitration Agreement is void or voidable. The Arbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are unconscionable or illusory and any defense to arbitration, including waiver, delay, laches or estoppel.27

Uber's Arbitration agreement expressly applies only to disputes, claims and controversies arising out of or relating to just two matters: (1) the "Terms" and (2) the "Services" covered by the Uber Contract. More specifically, under the "Agreement to Binding Arbitration Between You and Uber" section, the Uber Contract provides as follows:

> You and Uber agree that any dispute, claim or controversy arising out of or relating to (a) these Terms or the existence, breach, termination, enforcement, interpretation or validity thereof, or (b) your access to or use of the Services at any time, whether before or after the date you agreed to

24 State ex rel. Masto v. Second Judicial Dist. Court ex rel. Cty. of Washoe, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009).
25 Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212, 215–16, 163 P.3d 405, 407 (2007).
26 Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007).
27 Uber Terms of Use, 2,

> the Terms, will be settled by binding arbitration between you and Uber, and not a court of law.28

As discussed more fully within Plaintiffs' Opposition to the Motion to Compel Arbitration,29 and as already addressed by this Court in its Order, the "Terms" and "Services" that are the subject of the Uber Contract and corresponding arbitration agreement involve UBER's "mobile applications and related services," not transportation. Thus, Plaintiffs' "dispute or claim does not arise out of or relate to the 'Terms' or 'Services' described within" the Uber Contract or arbitration agreement, thereby rendering the Uber Contract and arbitration agreement inapplicable to the dispute at issue in this case. Therefore, as the delegation clause only applies to matters subject to the arbitration agreement, which does not include claims concerning transportation services like the case at hand, the delegation clause does not clearly and unmistakably delegate questions concerning arbitrability of the claims at issue in this case to an arbitrator.

Not only would it be entirely improper and unconscionable to apply the arbitration agreement and delegation clause to the dispute at hand, given that it does not arise from the Uber Contract, the purported delegation clause does not clearly and unmistakably apply to claims or controversies other than perhaps those that arise out of or are related to the "Terms" and "Services," as those are the only types of claims that are subject to the arbitration agreement per the express language within the Uber Contract. Therefore, because there is an utter absence of "clear and unmistakable evidence" that the parties intended to delegate questions regarding arbitrability when it comes to matters that are outside the scope of the Uber Contract and arbitration agreement, including that related to transportation services, it would be wholly improper for an arbitrator to render such decisions.

D. The Arbitration Agreement And Corresponding Delegation Clause Are Invalid And Unenforceable.

Even where a delegation clause exists, "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."30 Therefore, even "where an agreement

28 Uber Terms of Use, 2,

29 *See* Plaintiffs' Opposition to the Motion to Compel Arbitration on file.

30 Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530, 202 L. Ed. 2d 480 (2019); See also Rent-

to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that particular agreement, the district court considers the challenge…"31 In assessing whether a valid arbitration agreement exists, "[t]he FAA… places arbitration agreements on an equal footing with other contracts..."32 Thus, "[l]ike other contracts, … they may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'"33 Here, Plaintiffs challenge the validity of the arbitration agreement and the corresponding delegation clause; therefore, this Court is the proper forum to determine the validity of said agreement. As discussed below, the arbitration agreement and delegation clause are invalid and unenforceable as they are unconscionable, impracticable, and there was no meeting of the minds:

1. <u>The Arbitration Agreement and Delegation Clause are Invalid as they are Unconscionable and Impracticable.</u>

An arbitration agreement including a delegation clause therein is not enforceable where it is "itself unconscionable[,]" which is to be determined by the court.34 As explained within Plaintiffs' Opposition to the Motion to Compel Arbitration, the arbitration agreement and corresponding delegation clause is unconscionable and, thus, must not be enforced. Pursuant to the Nevada Supreme Court, courts must not "enforce a contract, or any clause of a contract, including an arbitration clause, that is unconscionable."35 This is in accordance with the FAA pursuant to the Nevada Supreme Court:

> Although the FAA establishes a strong public policy favoring arbitration for the purpose of avoiding the unnecessary expense and delay of litigation

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A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 130 S. Ct. 2772, 2774, 177 L. Ed. 2d 403 (2010) ("If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with the agreement under § 4.").

31 Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 130 S. Ct. 2772, 2774, 177 L. Ed. 2d 403 (2010).

32 Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67–68, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403 (2010).

33 Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67–68, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403 (2010)(*quoting* Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)); *See also* 9 U.S.C.A. § 2 (West) (an arbitration agreement will not be enforced where there are "such grounds as exist at law or in equity for the revocation of any contract.").

34 Brennan v. Opus Bank, 796 F.3d 1125, 1132 (9th Cir. 2015).

35 Burch v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe, 118 Nev. 438, 442, 49 P.3d 647, 649 (2002).

> where parties have agreed to arbitrate, it does not mandate the enforcement of an unconscionable contract or arbitration clause. The United States Supreme Court has interpreted § 2 of the FAA and held that '[s]tates may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'" Unconscionability, therefore, is a legitimate ground upon which to refuse to enforce [an arbitration clause]."36

Therefore, in assessing the enforceability of arbitration agreements, Nevada courts must apply the unconscionability doctrine and refuse to enforce arbitration agreements that are unconscionable. There are two types of unconscionability: procedural and substantive. While "both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a contract or clause as unconscionable[,]" when "the procedural unconscionability [] is so great, less evidence of substantive unconscionability is required to establish unconscionability[,]" and vice-versa (also known as a "sliding scale").37 Here, the arbitration agreement and delegation clause are both procedurally and substantively unconscionable as discussed below and, thus, are not enforceable:

a. *Procedural Unconscionability.*

The Nevada Supreme Court has described "procedural unconscionability" as it relates to arbitration clauses as follows:

> An arbitration clause is procedurally unconscionable when a party has no 'meaningful opportunity to agree to the clause terms either because of unequal bargaining power, as in an adhesion contract, or because the clause

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36 Burch v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe, 118 Nev. 438, 442, 49 P.3d 647, 649 (2002) [internal citations omitted]; *See also* 9 U.S.C.A. § 2 (West) (The FAA provides that arbitration agreements can be deemed unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."); *See also See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (Per the U. Supreme Court, in determining whether a valid arbitration agreement exists, courts should apply state law principles that govern the formation of contracts)

37 Burch v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe, 118 Nev. 438, 443, 444, 49 P.3d 647, 650 (2002).

> and its effects are not readily ascertainable upon a review of the contract.' Thus, for example, the use of fine print and/or misleading or complicated language that 'fails to inform a reasonable person of the contractual language's consequences' indicates procedural unconscionability.38

Adhesion contracts are "'a standardized contract form offered to consumers ... on a take it or leave it' basis, without affording the consumer a realistic opportunity to bargain.' 'The distinctive feature of an adhesion contract is that the weaker party has no choice as to its terms.'"39 The Nevada Supreme Court has held as follows:

> This court permits the enforcement of adhesion contracts where there is 'plain and clear notification of the terms and an understanding consent[,]' and 'if it falls within the reasonable expectations of the weaker ... party.' This court need not, however, enforce a contract, or any clause of a contract, including an arbitration clause, that is unconscionable.40

"To determine whether the arbitration agreement is procedurally unconscionable the court must examine 'the manner in which the contract was negotiated and the circumstances of the parties at that time.'"41 The "availability of other options does not bear on whether a contract is procedurally unconscionable."42 The inquiry is whether the agreement involves oppression or surprise:

> A contract is oppressive if an inequality of bargaining power between the parties precludes the weaker party from enjoying a meaningful opportunity to negotiate and choose the terms of the contract. 'Surprise involves the extent to which the supposedly agreed-upon terms of the bargain are hidden

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38 Gonski v. Second Judicial Dist. Court of State ex rel. Washoe, 126 Nev. 551, 558, 245 P.3d 1164, 1169 (2010)(*quoting* D.R. Horton, Inc. v. Green, 120 Nev. 549, 553, 554, 96 P.3d 1159, 1162, 1163 (2004) and Burch v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe, 118 Nev. 438, 444 49 P.3d 647, 651 (2002)).

39 Burch v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe, 118 Nev. 438, 442, 49 P.3d 647, 649 (2002) [internal citations omitted].

40 Burch v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe, 118 Nev. 438, 442, 49 P.3d 647, 649 (2002) [internal citations omitted].

41 Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171 (9th Cir. 2003) (*quoting* Kinney v. United Healthcare Servs., Inc., 70 Cal.App.4th 1322, 1329, 83 Cal.Rptr.2d 348, 352–53 (1999)).

42 Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172 (9th Cir. 2003).

> in the prolix printed form drafted by the party seeking to enforce the disputed terms.'43

Here, the Uber Contract and corresponding arbitration agreement and delegation clause are "take it or leave it" contracts of adhesion, which are procedurally unconscionable. They are oppressive because the inequality of bargaining power between UBER and Plaintiffs is significant, with Plaintiffs having zero opportunity to negotiate and choose the terms. Further, when Plaintiffs signed-up for Uber, they signed-up on their small smart phone, as most users do. As stated in the Motion to Compel Arbitration, Plaintiffs were not required nor was anything done during the signup process to ensure Plaintiffs actually read the Uber Contract, including the arbitration agreement/delegation clause, nor were Plaintiffs otherwise informed of an arbitration agreement/delegation clause. Simply put, the average, unsophisticated user like Plaintiffs would have no reason to believe they were agreeing to give-up their right to a trial by jury in the event they are involved in a motor vehicle collision while being driven by someone that works for UBER, and that any questions regarding the same would be left to an arbitrator out of California. In fact, the average person does not even know what an arbitration is.

Moreover, the Uber Contract is extremely lengthy, filling 10 full pages of printed paper. It can be presumed that the Uber Contract, including the arbitration provision/delegation clause, on a tiny smart phone screen would appear even longer, more overwhelming, and would be even more difficult to read than the printed version attached to the Motion to Compel Arbitration. Further, as discussed at length within Plaintiffs' Opposition to Motion to Compel Arbitration, Uber failed to utilize reasonable methods to ensure its users see and review the Uber Contract and corresponding arbitration agreement/delegation clause and, instead, chose a format that rendered the "Terms & Conditions" link inconspicuous. Needless to say, Plaintiffs– just as most users – did not see or read the Uber Contract and arbitration agreement/delegation clause before signing-up with Uber. In fact, Plaintiffs had no idea the Uber Contract, including the arbitration agreement/delegation clause, even existed until the subject Motion to Compel Arbitration. Thus, Plaintiffs are did not agree to the arbitration agreement or corresponding delegation clause.

43 Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171 (9th Cir. 2003).

As noted by the *Ramos* and *Kemenosh* courts, in the case of users/riders signing-up for Uber, the average user would not expect the Uber Contract to include an arbitration clause. Rather, reasonable interpretations of the Uber Contract for signing-up for rideshare include: (1) "letting Uber use the registrant's facebook account or email and mobile number for sending bills and receipts, as stated in the first screenshot[;]"44 and, (2) "agreeing to pay money in exchange for transportation[.]" 45 The hyperlink entitled "Terms & Conditions" does "not convey an offer to arbitrate, or notify the user in any way that the offered Terms of Service contain a waiver of jury trial and an arbitration clause."46

Additionally, the Uber Contract and arbitration agreement/delegation clause are adhesion contracts with a take-it-or-leave-it context, thereby precluding Plaintiffs and other users alike from having a fair opportunity to negotiate the terms therein. Plaintiffs did not receive a reasonable and fair notification and understanding of the terms. Further, the subject arbitration agreement and delegation clause do not fall within the reasonable expectations of a consumer who is involved in an automobile collision like Plaintiffs, especially given the ambiguous nature of the agreement (i.e. that the consumer will lose their legal right to a jury trial in the event of an automobile collision and will have to submit any questions regarding the same to an arbitrator in California). Further, the arbitration agreement and delegation clause are imbedded within extremely lengthy Terms of Use, which the consumer can only see if they happen to click on the inconspicuous hyperlink, thereby further demonstrating its procedural unconscionability.47

Moreover, given the seriousness of the issues in this case as it relates to Plaintiffs' damages, which are to be assessed based on Nevada law, it makes no sense for such a matter to be decided by California arbitrators. This is a matter for this Court to hear, and for jurors in this community to ultimately decide given that the dispute involves an automobile collision and parties that

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44 Ramos v. Uber Techs., Inc., 60 Misc. 3d 422, 428, 77 N.Y.S.3d 296, 301 (N.Y. Sup. Ct. 2018).

45 Kemenosh v. Uber Technologies, et al., 2020 WL 254634 (Jan. 3, 2020), https://www.courts.phila.gov/pdf/opinions/181202703_132020134049293.pdf.

46 Kemenosh v. Uber Technologies, et al., 2020 WL 254634 (Jan. 3, 2020), https://www.courts.phila.gov/pdf/opinions/181202703_132020134049293.pdf

47 *See* Gonski v. Second Judicial Dist. Court of State ex rel. Washoe, 126 Nev. 551, 560, 245 P.3d 1164, 1170 (2010).

specifically and directly concern Clark County, Nevada. Therefore, the arbitration agreement and corresponding delegation clause are procedurally unconscionable and unenforceable.

b. *Substantive Unconscionability.*

"The substantive element of unconscionability focuses on the actual terms of the contract and assesses whether those terms are overly harsh or one-sided."48 In other words, "[s]ubstantive unconscionability centers on the 'terms of the agreement and whether those terms are so onesided as to shock the conscience.'"49 An example of a substantively unconscionable arbitration agreement is one where it grants one party with "the unilateral and exclusive right to decide the rules that govern the arbitration and to select the arbitrators."50

Here, the arbitration agreement and corresponding delegation clause are substantively unconscionable. This action arises from a motor vehicle collision that occurred in Nevada, involves parties who are Nevada residents, and is subject to Nevada law. Given that this matter entirely concerns the State of Nevada, not only does this community have an interest in having this matter heard locally, Plaintiff has the right to have this case heard by a judge with sufficient knowledge of Nevada law, particularly when it comes to evidentiary issues. The arbitration agreement completely violates Plaintiffs' right to receive a fair and impartial decision based on Nevada law as the agreement provides that the arbitrator "will be either (1) a retired judge or (2) an attorney specifically licensed to practice law in the state of California."51 Not only does it make zero sense to have this matter adjudicated by people who are not even from Nevada and are presumably not licensed in Nevada, Plaintiff would be grossly prejudiced if that happens, especially given that the

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48 Henderson v. Watson, 131 Nev. 1290 (2015); *See also* 24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199, 1213, 78 Cal. Rptr. 2d 533, 541 (1998) ("While courts have defined the substantive element in various ways, it traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms."); *See also* Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1280–81 (9th Cir. 2006) ("An arbitration provision is substantively unconscionable if it is 'overly harsh' or generates 'one-sided' results.").

49 Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172 (9th Cir. 2003) (*quoting* Kinney v. United HealthCare Servs., Inc., 70 Cal. App. 4th 1322, 1330, 83 Cal. Rptr. 2d 348, 353 (1999)); *See also* Gonski v. Second Judicial Dist. Court of State ex rel. Washoe, 126 Nev. 551, 558, 245 P.3d 1164, 1169 (2010)(*quoting* D.R. Horton, Inc. v. Green, 120 Nev. 549, 553, 554, 96 P.3d 1159, 1162, 1163 (2004) and Burch v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe, 118 Nev. 438, 444 49 P.3d 647, 651 (2002) ("Substantive unconscionability… is based on the **one-sidedness** of the arbitration terms.")).

50 *See* Burch v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe, 118 Nev. 438, 444, 49 P.3d 647, 650 (2002).

51 Uber Terms of Use, 3,

law concerning personal injury matters is different in California. Likewise, it makes absolutely zero sense to allow an arbitrator out of California who does not have jurisdiction over this action to render any decisions concerning this matter whatsoever, including those related to arbitrability. It is this Court, and this Court only, that has the authority to do so.

Additionally, Plaintiffs' claims in this action are not "against Uber on an individual basis" as provided by the arbitration agreement.[52] Rather, Plaintiffs' claims against Uber are entirely contingent on their claims against the at-fault drivers, (e.g. if Defendant drivers is/are not negligent, then Uber is not liable).[53] It is undisputed that Plaintiffs' claims against the third party Uber driver are not subject to the arbitration agreement including the delegation clause.[54] Plaintiffs in no way consent to having their claims against one driver proceed in Arbitration while their claims against another driver proceed in Court.

Not only will this cause undue delay and the unnecessary expenditure of excessive costs and time in having to pursue the same action in two separate forums, but it could very well result in two different and inconsistent outcomes (i.e. one outcome decided by a Clark County jury following a trial and another outcome decided by a California arbitrator). This conundrum is further evidence that the Uber Contract and corresponding arbitration agreement and delegation clause were not intended to apply to motor vehicle collision claims, and it demonstrates the substantive unconscionability of the provisions.

Additionally, the agreement requires that the arbitrator be selected from the AAA roster of "consumer dispute arbitrators."[55] This is further evidence that the arbitration agreement was intended to apply to contractual disputes only, not negligence actions involving personal injuries arising from a motor vehicle collision. Additionally, a "consumer dispute" arbitrator may not have sufficient knowledge to properly decide the claims at hand (i.e. personal injuries arising from a motor vehicle collision that occurred in Nevada). Further, the arbitration agreement also gives the

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52 Uber Terms of Use, 1,

53 *See* Cruz v. Durbin, No. 2:11-CV-00342-RCJ, 2011 WL 1792765, at *3 (D. Nev. May 11, 2011) ("The employer's liability is a derivative claim fixed by a determination of the employee's negligence.").

55 Uber Terms of Use, 3.

AAA the authority to select the arbitrator if the parties are unable to agree on one,[56] which could result in gross prejudice to either party. The arbitration agreement also requires Plaintiff to pay for a portion of the arbitration fees, which can render the agreement substantively unconscionable in-and-of-itself.[57]

Ultimately, the arbitration agreement and delegation clause are unconscionable, and enforcing them in this case would be impracticable.[58]

2. The Arbitration Agreement and Delegation Clause are Invalid as There was No Meeting of the Minds.

In Nevada, to form a valid contract there must exist an offer, acceptance, meeting of the minds, and consideration.[59] A meeting of the minds exists when the parties have agreed upon the contract's essential terms.[60]

Respectfully, Plaintiffs still maintain that there was a lack of meeting of the minds as they did not receive adequate notice of the arbitration agreement and corresponding delegation clause due to the inconspicuous nature of the "Terms & Conditions" link. Plaintiff reiterates the arguments raised concerning such matter and incorporates the same herein from Plaintiffs' Opposition to Motion to Compel Arbitration.

As Plaintiff's claims do not arise from the "Terms" and "Services" that are the subject of the Uber Contract and arbitration agreement/delegation clause, but rather, arise from excluded transportation services, Plaintiffs certainly did not intend for the arbitration agreement and corresponding delegation clause to apply to a dispute like the one at hand (i.e. dispute arising from

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56 Uber Terms of Use, 3.

57 *See* D.R. Horton, Inc. v. Green, 120 Nev. 549, 558, 96 P.3d 1159, 1165 (2004), overruled by U.S. Home Corp. v. Michael Ballesteros Tr., 134 Nev. 180, 415 P.3d 32 (2018) ("Ordinary consumers may not always have the financial means to pursue their legal remedies, and significant arbitration costs greatly increase that danger. In such a circumstance, the contract would lack the 'modicum of bilaterality'....").

58 *See* United States v. Winstar Corp., 518 U.S. 839, 904, 116 S. Ct. 2432, 2469, 135 L. Ed. 2d 964 (1996) (*quoting* Restatement (Second) of Contracts § 261) ("'[w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.'").

59 May v. Anderson, 121 Nev. 668, 672 (2005) (*citing* Keddie v. Beneficial Insurance, Inc., 94 Nev. 418, 421 (1978) (Batjer, C.J., concurring)).

60 Roth v. Scott, 112 Nev. 1078, 1083 (1996).

a motor vehicle collision/transportation services). Therefore, the arbitration agreement and delegation clause are invalid as it relates to this matter as there was a complete lack of mutual assent.

E. Uber Waived Arbitration Through Its Prior Litigation Conduct.

This Court should let its prior Order stand and deny reconsideration. If this Court is inclined to reconsider, however, it must also consider whether Uber waived any right to arbitration through its prior litigation conduct. In *Principal Investments v. Harrison*, the Nevada Supreme Court held that "[a]bsent an explicit delegation, litigation-conduct waiver remains a matter for the court to resolve."[61] In that case, even a nonwaiver clause and language that delegated questions of the arbitration agreement's invalidity were not enough to overcome the heavy presumption that such questions are delegated to the court.[62] Indeed, the Nevada Supreme Court cited approvingly to *Marie v. Allied Home Mortg. Corp*., in which a provision delegating all questions of arbitrability to the arbitrator nonetheless did not evince an intent to have the arbitrator decide the threshold question of litigation-conduct waiver.[63]

On the actual question of waiver, the Nevada Supreme Court's direction is broad. A litigation-conduct waiver can even arise from prior litigation on related issues even if the arbitration agreement is otherwise timely asserted in a later case. In *Principal Investments*, for example, the Nevada Supreme Court found a waiver where a payday lender had brought individual justice-court actions to collect on its loans, but then asserted an arbitration agreement when some of the borrowers brought a separate class-action lawsuit years later. This was true even though the arbitration agreements at issue allowed the litigation of certain small-value claims while prohibiting class actions.

Here, there is no language in the arbitration agreement suggesting that the arbitrator, rather than this Court, decides questions of waiver by litigation conduct. And it appears Uber, in prior litigation, adopted a strategy of defending in court on the basis that its drivers were independent

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61 Principal Investments v. Harrison, 132 Nev. 9, 20, 366 P.3d 688, 696 (2016).
62 Principal Investments v. Harrison, 132 Nev. 9, 20, 366 P.3d 688, 696 (2016).
63 *See* Principal Investments v. Harrison, 132 Nev. 9, 20, 366 P.3d 688, 696 (2016) (*citing* Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 11–12 (1st Cir. 2005)).

contractors (allowing Uber to escape vicarious liability) even though the same "Terms" and "Services" that Uber now claims compel arbitration existed in those previous lawsuits. Uber's failure over years to assert the arbitration clause constitutes a waiver of its right to do so now. Plaintiffs therefore deserves an opportunity to conduct discovery on this issue before the entry of any order compelling this matter to arbitration.[64]

IV.

CONCLUSION

Based on the foregoing and the additional arguments raised in Plaintiffs' Opposition to Defendants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC's Motion to Compel Arbitration and Stay Action, Plaintiffs respectfully requests the Court deny Uber's Motion for Reconsideration.

DATED this 13th day of October, 2020.

QUIRK LAW FIRM, LLP

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Trevor Quirk, Esq.
Attorneys for Plaintiffs
Megan Royz & Andrea Eileen Work

64 *Cf.* NRCP 56(d).

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby affirm that I am an employee of Quirk Law Firm, LLP and that I caused the foregoing:

PLAINTIFFS' OPPOSITION TO DEFENDANTS UBER TECHNOLOGIES, INC., RASIER, LLC, AND RASIER-CA, LLC'S MOTION FOR LEAVE AND MOTION TO RECONSIDER THE COURT'S ORDER DENYING DEFENDANTS' UBER TECHNOLOGIES, INC., RASIER, LLC, AND RASIER-CA, LLC'S MOTION TO COMPEL ARBITRATION AND STAY ACTION ON ORDER SHORTENING TIME

to be served as follows:

[ ] by placing a true and correct copy of the same to be deposited for mailing in the U.S. mail in Ventura, California, enclosed in a sealed envelope upon which first class postage was fully prepaid: and/or

[ ] pursuant to EDCR 7.26, by sending the same via facsimile; and/or

[X] by e-filing and electronic service and/or

[ ] by hand delivery

to the party(ies) listed below

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Executed on this 13th Day of October, 2020.

Ellie Gomez
Quirk Law Firm, LLP