IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 82556

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

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Elizabeth A. Brown
Clerk of Supreme Court

v.

Megan Royz;
and Andrea Eileen Work,
Respondents

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

APPELLANTS' APPENDIX
VOLUME 3

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Docket 82556 Document 2021-20503

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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

REPLY IN SUPPORT OF 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 DATE: OCTOBER 27, 2020
HEARING TIME: 1:15 P.M.

Case Number: A-20-810843-C

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs' kitchen-sink Opposition is right about one thing—Department 22 recently faced the same issues on reconsideration as presented here. There, on October 16, 2020, the district court issued an order entertaining Rasier and Uber's motion for reconsideration on the merits, but, ultimately denied it. *See* Department 22 Order (**Ex. 1**).[1]

Department 22's reasoning, however, serves as clear evidence why this Court should reach the opposite conclusion and grant Rasier and Uber's Motion for Reconsideration ("Motion"). Department 22 reasoned that although the delegation clause is severable from the arbitration agreement, it still must be read "in conjunction with the 'Terms & Conditions,'" and, because the Terms & Conditions do not encompass the subject dispute (according to the district court), the Delegation Clause also does not apply to the subject dispute. Yet, as detailed below, Circuit Courts and the Supreme Court have both critiqued and abrogated this *exact* type of circular reasoning. This Court should not fall victim to the same faulty logic.

Turning to the instant Motion, Rasier and Uber argue that the Court, in concluding that the Arbitration Agreement did not apply to the subject dispute, missed a critical step in the requisite analysis. The argument goes like this: before addressing whether the arbitration agreement applies to the subject dispute, the Court should have determined *who has the authority to decide* threshold questions of arbitrability under the Arbitration Agreement's Delegation Clause; and, once it performs this analysis, the Court will find that the Delegation Clause clearly and unmistakably delegated to the arbitrator the authority to decide threshold questions of arbitrability, including whether the Arbitration Agreement applies to the subject dispute and is enforceable.

In response, Plaintiffs make three primary arguments: (1) the Court should not entertain the Motion on the merits, (2) the Court's Order refusing to compel arbitration is not clearly

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[1] Rasier, Uber, Order, Arbitration Agreement, Delegation Clause, and Terms & Conditions utilize the meaning ascribed to them in the Motion.

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erroneous, and (3) to the extent the Court reconsiders its Order, waiver related discovery is appropriate. As detailed below, Plaintiffs' arguments fail.

First, the Court should entertain the Motion on the merits. Nevada precedent supports this result, and there is no reason not to do so here.

Second, respectfully, the Court's Order refusing to compel arbitration is clearly erroneous. The Court skipped a critical step in the requisite analysis. Once this step is considered, reconsideration is the only appropriate result.

Third, Plaintiffs' request for waiver related discovery should be denied. There is no support or precedent for such discovery. A company cannot waive arbitration in one action by not having compelled arbitration in an entirely separate action with different facts and parties. Indeed, the one case Plaintiffs cite in support of their argument provides no support. Accordingly, Rasier and Uber's Motion should be granted.

II. ARGUMENT

A. Procedurally, the Court may (and should) reconsider its Order.

A court can reconsider a pre-trial decision if shown to be clearly erroneous because the court ignored an argument raised in the underlying briefing. EDCR 2.24; *see Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 466, n. 4, 134 P.3d 698, 705, n. 4 (2006) (Maupin, J., concurring) (citing to Rule 54(b) to provide that "the district court is empowered to correct erroneous rulings at any time prior to the entry of final judgment"); *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (affirming a district court judge's reconsideration and reversal of a decision by a separate district court judge because the initial decision was clearly erroneous); *Gibbs v. Giles*, 96 Nev. 243, 245, 607 P.2d 118, 119 (1980) (citing former District Court Rule 20(4), which is substantially similar to EDCR 2.24, for the proposition that a district court judge retains jurisdiction until appeal "to grant a motion for rehearing if he or she concludes that reargument is warranted").

Here, there is no question that this Court is procedurally permitted to reconsider its Order refusing to compel arbitration. In fact, Plaintiffs concede as much, stating: "District Court may only 'reconsider a previously decided issue if . . . the decision is clearly erroneous.'" Opposition

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at 5:21-22 (citing *Masonry*, 113 Nev. at 741, 941 P.2d at 489). Thus, the Court should grant the leave requested by Rasier and Uber's Motion for Reconsideration and address the Motion on the merits.

B. The Court's Order is clearly erroneous because it skipped a necessary step in the analysis.

1. Only the arbitrator has the authority to decide whether the Arbitration Agreement encompasses the subject dispute and whether Plaintiff Royz entered into an enforceable agreement to arbitrate.

As explained in the Motion, in refusing to compel arbitration, the Court did not properly consider whether it or the arbitrator had the authority to decide threshold questions of arbitrability. The Court should have (1) considered the parties' Delegation Clause, which 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, (2) found the Delegation Clause effective, and (3) as a result, declared it was for the arbitrator to decide whether the Arbitration Agreement encompasses the subject dispute and whether Plaintiff Royz entered into an enforceable agreement to arbitrate. Not doing so was clear error.

In an effort to show otherwise, Plaintiffs make three arguments. Yet, as explained below, each is unpersuasive and contrary to the authority.

a. Plaintiffs cannot look to the scope of the Terms & Conditions to modify the scope of the Delegation Clause.

Plaintiffs first argue that the Delegation Clause only applies if the Arbitration Agreement encompasses the subject dispute. *See* Opposition at 7-13, 12:10-14 ("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.").

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This argument is wrong for several reasons. The Delegation Clause is completely severable, thus, the Terms & Conditions and Arbitration Agreement have no bearing on the Delegation Clause's scope. To hold otherwise, would be to engage in improper circular reasoning and resurrect the "wholly groundless" exception abrogated by the Supreme Court in *Henry Schein.*

First, Plaintiffs' argument ignores the severable nature of the Delegation Clause. As explained by the Supreme Court, because delegation clauses are severable from the agreement to arbitrate and the underlying contract, "[a]pplication of the severability rule does not depend on the substance of the remainder of the contract"—"remainder of the contract" referring to "the rest of the agreement to arbitrate." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010).

Although quoted at length in the Motion, it is worth revisiting the California Court of Appeal's explanation of this severability principle in *Malone*. Motion at 15 (citing *Malone v. Superior Court*, 173 Cal. Rptr. 3d 241, 246-47 (Cal. App. 2014)). There, the court explained that because the delegation clause is to be treated as a separate agreement, arguments that relate to the enforceability of the agreement to arbitrate do not relate to the delegation clause. *Id.*

The Fifth Circuit's reasoning in *Kubala* is also instructive. *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 204 (5th Cir. 2016). The party opposing arbitration made "a variety of contract-interpretation arguments designed to show that the arbitration agreement does not apply retroactively to claims filed before it went into effect." *Id.* In response, the court concluded that "those are precisely the sort of issues that, in the presence of a valid delegation clause, we cannot resolve." *Id.*

Second, Plaintiffs' argument requires the Court to engage in flawed circular reasoning. For instance, if a delegation clause delegates the interpretation of the scope of the agreement to arbitrate to the arbitrator, but, a court will only enforce a delegation clause if it determines that the claims at issue fall within the scope of the agreement to arbitrate, then the court effectively nullifies the delegation clause. This is exactly what Plaintiffs are asking the Court to do here.

The Sixth Circuit has explained why this very argument made by Plaintiffs "doesn't make much sense," as it would mean the arbitrator would only "have the power to determine the

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scope of the agreement . . . as to claims that fall within the scope of the agreement.:"

> Piersing argues that his arbitration agreement incorporates the AAA Rules only as to claims that fall within the scope of the agreement. In other words, he thinks that a court must first determine whether the agreement covers a particular claim before the arbitrator has any authority to address its jurisdiction. But nothing in the relevant provision limits the incorporation in this way. Instead, it simply provides that "the arbitration will be conducted in accordance with then-current [AAA Rules]." R. 61-4, Pg. ID 982. Other courts have read similar references to "arbitration" or "the arbitration" as generally authorizing an arbitrator to decide questions of "arbitrability." See, e.g., Dish Network, 900 F.3d at 1244–46; Simply Wireless, 877 F.3d at 525, 527–28; Awuah, 554 F.3d at 9, 11; Terminix Int'l Co., 432 F.3d at 1332. And on its own terms, Piersing's reading of the agreement doesn't make much sense. ***He reads the agreement to say that the arbitrator shall have the power to determine the scope of the agreement only as to claims that fall within the scope of the agreement. Yet that reading would render the AAA's jurisdictional rule superfluous.***

Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 847 (6th Cir. 2020) (emphasis added).

Third, Plaintiffs' argument equates to nothing more than the "wholly groundless" argument abrogated by *Henry Schein*. For years, certain courts created and recognized an exception to delegation clauses; they would not enforce a delegation clause where the argument for arbitration was "wholly groundless." These courts "reasoned that the 'wholly groundless' exception enables courts to block frivolous attempts to transfer disputes from the court system to arbitration." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). In *Henry Schein*, the Supreme Court concluded that "the 'wholly groundless' exception is inconsistent with the text of the [FAA] and with our precedent." *Id.*

Plaintiffs' argument is no different. Rasier and Uber contend that their interpretation of the scope of the Arbitration Agreement is not "wholly groundless," but, even if it were, it would still be a question for the arbitrator, not this Court.

In an attempt to convince the Supreme Court to not abrogate the "wholly groundless" exception, the respondent in *Henry Schein* made various sky-is-falling arguments, including (i)

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"if a court at the back end can say that the underlying issue was not arbitrable, the court at the front end should also be able to say that the underlying issue is not arbitrable," (ii) "as a practical and policy matter, it would be a waste of the parties' time and money to send the arbitrability question to an arbitrator if the argument for arbitration is wholly groundless," and (iii) the exception is "necessary to deter frivolous motions to compel arbitration." *Id.* at 530-31. Yet, the Supreme Court rejected each of these arguments, reiterating that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Id.* at 531. The same arguments should be rejected here.

b. The Delegation Clause is clear and unmistakable.

Plaintiffs argue that there is not "clear and unmistakable" evidence that the parties agreed to have an arbitrator decide the scope and enforceability of the Arbitration Agreement because "the delegation clause only applies to matters subject to the arbitration agreement." Opposition at 15:9-12.

No one disputes that 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." Motion at 11 (quoting *Blanton*, 962 F.3d at 844 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). But Plaintiffs' reliance on this basic principle is misplaced. Plaintiffs' argument fails for several reasons: it is circular, ignores the language of the Delegation Clause, and ignores that every Circuit that has faced the same or similar language at issue here has found it to be "clear and unmistakable."

First, for the same reasons discussed above, the "clear and unmistakable" inquiry does not turn on the scope of the Arbitration Agreement. To require as much, would be to ignore the severable nature of the Delegation Clause, engage in the exact type of circular reasoning criticized by *Blanton*, and resurrect the "wholly groundless" exception abrogated by *Henry Schein*.

Second, the Delegation Clause clearly and unmistakably delegates to the arbitrator the exclusive authority to "resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement." Ex. 1-E to the Motion at 2 (quoted in

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full in the Motion at 10). It also incorporates the AAA rules, which mandate the same result. *Id.*

Third, as explained in the Motion, courts have universally held that this type of language in a delegation clause provides "clear and unmistakable" evidence that the parties agreed to arbitrate threshold questions of arbitrability. *See* Motion at 11-12 (citing *Blanton*, 962 F.3d at 846 (explaining that every circuit court that has faced the issue, which is eleven out of twelve, has reached this conclusion) and various other decisions that have enforced similar language). Plaintiffs have offered nothing to suggest that a different result is warranted here.

c. The Delegation Clause is not unconscionable.

Next, Plaintiffs argue that "the arbitration agreement and delegation clause are both procedurally and substantively unconscionable . . . and, thus, are not enforceable." Opposition at 17:15-17. As explained below, this argument is wrong for three reasons: it is inapplicable to the Arbitration Agreement, it is waived because Plaintiffs never raised it until their current Opposition, and the Delegation Clause is not unconscionable.

First, because the Delegation Clause is severable, as explained above, the alleged unconscionability of the Arbitration Agreement (of which there is none) has no bearing on the argument raised in the Motion.[2]

Second, as it relates to the Delegation Clause, the Court should not address this new argument because Plaintiffs raised it for the first time in their Opposition. In Plaintiffs' own words: "'[p]oints or contentions not raised in the original hearing cannot be maintained or considered on rehearing.'" Opposition at 6:3-4 (quoting *Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996)). Here, Plaintiffs did not question the

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[2] *See, e.g., Brennan*, 796 F.3d at 1132 ("But since Brennan failed to make any arguments specific to the delegation provision, and instead argued that the Arbitration Clause as a whole is unconscionable under state law, we need not consider that claim because it is for the arbitrator to decide in light of the parties' clear and unmistakable delegation of that question."); *Saizhang Guan v. Uber Techs., Inc.*, 236 F. Supp. 3d 711, 730 (E.D.N.Y. 2017) ("Accordingly, unless a party challenges the delegation clause separately from the arbitration agreement, the court must 'treat it as valid under § 2, and must enforce it under [the FAA's provisions for compelling arbitration and staying the federal court action], leaving any challenge to the validity of the [Arbitration] Agreement as a whole for the arbitrator.'" (quoting *Rent-A-Center*, 561 U.S. at 72)); *Lee v. Uber Techs., Inc.*, 208 F. Supp. 3d 886, 893 (N.D. Ill. 2016) ("The plaintiffs' [conscionability] arguments, moreover, pertain to provisions of the Arbitration Provision outside of the delegation clause or to entirely separate portions of the Agreement. The plaintiffs fail to challenge the validity of the delegation clause, itself, and the Court must enforce it pursuant to § 2.").

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conscionability of the Delegation Clause in the underlying briefing. *See* Plaintiffs' Opposition to Rasier and Uber's Motion to Compel Arbitration.

Numerous courts have faced this exact issue, and concluded that a challenge to the delegation clause was waived for this very reason. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1132 (9th Cir. 2015) (explaining this principle); *Rent-A-Ctr., Inc. v. Ellis*, 827 S.E.2d 605, 613 (W. Va. 2019) ("A party resisting delegation to an arbitrator of any question about the enforceability of an arbitration agreement must specifically challenge the delegation provision first."); *supra*, n. 2. Indeed, in *Rent-A-Center*, the Supreme Court held that even though the respondent questioned the conscionability of the agreement to arbitrate, his failure to do so until briefing before the Court resulted in waiver:

> In his brief to this Court, Jackson made the contention, not mentioned below, that the delegation provision itself is substantively unconscionable . . . . He brought this challenge to the delegation provision too late, and we will not consider it.

561 U.S. at 76; Here, the result should be the same.

Third, if the Court opts to consider Plaintiffs' new argument that the Delegation Clause is unconscionable, it should reject it. The issue is whether the Delegation Clause is unconscionable as it relates to an arbitrator determining the scope and enforceability of the Arbitration Agreement. As explained below, it is not.

In Nevada, "[a] contract is unconscionable only when the clauses of that contract and the circumstances existing at the time of the execution of the contract are so one-sided as to oppress or unfairly surprise an innocent party." *Bill Stremmel Motors, Inc., v. IDS Leasing Corp.*, 89 Nev. 414, 418, 514 P.2d 654, 657 (1973). Generally, Nevada law requires a showing of "both procedural and substantive unconscionability to invalidate a contract as unconscionable." *U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 190, 415 P.3d 32, 40 (2018). That said, procedural and substantive unconscionability operate on a sliding scale, such that "less evidence of substantive unconscionability is required" where the procedural unconscionability is great. *Burch v. Second Judicial Dist. Court*, 118 Nev. 438, 444, 49 P.3d 647, 650 (2002). The burden to prove unconscionability lies with the moving party. *See, e.g., Hayes v. Oakridge Home*, 908

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N.E.2d 408, 412 (Ohio 2009).

In assessing unconscionability, it is important to remember that the FAA "preempts state laws that single out and disfavor arbitration." *Ballesteros*, 134 Nev. at 188, 415 P.3d at 40. Accordingly, where the FAA applies, district courts may invalidate an arbitration provision under a generally applicable contract defense, such as unconscionability—but it may not apply that defense "in a fashion that disfavors arbitration." *Id.* at 189, 415 P.3d at 40. This means, for instance, a state "may not . . . 'decide that a contract is fair enough to enforce all of its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.'" *Id.* (quoting *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995)).

Further, it is ***critical to note*** that when considering "an unconscionability challenge to a delegation provision, the court must consider only arguments 'specific to the delegation provision.'" *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1210 (9th Cir. 2016) (concluding that an Uber delegation clause was not procedurally unconscionable, and thus, not unconscionable (quoting *Rent-A-Ctr.*, 561 U.S. at 73)). As explained by the Supreme Court in *Rent-A-Center*, an argument that an agreement to arbitrate arising out of an employment dispute is unconscionable based on a fee-splitting arrangement and discovery limitations is much harder to show when it comes to a narrow enforceability and scope determination under a delegation clause:

> To make such a claim based on the discovery procedures, Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the [arbitration] Agreement is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his factbound employment-discrimination claim unconscionable. Likewise, the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination.

Rent-A-Center, 561 U.S. at 130.

Here, the Delegation Clause is not unconscionable. Even to the extent it is either procedurally or substantively unconscionable to some minor degree, neither would rise to the level to render it unconscionable. *See Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 957 (N.D. Cal.

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2015) (concluding that although low levels of procedural and substantive unconscionability existed, together, they did not warrant a finding of unconscionability).

Critically, when the lens is properly focused on the issue at hand—whether the Delegation Clause is unconscionable as it relates to an arbitrator determining the scope and enforceability of the Arbitration Agreement—it is all the more clear that it is not. In performing this analysis, it is important to keep in mind that the issue is not whether the Delegation Clause is unconscionable as it relates to an arbitrator resolving a personal injury case.

i. The Delegation Clause is not substantively unconscionable.

Plaintiffs' substantive unconscionability arguments, *see* Opposition at 21-23, are not relevant to the Delegation Clause. *See Ellis*, 827 S.E.2d at 620 ("Numerous courts have similarly rejected substantive unconscionability arguments directed at the arbitration agreement, itself, rather than the terms of the delegation provision."). Instead, nearly all of Plaintiffs' arguments focus on the underlying car accident case, as opposed to determining the scope and enforceability of the Arbitration Agreement per the Delegation Clause, and the only one that does not, is *de minimus*:

- "This action arises from a motor vehicle collision that occurred in Nevada, involves parties who are Nevada residents, and is subject to Nevada law . . . 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." Opposition at 21:11-15. These complaints do not apply to the Delegation Clause. The arbitrator will decide if the scope of the Arbitration Agreement encompasses the subject dispute—very little law involved, and to the extent it is, contractual interpretation law and unconscionability law is mostly uniform and any arbitrator can quickly read the handful of Nevada cases dealing with both; also, no evidentiary issues to speak of.
- "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 law concerning personal injury matters is

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different in California." *Id.* at 22:18-23:1. Again, wrong focus—personal injury law is not at issue.

- "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." *Id.* at 22:1-3. Incorrect—the arbitrator has jurisdiction under the Delegation Clause—the Court does not.
- "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)." *Id.* at 22:12-15. Again, wrong focus—only one person will decide the scope of the Arbitration Agreement: the arbitrator.
- "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)." *Id.* at 22:22-24. Again, wrong focus—personal injury law is not at issue.
- "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." *Id.* at 23:2-4. As expressed by the Supreme Court in *Rent-A-Center*, this concern is *de minimus* as it relates to interpretation of the Arbitration Agreement.

ii. The Delegation Clause is not procedurally unconscionable.

Plaintiffs' procedural unconscionability arguments suffer a similar fate. Plaintiffs argue: "adhesion contract," "inequality of bargaining power," "zero opportunity to negotiate," "unsophisticated user," and other similarly unsupported and hollow allegations. *See* Opposition at 17-21.

If these arguments equated to procedural unconscionability, by Plaintiffs' definition, every contract not negotiated at arm's length between attorneys or sophisticated users with equal bargaining power would be procedurally unconscionable. Plaintiffs do not cite to any evidence or

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law that distinguishes their arguments from this reality.[3]

It is precisely for this reason that courts regularly toss aside similar cries of procedural unconscionability. *See Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 264 (5th Cir. 2014) (rejecting these same arguments and noting that the plaintiff failed to present any evidence it "could not have abstained from contracting with the Defendants at all," which applies equally here); *Ellis*, 827 S.E.2d at 617 (rejecting all the same arguments and "acknowledge[ing] the realities of consummating standardized business transactions and the attendant unworkability of individualized bargaining"); *Burch v. Second Judicial Dist.*, 118 Nev. 438, 442, 49 P.3d 647, 649 (2002) (explaining that adhesion contracts are enforceable, but the one at issue was not because the consumer "did not receive a copy" until after assenting and, as a result, "did not have an opportunity" to read it, which did not occur here).

Accordingly, Plaintiffs' argument that the Delegation Clause is unconscionable fails.[4]

2. To see why this Court should grant the Motion, it should look to Department 22's erroneous decision.

Department 22 faced the same issue as presented here. There, the court refused to compel arbitration, concluding that the scope of the same agreement to arbitrate at issue here did not encompass negligence claims arising out of a car accident. In response, Rasier and Uber moved for reconsideration, arguing that under the delegation clause, only the arbitrator had the authority decide the scope of the agreement to arbitrate.

Department 22 denied the motion for reconsideration in a ten page written order. *See* Ex.

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[3] Plaintiffs cite to two cases involving Uber in their procedural unconscionability discussion, *Ramos* and *Kemenosh*, Opposition at 20:1, but neither have anything to do with procedural unconscionability.

[4] In addition, Plaintiffs argue that enforcing the Delegation Clause is "impracticable." Opposition at 23:6. They do not support this argument with any explanation. Needless to say, the doctrine of impracticability is inapposite to enforcing the Delegation Clause. There was no event that occurred that rendered enforcement of the Delegation Clause impracticable. *See Max Baer Prods., Ltd. v. Riverwood Partners, LLC*, No. 309-CV-00512-RCJRAM, 2010 WL 3743926, at *3 (D. Nev. Sept. 20, 2010) (providing that under the doctrine of impracticability, "performance is excused if the promisor's performance is made impossible or highly impractical by the occurrence of unforeseen contingencies," unless the risk for such contingencies was allocated in the contract). Plaintiffs also argue that the Arbitration Agreement and Delegation Clause is invalid as there was no meeting of the minds. Opposition at 23. Plaintiffs suggest that they made the same argument in their opposition to the motion to compel arbitration, but they did not (it appears they copied this argument from the opposition filed in the case before Department 22). Regardless, Plaintiffs' argument is unsupported and also wrong. The Terms & Conditions, Arbitration Agreement, and Delegation Clause are valid.

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1. The court reasoned that the delegation clause had to be read "in conjunction with the 'Terms & Conditions' and Arbitration Agreement," *id.* at 7:19, and, as a result, "while there is no question the delegation clause provides the arbitrator exclusive authority to resolve disputes relating to the interpretation, applicability, enforceability or formation of the Arbitration Agreement, the arbitrator's authority is also limited to deciding those disputes identified within the four corners of the 'Terms & Conditions' and Arbitration Agreement," *id.* at 8:3-8.

Department 22's denial suffers from at least three fatal flaws. This Court should not follow its lead.

One, by interpreting the scope of the Delegation Clause by relying on the language of the Terms & Conditions, **it engaged in the *exact* type of circular reasoning that the Sixth Circuit warned against in *Blanton***, as explained above.

Two, without using the precise phrasing, it effectively found that the argument in favor of arbitration was "wholly groundless," even citing to the same types of policy and practicality arguments that the Supreme Court expressly rejected in *Henry Schein* when it abrogated this very reasoning, as explained above.

Three, the order rings of an anti-arbitration sentiment that courts and legislators have tried to eliminate for decades. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("What States may not do is decide that a contract is fair enough to enforce all of its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent."); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017) ("A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made.").

C. Plaintiffs' request for waiver related discovery should be denied because it is unprecedented and contrary to any authority.

Plaintiffs lastly ask that if the Court is inclined to reconsider its prior Order, Plaintiffs should be permitted to conduct waiver related discovery. Opposition at 24-25. Plaintiffs do not

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specify the discovery sought, but it appears they would seek discovery as to whether Rasier and Uber sought to compel arbitration in every case where they faced a lawsuit from a person who agreed to the Terms & Conditions. *Id.* This request lacks merit.

There is no support or precedent for such discovery. A company cannot waive its right to compel arbitration in one matter because it did not assert its right to compel arbitration in a separate matter featuring different parties and facts. *See Principal Investments v. Harrison*, 132 Nev. 9, 21, 366 P.3d 688, 697 (2016) (providing that "caselaw teaches that 'only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate'" (citing *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir.1997)).

When the Central District of California faced this same argument, it found it to be absurd: "[i]n addition, to hold that defendant can no longer assert its right to compel arbitration simply because it did not assert that right in another case is *absurd*." *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1113 (C.D. Cal. 2002) (emphasis added).

In an effort to support this "absurd" argument, Plaintiffs cite to one case: *Principal Investments v. Harrison*, 132 Nev. 9, 366 P.3d 688 (2016). Yet a quick review of *Principal Investments* shows that it does not support Plaintiffs' argument. There, the waiver stemmed from proceedings involving the same parties and facts, whereas here, it would not.

In *Principal*, a payday loan company, Rapid Cash, filed claims against thousands of persons in justice court for failing to repay their loans. 132 Nev. at 11-12, 366 P.3d at 690-91. Rapid Cash obtained default judgment against many of them. *Id.* Process, however, was never served on those against whom default judgments were entered because Rapid Cash's process server ran a fraudulent "sewer service" scheme and never served process on them. *Id.* These individuals then sued Rapid Cash as a class related to this scheme. *Id.* Rapid Cash sought to compel the class claims to arbitration, which the district court denied. *Id.*

On appeal, the Supreme Court looked to the long-held rule cited above that "'only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate.'" *Id.* at 21, 366 P.3d at 697. Applying this rule, the Court held that the defendant waived the right to compel the class action plaintiffs to arbitration because it

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had previously brought claims against those same plaintiffs in justice court and the class action claims arose out of, and were integrally related to, the justice court litigation:

> This case differs from the cases just cited in one crucial respect: The claims the named plaintiffs have asserted in district court arise out of, and are integrally related to, the litigation Rapid Cash conducted in justice court. By initiating a collection action in justice court, Rapid Cash waived its right to arbitrate to the extent of inviting its borrower to appear and defend on the merits of that claim. The entry of default judgment based on a falsified affidavit of service denied the defendant borrower that invited opportunity to appear and defend. Allowing the borrower to litigate its claim to set aside the judgment and be heard on the merits comports with the waiver Rapid Cash initiated. If the judgment Rapid Cash obtained was the product of fraud or criminal misconduct and is unenforceable for that reason, it would be unfairly prejudicial to the judgment debtor to require arbitration of claims seeking to set that judgment aside, to enjoin its enforcement, and otherwise to remediate its improper entry.

Id. at 22, 366 P.3d at 697–98. Therefore, given these facts and law, *Principal Investments* does not support Plaintiffs' argument.[5]

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[5] In addition, the Delegation Clause explicitly delegates waiver issues to the arbitrator. Specifically, it delegates to the arbitrator "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 to Compel at 2.

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III. CONCLUSION

Given the above, Rasier and Uber's Motion for Reconsideration should be granted. All of Plaintiffs' arguments in response to the Motion fail. Further, Plaintiffs' request for waiver related discovery should be denied.

Dated this 20th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2020, a true and correct copy of the foregoing **REPLY IN SUPPORT OF 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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DISTRICT COURT

CLARK COUNTY, NEVADA

YOLANDA HAUFF, individually, **Plaintiff,** **Vs.** **KEVIN HEWARD, individually; RASIER, LLC d/b/a UBER; UBER TECHNOLOGIES, INC. d/b/a UBER; DOES I through X; and ROE CORPORATIONS I through X, inclusive,** **Defendants.**	**Case No. A-20-809538-C** **Dept. No. XXII**

ORDER DENYING DEFENDANTS RASIER, LLC'S AND UBER TECHNOLOGIES, INC.'S MOTION TO RECONSIDER COURT'S ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY ACTION

This matter concerning Defendants RASIER, LLC'S and UBER TECHNOLOGIES, INC.'S Motion for Leave and Motion to Reconsider the Court's Order Denying Defendants' Motion to Compel Arbitration and Stay Action filed September 14, 2020 came on for hearing on an Order Shortening Time on the 24th day of September 2020 at the hour of 9:00 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN JOHNSON presiding; Plaintiff YOLANDA HAUFF appeared by and through her attorneys, ABRAHAM SMITH, ESQ. and DANIEL F. POLSENBERG, ESQ. of the law firm, LEWIS ROCA ROTHBERGER CHRISTIE, and FARHAN R. NAQVI, ESQ. and ELIZABETH E. COATS, ESQ. of the law firm, NAQVI INJURY LAW; Defendants UBER TECHNOLOGIES, INC. and RASIER, LLC appeared by and through their attorneys, D. LEE ROBERTS, JR., ESQ. and RYAN T. GORMLEY, ESQ. of the law firm, WEINBERG WHEELER HUDGINS GINN & DIAL; and

Case Number: A-20-809538-C

Defendant KEVIN HEWARD appeared by and through his attorney, DANIELLE M. MERIWETHER, ESQ. of the law firm, BREMER WHYTE BROWN & O'MEARA. Having reviewed the papers and pleadings on file herein, heard oral arguments of the parties, taken this matter under advisement for purposes of reviewing Defendants' Reply filed the day before the hearing and finding good cause therefore, this Court states the following:

While this Court is mindful of the 10-day deadline set forth by Rule 2.24(b) of the Eighth Judicial District Court Rules (EDCR), there is no question a district court may grant a motion for rehearing at any time should the judge conclude re-argument is warranted. *See* Gibbs v. Giles, 96 Nev. 243, 244, 607 P.2d 118, 119 (1980), *citing* former District Court Rule (DCR) 20(4). Indeed, unless and until an order is appealed, the district court retains jurisdiction to review the matter. *Id.* at 244. For reasons set forth below, this Court concludes the parties' re-arguments provided within their papers were warranted and grants leave to decide Defendants RASIER, LLC's and UBER TECHNOLOGIES, INC.'S Motion to Reconsider the Court's Order Denying the Motion to Compel Arbitration and Stay Action filed August 28, 2020 as set forth in more detail *infra.*

Movants UBER TECHNOLOGIES, INC. and RASIER, LLC argue this Court erred in deciding the arbitration agreement did not embody the personal injury dispute at issue as opposed to deferring the question of its arbitrability to the arbitrator. In their view, the Arbitration Agreement's delegation clause designated threshold questions of arbitrability to the arbitrator which included whether the Arbitration Agreement encompassed MS. HAUFF'S personal injury claims allegedly caused by the driver, MR. HEWARD, after he was hailed through her use of the Uber app. Simply put, movants propose this Court should have deferred the claims to the arbitrator to decide their

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arbitrability pursuant to the parties' contract. "Only the arbitrator, and not the Court, has authority to decide this issue."[1]

As previously noted, this Court's role under the Federal Arbitration Act (referred to as "FAA" herein), Title 9 U.S.C. §2,[2] is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." Cordas v. Uber Technologies, Inc., 228 F.Supp.3d 985, 988 (N.D.Ca. 2017), *quoting* Chiron Corp. v. Ortho Diagnostic Systems, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). If the response is affirmative on both counts, the FAA requires the Court to enforce the arbitration agreement in accordance with its terms. While, ordinarily, both questions set forth above are for the court to determine, the parties can enter into an arbitration agreement that delegates to the arbitrator the power to decide whether a particular claim is arbitrable. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002). The United States Supreme Court has repeatedly made clear "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68-69, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010), *citing* Howsam, 537 U.S. at 83-85, 123 S.Ct. 588.

The question movants have now asked this Court to reconsider—whether the arbitrability of the personal injury dispute ***must*** be delegated to the arbitrator--is a narrow one. To understand the narrowness of the issue, the parties must appreciate there are actually three disagreements that are the subject of this litigation and movants' Motion to Compel Arbitration and Stay Action filed June

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[1]*See* Defendants RASIER, LLC'S and UBER TECHNOLOGIES, INC.'S Motion for Leave and Motion to Reconsider the Court's Order Denying Defendants' Motion to Compel Arbitration and Stay Action filed September 14, 2020, p. 6.

[2]This section provides in relevant part: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

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12, 2020. The first deals with the merits of the dispute itself; that is, the parties disagree whether Defendants were negligent or liable for causing Plaintiff's personal injuries and/or damages, if any. Second, the parties differ whether they agreed to arbitrate the merits of the personal injury claim; that challenge is about the arbitrability of the dispute. Third, the parties disagree *who* should have the primary power—the court or arbitrator--to decide the second dispute, and that is the limited question to be decided now.

Although the third inquiry identified above is a narrow one, it has certain practical importance. That is because, normally, a party who has not agreed to arbitrate would have a right to a court's decision concerning the merits of his or her dispute. Where a party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value; the party still can ask a court to review the arbitrator's decision, but the court will set that decision aside *only* in very unusual or limited circumstances. *See* Title 9 U.S.C. §10 (for example, award procured by corruption, fraud or undue means; arbitrator exceeded his powers). Thus, whether it is the court or arbitrator who has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942, 115 S.Ct. 1920, 1923, 131 L.Ed.2d 985 (1995).

Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate their differences, the question "who has the primary power to decide arbitrability" also turns upon what the parties bargained for concerning that issue. That is, the answer as to "who has the primary power to decide arbitrability" flows from the fact arbitration simply is a matter of contract; it is a way to resolve those disputes—but only those disputes—the parties agreed to submit to arbitration. AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986). Thus, when deciding whether the parties agreed to arbitrate a

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certain matter, including arbitrability, courts generally should apply ordinary state law principles that govern the formation of contracts.[3]

The United States Supreme Court, however, has added an important qualification applicable when courts decide whether a party has agreed the arbitrator should decide arbitrability. Courts should not assume the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence they did so. AT&T Technologies, Inc., 475 S.Ct. at 649, 106 S.Ct. at 1418-1419, *cited and quoted by* First Options of Chicago, Inc., 514 U.S. at 944, 115 S.Ct. at 1924; *also see* Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 n.7, 80 S.Ct. 1347, 1353 n.7, 4 L.Ed.2d 1409 (1960). "In other words, there is a presumption that courts will decide which issues are arbitrable; the federal policy in favor of arbitration does not extend to deciding questions of arbitrability." Howsam, 537 U.S. at 83, 123 S.Ct. 588, 154 L.Ed.2d 491. Clear and unmistakable evidence of an agreement to arbitrate arbitrability "might include...a course of conduct demonstrating assent...or...an express agreement to do so." Mohamed v. Uber Technologies, Inc., 848 F.3d. 1201, 1208 (9th Cir. 2016), *quoting* Momot v. Mastro, 652 F.3d 982, 988 (9th Cir. 2011), *in turn, quoting* Rent-A-Center, West, Inc., 561 U.S. at 79-80, 130 S.Ct. 2772, 177 L.Ed.2d 403 (Stevens, J. dissenting), That is, the law treats silence or ambiguity about the question "*who* primarily should decide arbitrability" differently from the way it treats silence or ambiguity concerning "*whether* a particular merits-related dispute is arbitrable because it is within the scope of . . .

[3]As this Court previously noted in its original decision, in Nevada, basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds and consideration. May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005), *citing* Keddie v. Beneficial Insurance, Inc., 94 Nev. 418, 421, 580 P.2d 955, 956 (1978) (Batjer, C.J., concurring) (a contract "requires a manifestation of mutual asset in the form of an offer by one party and acceptance thereof by the other."). "A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite" for a court "to ascertain what is required of the respective parties" and to "compel compliance" if necessary. May, 121 Nev. at 672, 119 P.3d 1257, *cited and quoted by* Grisham v. Grisham, 128 Nev. 679, 685, 289 P.3d 230, 235 (2012).

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a valid arbitration agreement"—for, in respect to this latter inquiry, the law reverses the presumption. *See* First Options of Chicago, Inc., 514 U.S. at 944-945, 115 S.Ct. at 1924.[4]

The difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. Given the law's permissive policies in respect to arbitration,[5] one can understand why the law would insist upon clarity before concluding the parties did *not* want to arbitrate a related matter. First Options of Chicago, Inc., 514 U.S. at 945, 115 S.Ct. at 1924, *citing* Domke on Commercial Arbitration §12.02, p. 156 (rev. ed. Supp. 1993) (issues will be deemed arbitrable unless "it is clear that the arbitration clause has not included" them). On the other hand, the former question—the "who primarily should decide arbitrability" question—is rather arcane. A party often might not focus upon that question or the significance of having arbitrators decide the scope of their own powers. *Id.*, 514 U.S. at 945, 115 S.Ct. at 1925, *citing* Cox, "Reflections Upon Labor Arbitration," 72 Harv.L.Rev. 1482, 1508-1509 (1959), *also cited in* Steelworkers, 363 U.S. at 583 n.7, 80 S.Ct. at 1353 n.7. Given the principal a party can be forced to arbitrate only those issues he or she specifically has agreed to submit to arbitration, one can understand why courts, including this one, might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrator that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide. First Options of Chicago, Inc., 514 U.S. at 945, 115 S.Ct. at 1925; *also see generally* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213-219-220, 105 S.Ct. 1238, 1241-1242,

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[4]*See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985), *quoting* Moses H Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927,941, 74 L.Ed.2d 765 (1983) (" '[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'").

[5]Mitsubishi Motors Corp., 473 U.S. at 626, 105 S.Ct. at 3353.

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84 L.Ed.2d 158 (1985) (FAA's basic purpose is to "ensure judicial enforcement of privately made agreements to arbitrate").

Here, movants propose the "delegation clause" contained within the Arbitration Agreement's "Rules and Governing Law" of the "Terms and Conditions" hyperlinked within Uber's rider app sets forth the parties' agreement the arbitrator will decide issues of arbitrability of all their disputes:

> 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.

Movants argue the delegation clause provides the arbitrator shall have exclusive authority to resolve disputes relating to the interpretation, applicability, enforceability or formation of the Arbitration Agreement and such is completely severable from the "Terms & Conditions" and Arbitration Agreement. That is, the delegation clause must be considered an agreement separate from the Arbitration Agreement thus imparting the arbitrator's exclusive authority to resolve disputes relating to the enforcement of the contract without undermining his jurisdiction to do so. While there is no question it is severable from the Arbitration Agreement, the delegation clause cannot be read in a vacuum as movants propose. It must be read in conjunction with the "Terms & Conditions" and Arbitration Agreement which determines the scope of the arbitration or the particular merits-related disputes the parties agreed to arbitrate. To allow otherwise would produce absurd results. It would give the arbitrator unfettered, exclusive authority to interpret, apply and enforce the Arbitration Agreement to include virtually any dispute a litigant or claimant may have with UBER TECHNOLOGIES, INC. and RASIER, LLC. For example, applying the scenario movants urge this Court to follow, a person who previously downloaded the Uber app onto his or her phone could be forced to submit his personal injury claims caused by an *adverse* Uber driver to arbitration. A

person who provides supplies to UBER TECHNOLOGIES, INC. and/or RASIER, LLC that are unrelated to movants' services described in the "Terms & Conditions" could be forced to submit his business disputes to arbitration simply because he had an Uber rider app on his phone. Thus, while there is no question the delegation clause provides the arbitrator exclusive authority to resolve disputes relating to the interpretation, applicability, enforceability or formation of the Arbitration Agreement, the arbitrator's authority is also limited to deciding those disputes identified within the four corners of the "Terms & Conditions" and Arbitration Agreement. That is, he can determine arbitrability of disputes or issues--unless "it is clear that the arbitration clause has not included" them. First Options of Chicago, Inc., 514 U.S. at 945, 115 S.Ct. at 1924, *citing* Domke on Commercial Arbitration §12.02, p. 156.

As set forth within this Court's August 28, 2020 decision, the "Terms & Conditions" identify the "contractual relationship" of the parties within Section 1. It specifically states "[t]hese Terms of Use...govern your access or use...of the applications, websites, content, products and services" as more fully defined in Section 3 by UBER. "By accessing or using the Services, you confirm your agreement to be bound by these Terms. If you do not agree to these Terms, you may not access or use the Services." The "services," identified in Section 3, "comprise mobile applications and related services..., 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...." The user of such "services" acknowledges in capitalized wording "THE USE OF THE SERVICES DOES NOT ESTABLISH UBER AS A PROVIDER OF TRANSPORTATION." (Emphasis in original)

By agreeing to the "Terms," the user agrees he/she is required to resolve any claim he/she may have against UBER in arbitration as specified in Section 2 of the "Terms & Conditions." While the first sentence of Section 2 indicates "you are required to resolve *any* claim that you may have

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against Uber on an individual basis in arbitration,[6]" the term "any claim" is described and identified "as set forth in this Arbitration Agreement." The agreement to binding arbitration indicates the user and UBER agree "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 the Terms, will be settled by binding arbitration between you and Uber, and not in a court of law." That is, the agreement to arbitrate is limited to those disputes, claims or controversies arising out of or relating to the Terms or use of movants' Services—the use of which do not establish UBER as a provider of transportation.

As previously set forth within the Court's August 28, 2020 Order, MS. HAUFF'S personal injury claims do not concern the mobile applications and related services which enabled MS. HAUFF to arrange and schedule transportation as described within the parties' "Contractual Relationship." Her disputes or claims do not arise out of or relate to the "Terms" or "Services" described within Section 2, or Arbitration Agreement. MS. HAUFF is suing movants and MR. HEWARD for alleged personal injuries she sustained in a motor vehicle collision caused by a driver hailed through the Uber app; such claims are not included within the perimeters of the "Terms & Conditions" or Arbitration Agreement and the arbitrator has no authority to conclude otherwise.

To be clear, there is no question the parties may agree to delegate the issue of arbitrability to the arbitrator pursuant to the delegation clause. However, the delegation is limited to the parties' issues and disputes relating to movants' mobile applications and related services described in the "Contractual Relationship." To allow otherwise would force a party to arbitrate issues he or she had not specifically agreed to submit to arbitration. Accordingly,

. . .

[6]Emphasis added.

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Defendants RASIER, LLC'S and UBER TECHNOLOGIES, INC.'S Motion for Leave and Motion to Reconsider the Court's Order Denying Defendants' Motion to Compel Arbitration and Stay Action filed September 14, 2020 is denied.

Dated this 16th day of October, 2020

SUSAN JOHNSON, DISTRICT COURT JUDGE

579 A25 F29C 4A95
Susan Johnson
District Court Judge

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Yolanda Hauff, Plaintiff(s)	CASE NO: A-20-809538-C
vs.	DEPT. NO. Department 22
Kevin Heward, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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CASE NO. A-20-810843-C

DOCKET U

DEPT. XVI

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

MEGAN ROYZ,

Plaintiff,

vs.

MARC JACOBS,

Defendant.

REPORTER'S TRANSCRIPT
OF
MOTION
(VIA TELEPHONIC CONFERENCE CALL)

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED TUESDAY, OCTOBER 27, 2020

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

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APPEARANCES:

(PURSUANT TO ADMINISTRATIVE ORDER 20-10, ALL MATTERS IN DEPARTMENT 16 ARE BEING HEARD VIA TELEPHONIC APPEARANCE)

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LAS VEGAS, NEVADA; TUESDAY, OCTOBER 27, 2020

1:16 P.M.

P R O C E E D I N G S

* * * * * * *

01:16:07

THE COURT: Okay. I'd like to say good afternoon to everyone. And this is the time set for the afternoon 1:15 p.m. October 27th, 2020, law and motion calendar. We have one matter on calendar this afternoon and that happens to be Megan Royz versus Marc Anthony Jacobs, et al. And let's go ahead and place our appearances on the record we'll start first with the plaintiff and then we'll move to the defense.

MR. QUIRK: Trevor Quirk for plaintiffs.

01:16:41 MR. GORMLEY: Good afternoon, your Honor. Ryan Gormley and Lee Roberts for defendant Raiser LLC, Uber Technologies, and Uber Technologies Inc.

MR. ROBERTS: Good afternoon, your Honor.

THE COURT: Good morning to everyone. I mean,

01:16:58 good afternoon.

And as we all probably know now we're connected via audio on BlueJeans working remotely. And what we'll try to do is take our time as far as making a record in this matter. We do have a court reporter

01:17:12 available, and that's Ms. Peggy Isom. And my first

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question is this: Does anyone want to have this matter court reported?

MR. GORMLEY: This is Ryan Gormley. Yes, your Honor.

THE COURT: Okay, sir. We'll do that.

MR. GORMLEY: Thank you.

THE COURT: Everyone's appearances on the record.

THE COURT REPORTER: I got the appearances, Judge.

THE COURT: Okay. Thank you, ma'am.

And what we'll try to do just take our time because for whatever reason, especially with the computerized link, from time to time it will cut us off. And I don't know why it does that.

But we'll just take our time. And if Peggy is having difficulty, she'll interrupt us to make sure we get a clear record. So anyway it's my understanding we have --

THE COURT REPORTER: Judge, you are cutting out.

THE COURT: Is that correct? There you go. Cutting out.

And it's my understanding we have defendant's motion to reconsider; is that correct?

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01:18:14 MR. QUIRK: Yes, your Honor.

THE COURT: Okay. And, sir, you have the floor.

MR. GORMLEY: Great. This is Ryan Gormley for
01:18:22 defendants. As you just mentioned, this is Uber's motion for reconsideration of the Court's order denying Uber's motion to compel arbitration. I have an argument prepared but before delving into that, I was wondering if the Court had any questions they would
01:18:40 like me to address off the bat before going into the argument.

THE COURT: Sir, for the record, not really. But, unfortunately, I think you cut off at the very end too.

01:18:50 MR. GORMLEY: Okay.

THE COURT: And I think the question was is there anything you want -- any questions from me that needed to be addressed preliminarily. And for the record not at this point.

01:19:01 MR. GORMLEY: Okay. Great. So I'll go into what I have prepared. So basically today I was hoping to cover four issues. So start with the first one is pretty brief. It's why this motion should be considered. And, your Honor, we're not making a new
01:19:17 argument in bringing this motion for reconsideration.

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01:19:20 We're simply honing in on a nuanced legal issue. There's really no question that reconsideration is procedurally appropriate under Nevada precedent.

And, candidly, we just thought it was more 01:19:36 fair to file this motion now than rush to an interlocutory appeal. So that's why we brought this motion and why we think it should be considered on the merits, and there's no bar against doing so.

So moving into the second main issue is why 01:19:59 reconsideration is warranted. And I think to answer that it's helpful to actually go back in time a little bit before the Supreme Court's opinion in Henry Schein in 2019 which, as you saw in the briefing, is a case we cited to numerous times.

01:20:14 So prior to Henry Schein in determining whether to enforce delegation clauses in arbitration agreements there is a circuit split --

THE COURT: I don't want to cut you off, but I think you did cut off when you said "prior to". And I 01:20:29 think you're referring to the Henry Schein case. I want to make sure we have a clear record, but you can continue from there.

MR. GORMLEY: Yeah. No problem. I appreciate that, your Honor. Hopefully, hopefully what I'm saying 01:20:41 is worthwhile so, one, it doesn't get cut off, I'll be

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willing to say it again. So no problem.

So I just said prior to the Henry Schein in 2019 there was a circuit split on how to enforce delegation clauses in arbitration agreements.

And at least three circuits recognized the wholly groundless exception. So what that means is the courts would ask five questions when it came to enforce the delegation clause.

One, is there an arbitration agreement under the FAA?

Two, does it contain a delegation clause?

Three, is the language in the delegation clause clear and unmistakable?

Four, is the severable delegation clause conscionable?

And five, if it is all those things, then is the assertion of arbitrability, quote, "wholly groundless". Meaning, no legitimate argument that the arbitration clause covers the present dispute.

In Henry Schein, the Supreme Court had to decide if that five question, the wholly groundless exception, is actually a legitimate question under the Federal Arbitration Act. And the court came in and said that there's no basis for that question, and it abrogated the wholly groundless inquiry.

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01:22:06 So what that means today, it means that a court cannot look to the scope of the arbitration agreement to decide whether to enforce the delegation clause.

01:22:18 Now, in Henry Schein in an effort to save that exception, the respondents made all the policy arguments they could come up with, which would have been expected from high level appellate counsel that have been retained for the Supreme Court briefing and

01:22:36 argument.

They argued that eliminating that inquiry would result in grave inefficiency. They argued it would promote frivolous motions to compel as a tactic by large corporations and raise various other types of

01:22:51 sky-is-falling arguments.

And the Supreme Court came in and one at a time and rejected all of them and simply said there's no basis for that inquiry under the Federal Arbitration Act without any exception.

01:23:06 So since Henry Schein in 2019, that means all courts interpreting any arbitration agreement and delegation clause only look -- can only look to those first four questions.

And I think I quote from the Fifth Circuit in

01:23:26 Kubala, that's 830 F.3d at 202 and cited in our papers

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really brings this to a fine point. So I'm going to read that. It says, quote:

"But the only question after finding that there is, in fact, a valid agreement is whether the purported delegation clause is, in fact, a delegation clause. That is if it evidences an intent to have the arbitrator decide whether a given claim must be arbitrated.

"If there is a delegation clause, the motion to compel arbitration should be granted in almost all cases."

And the key I want to focus on is that "almost all" language. It cites to a footnote, Footnote No. 1, and it says:

"The only exception for why it shouldn't be granted is the wholly groundless exception."

And that's because the Fifth Circuit recognized the wholly groundless exception and Kubala was decided in 2016. But since Henry Schein the wholly groundless exception has been abrogated, so now the only reason not to enforce a delegation clause is no -- is no longer a valid reason.

So with that, I'm just going to turn to those four questions as applied to the facts here. So the first one is there an arbitration agreement under the

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01:24:57 FAA? And that's yes as to both plaintiffs. There's really been no argument raised that there's not an arbitration agreement under the FAA at issue here.

Second, does it contain a delegation clause 01:25:13 that delegates threshold questions of arbitrability to the arbitrator? And that is also yes as to both plaintiffs.

They contain a delegation clause that consists of two paragraphs. The delegation clause is quoted 01:25:28 verbatim on page 10 of the motion. The first paragraph delegates by incorporating the AAA language, the American Arbitration Association rules. And the second paragraph delegates by doing so in explicit terms.

So that leads to the third question, is this 01:25:50 delegation language clear and unmistakable? And the answer to that is yes.

THE COURT: Wait, wait, wait, wait. And, sir, I don't want to cut you off, but after you say the second question you dropped at some point.

01:26:05 MR. GORMLEY: Okay.

THE COURT: So I want to make sure you start off again anew on that issue so we have a clear record and also so I can follow you.

MR. GORMLEY: Yeah. So the second question is 01:26:16 does it contain a delegation clause that delegates

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special questions of arbitrability? And the answer as to both plaintiffs is yes.

The delegation clause consists of two paragraphs. The first paragraph delegates the authority to decide threshold questions of arbitrability to the incorporation of the AAA rules. And the second paragraph does so explicitly. And those paragraphs are cited or quoted verbatim on page 10 of the motion.

So then the third question is, is this delegation language clear and unmistakable? And the answer is yes, as to both paragraphs separately. And when they're combined as they are here, it makes it all the more clear.

So the first paragraph incorporates the AAA rules. Every circuit to have faced this issue, which is 11 out of 12 so far, has determined that this language, this same language is clear and unmistakable.

And that was dated as recently as 2020 by the Sixth Circuit in Blanton.

So the first paragraph alone is clear and unmistakable and meets the threshold.

But then you take the second paragraph with -- (telephonic audio glitch) --

The second paragraph, so you heard where I

01:28:18 talked about the AAA language?

MR. GORMLEY: Okay. Yeah. I'll jump back there. So I'm going back now to talking about the language in the delegation clause.

01:28:37 So the first paragraph incorporates the AAA language, and the second paragraph explicitly delegates threshold questions of arbitrability to the arbitrator. And these paragraphs are quoted verbatim on page 10 of the motion.

01:28:58 So that leads us to our third question, which is: Is this delegation language clear and unmistakable? And the answer to that is "yes". When it comes to the AAA language in the first paragraph, every circuit to have faced this issue, 11 out of 12, 01:29:16 has determined that this AAA language is clear and unmistakable. And now that was found as recently in 2020 by the Sixth Circuit in Blanton.

And then moving to the second paragraph, the explicit language, this is the same explicit language 01:29:36 that was deemed as clear and unmistakable by the Supreme Court in the Rent-A-Center and has also been deemed clear and unmistakable by numerous courts including the Fifth Circuit in Kubala.

So even taking -- if the delegation clause 01:29:54 only contained one of those paragraphs, there would

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still be clear and unmistakable. But the fact that it contains both makes it all the more clear and unmistakable. And this isn't surprising because the language was carefully drafted to adhere to the law which is why it's been enforced in numerous courts around the country, and that we've cited to some of those -- some of those cases in the papers.

So and on this third inquiry whether the delegation language is clear and unmistakable this is respectfully, your Honor, where it appears that the Court's order went awry. It identified the clear and unmistakable inquiry. But then instead of just looking at the delegation language, it looked to Section 6 of the terms and conditions. And it said that based on Section 6:

> "The arbitration provision does not clearly or unmistakably provide that the parties have agreed to submit a motor vehicle dispute to arbitration."

So there's a few issues with this. The first one is that this usurps the arbitrator's authority to decide the scope of the arbitration agreement under the delegation clause.

And the reasoning is circular because it's essentially deciding that the arbitrator does not have

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authority to decide the scope of the arbitration agreement by determining the scope of the arbitration agreement. And this same argument was made to the Sixth Circuit in Blanton.

And what the Court said in response was:

"And on its own terms, plaintiffs' reading of the agreement doesn't make much sense. He reads the agreement to say that the arbitrator shall have the power to determine the scope of the agreement only as to the claims that fall within the scope of the agreement. Yet that reading would render the AAA jurisdictional rule superfluous."

So that is the -- that's exactly what happened here. And in doing so, it also renders the delegation clause superfluous.

THE COURT: Sir, I don't want to stop you, but could you restate that last sentence again?

MR. GORMLEY: Yeah. I said -- I closed the quote on Blanton. And I said that, essentially, the Court -- the Court's ruling here also had the same effect. It rendered the delegation clause language superfluous.

And then the Court's reasoning is also essentially equivalent to the wholly groundless

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01:32:44 exception that was abrogated in Henry Schein because the Court is determining that the arbitration agreement does not apply instead of letting the arbitrator decide the scope based on the delegation clause.

01:32:58 And there's really no support for the inquiry that the Court performed especially since Henry Schein was decided.

And there's also one factual issue so with the Court's holding is that it references Section 6 from

01:33:17 the terms. But Section 6 was from the February 2015 terms. And the applicable terms to both plaintiffs were the November 2016 terms, not the February 2015 terms. But this is sort of besides the point because the Court's inquiry shouldn't even go to looking

01:33:38 outside the delegation clause as that's been -- that authority has been delegated to the arbitrator.

So moving to the fourth and last question. Is this severable delegation clause conscionable? And that's also, "yes". It's important that this inquiry

01:33:58 only focuses on the delegation clause. It doesn't focus on -- it doesn't relate to conscionability of the terms. It doesn't concern the conscionability of the arbitration agreement.

It doesn't concern the conscionability of the

01:34:14 personal injury dispute being arbitrated.

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01:34:16 It only focuses on whether the delegation clause is enforced for an arbitrator to decide threshold questions of arbitrability. And so in the briefing all the plaintiffs' arguments generally relate 01:34:32 to the personal injury law in the underlying dispute. And that has nothing to do with the question at hand. And the answer as to whether the severable delegation clause is conscionable is a resounding yes.

So since the wholly groundless exception has 01:34:51 been abrogated as decided by the Sixth Circuit this basically is one of those cases that must be sent to arbitration for the arbitrator to decide the threshold questions of arbitrability. And there's really no -- they're all legal questions that are bound by 01:35:09 precedent. And there's no room for really any discretion in that decision.

So moving to the -- quickly moving to the third issue is just as we pointed out as plaintiffs brought up in their opposition and we discussed more at 01:35:27 length in our reply, Department 22 has faced the same issue recently and denied the motion for reconsideration.

THE COURT: Wait, wait, wait. I don't want to cut you off but I think you dropped. You said the 01:35:39 department, and then it dropped from what I can tell.

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But go ahead, sir.

MR. GORMLEY: Oh, I just said as for the third issue I want to discuss just quickly is we pointed out -- discussed it in the reply, but Department 22 recently faced the same issue on a motion for reconsideration and denied it. And just wanted to highlight again why this Court should not follow Department 22's lead. Department 22's reasoning suffered from the same circular type of reasoning that I just discussed.

And it also essentially brought back to life the wholly groundless exception that's been abrogated and rendered the delegation clause superfluous by taking that -- by taking those questions out of the arbitrator's hands and deciding it on its own. And the motivation for the Court was the belief that not doing so would be absurd. The quote -- the Court stated in the order it would give the arbitrator unfettered exclusive authority to interpret, apply, and enforce the arbitration agreement to include virtually any dispute a litigant or claimant may have with Uber or Raiser.

But the issue is those are the exact same policy arguments that were explicitly rejected by the United States Supreme Courts in Henry Schein. They're

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01:37:07 the same arguments I discussed earlier. And one quote from Henry Schein that particularly applies is the Court stated that arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is 01:37:22 not, in fact, arbitrable. So the concern of frivolous motions or the concern of things going to the arbitrator instead of being decided by the Court is not a legitimate concern under Henry Schein.

So, and then moving to the last issue is, 01:37:43 quickly, why is there no basis for a waiver discovery. In the opposition plaintiff asks for discovery as to whether Uber sought to compel arbitration in different actions with different parties and different facts to potentially make a waiver argument.

01:38:02 There's no legal support for waiver discovery in cases featuring different parties and different facts. This argument was raised in the Central District of California once, and the court called it absurd and that authority cited in the reply brief.

01:38:18 And the plaintiff cites the one case in support of the argument Principle Investments vs. Harrison. But there the corporation Rapid Cash sued debtors in court, and then sought to send those same debtors to arbitration. Thus, the waiver that was 01:38:38 found stemmed from proceedings involving the same

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01:38:41 parties and facts. And here that would not be the case, so there's really no basis for that request.

So with that, your Honor, we submit that the motion should be granted. And plaintiffs' claims against Uber and its affiliated entities should be sent to arbitration. The case should be stayed pending the arbitration and plaintiffs' request for waiver discovery should be denied.

Do you have any questions?

01:39:16 THE COURT: Just, I just want to make sure I have the right case. And because I think I've had this issue a couple of times. And is there an issue as to whether or not we have two parties to this case? We have Megan Royz and Andrea Eileen Work. And wasn't --

01:39:40 was there an issue as to whether or not, for example, one of them would come under the arbitration provision because they were not the individual that employed, for lack of a better term, Uber at the time of this accident?

01:40:01 MR. GORMLEY: Right. They were both passengers. My understanding is they were both passengers in this same vehicle. And there's the allegation that only one of them would have actually requested the ride under the Uber app. Is that what

01:40:16 you're referring to?

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01:40:18 THE COURT: That's exactly it, sir.

MR. GORMLEY: Okay. Yeah. And so when it comes to that, all of that analysis is for the arbitrator. So that the inquiry for the Court is the 01:40:31 same for both. The arbitrator might view that differently when it comes to whether -- may or may not view it differently when it comes to whether the delegate -- the arbitration applies to them.

But when it comes to the Court's inquiry, the 01:40:51 delegation clause instructs that only the arbitrator has the authority to decide the scope and applicability of the arbitration agreement. So those sort of background facts don't have any impact on what the Court's inquiry is today.

01:41:13 THE COURT: Would the Court be -- would a court under those circumstances where, for example, there was no contract triggered, why wouldn't a court make some sort of initial inquiry as to whether or not there was a valid and existing contract as a condition 01:41:32 to triggering the delegation clause pursuant to the arbitration agreement?

MR. GORMLEY: If the argument is, is there a valid contract, meaning a contract that's been signed by the parties, then that is -- that does fall under 01:41:52 the Court's jurisdiction to decide.

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But here that argument wasn't necessarily raised. It was more looking at the terms of the arbitration agreement and whether it applies to the person who did not request the ride.

Here it seems it's undisputed that the plaintiff that did not request the ride has entered into an arbitration agreement and has had executed that arbitration agreement.

THE COURT: And I just want to make sure the record is real clear, and I think this is important because I think you cut off for a second.

But I'm just trying to -- it's been a while since I looked at this issue. I don't know if I've had other cases. But say hypothetically you have this scenario. There's a service agreement between AT&T. And we have the AT&T Concepcion case which, really and truly, I think is a landmark case as far as the application of the Federal Arbitration Act. And it's my recollection it dealt specifically with a decision by the California Supreme Court. This is going back maybe 8, 10, 12 years ago. I forget the exact time period, but you have that; right? And it's pretty clear. And it dealt with class action cases and so on. And this is just off of rote memory. I haven't read that case in quite a while.

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01:43:26 But here's my point: Say you have your telephone or cellular service with AT&T, they're driving down the street and lo and behold they're rear ended by an AT&T truck; right? Under those
01:43:43 circumstances, would the trial court be required to make a threshold determination as to whether or not this "arbitration provision" as it pertains to services under the agreement for cell service would apply -- (telephonic audio glitch) --

01:44:06 Okay. What did you -- what did I leave off at, Peggy? I'll just say it again.

Would the judge have to make an initial inquiry as to whether or not the terms and conditions as it relates to the service agreement would --
01:44:21 between, say, the driver of the motor vehicle and AT&T vis-à-vis the service agreement whether that even applies to the facts of that case.

MR. GORMLEY: I -- I think I heard the buildup, your Honor, of what -- in the AT&T but I think
01:44:48 it cut out a little bit in the --

THE COURT: I understand. And I don't want to cut you off. This is what I'm thinking. Because here's my scenario. You have a rear end motor vehicle accident. Clearly, there is a service agreement and
01:45:00 the AT&T is the carrier for the plaintiff, that's an

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01:45:03 operator of a motor vehicle; right?

And so if they're involved, and, say, they were involved in a rear end motor vehicle accident with a company vehicle owned by AT&T, would that service 01:45:19 contract and its applicability even if it had a delegation clause be decided by the trial court?

MR. GORMLEY: And even -- as silly as the answer may seem, your Honor, is that if their service agreement with AT&T had a delegation clause like the 01:45:41 one at issue here, then and AT&T made the argument that should -- that under that there should be -- the case should go to arbitration, it would be -- that would delegate the authority to make that scope determination to the arbitrator.

01:45:59 And that's the exact type of policy arguments that the Supreme Court wrestled with in Henry Schein and that the other side made. I have the respondents' brief in Henry Schein here, and they --

THE COURT: Sir. You're like me. You 01:46:18 dropped. You said, "the other side", and then you dropped.

MR. GORMLEY: The other side. Let's see. I'm trying to think where I dropped at.

You heard me -- you heard me answer the 01:46:33 question. And then I was saying that the other side in

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Henry Schein made those arguments; does that sound right?

THE COURT: It could be, sir. It makes sense. It does.

MR. GORMLEY: I was saying it would -- basically that would be a question for the arbitrator under Henry Schein. The respondent in Henry Schein made those same type of arguments and in their answering brief they painted the same type of pictures of that that, you know, if you have contracts with entities completely unrelated to the situation, then that would still -- they could still try to delay the case by -- by sending some scope determination to arbitration.

But the Court said that that's not -- that's not the Court's concern under the Federal Arbitration Act, and the Federal Arbitration Act doesn't allow that inquiry. And essentially to the extent it becomes too many frivolous motions to compel arbitration, then that would be something for the legislature to deal with.

I'd also want to point out too as it applies to the passenger who did not request the ride is we make an argument in Footnote 6 in the motion pointing out that that passenger would also be a third party intended beneficiary under the passenger who did

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request the ride. So under that doctrine, there's also another basis that, that there was an arbitration agreement in place and the delegation clause applies to both plaintiffs.

THE COURT: Here's my --

MR. GORMLEY: Okay. -- (telephonic audio glitch) --

THE COURT: I'm sorry. Okay. The third-party beneficiary issue, I'm trying to figure out what would be the basis for that. Because at the end of the day I would anticipate you'd have to have as a threshold question an enforceable contract in place; right? And so I'm trying to -- (telephonic audio glitch) -- how you have a third-party beneficiary that results in waivers of specific rights under the Seventh Amendment of the United States Constitution and also under the Nevada Constitution as it relates to a right to a jury trial.

To me, it seems like that one would be a stretch.

MR. GORMLEY: Your Honor. I think it's -- I'm not sure if any cases has resolved that issue before. Here I think the first inquiry is you don't need to resolve it because they both have delegation clauses that would result in this scope determination being

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01:49:54 sent to the arbitrator.

But that fits into a tough issue of the delegation clause doesn't only delegate the authority to determine the scope, it also delegates the authority 01:50:12 to determine enforceability and all other questions of contract formation.

So the Court having to do -- attempting to do so in order to rule on the third-party beneficiary argument would also be usurping the arbitrator's 01:50:33 authority to do so.

THE COURT: Here's another question I have for you. I don't know if this was thoroughly answered in the case you're citing because I think Question No. -- (telephonic audio glitch) --

01:50:44 MR. GORMLEY: I think --

THE COURT: Yeah. Did the Question No. 3 deal with conscionability? Was that --

MR. GORMLEY: Three was unmistakable and four was unconscionability.

01:50:59 THE COURT: Okay.

MR. GORMLEY: Which --

THE COURT: Go ahead.

MR. GORMLEY: No I was just going to say -- but if just -- I wasn't sure if you were referring to 01:51:06 clear and unmistakable or conscionability.

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01:51:10 THE COURT: Conscionability.
MR. GORMLEY: Okay.
THE COURT: How do I make that determination?
MR. GORMLEY: What's the inquiry for the
01:51:21 determining the conscionability?
THE COURT: Yes.
MR. GORMLEY: The -- it's laid out in our reply. The -- it's a normal evaluation under Nevada law looking at procedural and substantive
01:51:39 unconscionability principles. But the key is that it only focuses on the delegation clause.
THE COURT: No, I understand that.
MR. GORMLEY: Yeah.
THE COURT: So for -- fascinating. And
01:51:55 understand this. I know Mr. Roberts understands this. I have no problems with motions for reconsideration, I just don't, as a threshold question.
Secondly, what other trial judges do, I really don't pay much attention to. What I try to do is I try
01:52:12 to dig down deep and into the issues as they're being presented and then make my best call.
And that is this, and this is what I find so fascinating by this issue. It appeared to -- (telephonic audio glitch) --
01:52:32 MR. GORMLEY: You cut out at "fascinating".

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01:52:34 THE COURT: Okay. Yeah. What I find fascinating about this motion and that recent US Supreme Court case in this regard. And if my recollection is incorrect, I have no problem with
01:52:47 saying, Judge, that's not exactly how it happened. But it's been a while since I raised -- I mean, I've read the AT&T case coming out of California. But it's -- (telephonic audio glitch) --

And that's why I'm going real slow, Peggy.

01:53:11 It's my recollection in the AT&T case one of the issues that was raised by the California Supreme Court was unconscionability, both procedural and substantive; right?

MR. GORMLEY: Right.

01:53:31 THE COURT: Now, and to a general extent, our US Supreme Court took that off the table. But it appears now at this stage of the Federal Arbitration Act, and when it deals specifically with delegation, that procedural and substantive unconscionability are
01:54:00 on the table as part four of my analysis.

Does that make sense?

MR. GORMLEY: I'm not exactly versed in your -- in your recall of the AT&T Concepcion case, but it -- under the Rain for Rent decision, which is sort
01:54:24 of the precedential leading decision in 2010 that

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decided that the delegation clauses are completely severable, the court does reference how courts can look to the conscionability of the severable delegation clause. And the court kind of -- courts have done that.

(Reporter clarification)

MR. GORMLEY: Just, is that in since Rain for Rent at least in 2010 courts have performed that inquiry looking specifically at the delegation clause.

THE COURT: I understand, sir. Those are all the questions I have.

At this point we'll hear from the plaintiff.

MR. QUIRK: Trevor Quirk here. Thank you, Judge.

I think, as I'm listening to your conversation with Uber's counsel that you've hit the nail on the head, if you will, because there is -- there is no end under Uber's analysis. And your recollection of this case, Judge, is correct in that here Ms. Royz is the one who ordered the Uber. Her friend just happened to have an Uber app on her phone. And Uber concedes to you just because Ms. Work happens to have an Uber app on her phone that she is bound by this arbitration agreement just by virtue of having her -- this application on her phone. And that makes no sense I

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think to the average person. And it -- and it doesn't pass muster according to the court.

And the courts have looked at this. And when you looked at this previously, they say what is it that you are agreeing to arbitrate. Because the arbitrator can only resolve the disputes that the people have agreed to arbitrate. You have to look within the four corners of the arbitration agreement and determine what it is that you're agreeing to arbitrate.

And that's what you already did, your Honor. You looked at it. You said the terms and conditions of the arbitration agreement specifically exclude personal injury claims because it states as much in the arbitration agreement. And you said this matter is not subject to arbitration. And so I think for Uber to stretch their argument to include something that they specifically previously excluded, it doesn't -- it doesn't pass muster. So I think your initial inclination was right.

The other thing I heard counsel state is that he kept referring to the Schein case, the Supreme Court case. And that case specifically states that the -- under the Federal Arbitration Act the Court is to look and determine -- let me find the quote. Oh, there it is.

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"Is that the dispute or controversy must arise out of the contract in which the arbitration agreement exists."

That -- so even under the most recent Supreme Court case, this dispute or controversy does not arise out of the arbitration agreement because then, again, you go back to the terms and conditions of the contract.

So this matter should not be sent to San Francisco to have an arbitrator determine the arbitrability of a personal injury case when Uber's own arbitration agreement says that this matter is not subject to arbitration according to its terms and conditions.

THE COURT: Anything else?

MR. QUIRK: No.

THE COURT: Okay. I just wanted to make sure we didn't drop you and I wasn't dropped because we've been having that as an issue.

All right. We'll hear from the moving party.

MR. GORMLEY: Hello. Can you hear me?

THE COURT: Yes, sir, we can.

MR. GORMLEY: I think it -- the plaintiffs' counsel's last argument might have cut off, so I wasn't able to --

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01:59:53 THE COURT: If you didn't hear it, sir, we'll go ahead back to Mr. Quirk and have Mr. Quirk, I guess, summarize that last sentence or two for the record so you have a fair and full opportunity to respond.

02:00:10 MR. QUIRK: Okay. I guess I can just restate what I was stating earlier.

And that is that, look, un -- plaintiffs in this case, Ms. Royz and Ms. Works, can only be required to submit to arbitration a dispute that they've agreed

02:00:27 to arbitrate.

And under the Schein case and under the Federal Arbitration Act, it specifically states that they are to arbitrate those controversies arising out of the arbitration agreement.

02:00:42 That's what the Schein case says. And if you follow the Court's previous analysis that it did correctly here that under this arbitration agreement, the parties did not specifically agree to arbitrate personal injury disputes because they were specifically

02:01:04 excluded under the terms and conditions section of the contract.

So the Court is correct to make that initial inquiry because otherwise anything would be subject to arbitration like any case. And that makes no sense --

02:01:23 it's just not reasonable for that to happen.

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02:01:28 So I don't know if that was the first or last argument that I made, but that's the basic premise of the argument. And I think it gets to the heart of what we've been discussing.

02:01:40 MR. GORMLEY: And this is Uber's counsel again. Thank you for that. That was the part that got cut off. That, I was able to hear that now.

So the -- quickly, your Honor, I wanted to make one point about AT&T. I quickly sort of refreshed

02:02:03 my recollection on that. And the key inquiry in AT&T was that unconscionability can't be determined based on the sort of, for lack of a better term, natural aspects of arbitration. The fact that it's being decided by an arbitrator instead of a jury or a judge and things like

02:02:26 that.

But it didn't -- it didn't eliminate the unconscionability inquiry. It only said that you can't take the innate aspects of arbitration and use those as arguments to argue that an arbitration agreement is

02:02:45 unconscionable is my understanding of the holding for Concepcion.

THE COURT: Well --

MR. GORMLEY: And --

THE COURT: I don't want to cut you off, sir,

02:02:54 I really and truly don't. But the reason why I brought

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that up if that's the fourth prong of my analysis, I guess, in many respects I have to look at the delegation. This is what it seems to me. Because I understand unconscionability as it relates to arbitration.

This is why I bring up the AT&T Concepcion case. And understand I haven't read it in a long time. And this is more of a thumbnail-type recollection and analysis. One of the issues as it pertained to that specific case that the California Supreme Court focused on as a basis in denying the motion as it related to arbitration in a class action case was essentially this: The provisions under the search. -- (telephonic audio glitch) -- the contract. They made a determination.

Okay. I'll go back. Under the terms and conditions of the contract, they made a decision that it was both procedurally and substantively unconscionable. And we all understand what that means.

And so my question is this -- I'm glad we're spending a lot of time on this because I've had a chance to sit back and really reflect. If I'm making -- if I'm called to make an unconscionability evaluation -- (telephonic audio glitch) --

Okay. If I'm -- hopefully, you heard me from

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here. If I'm called to make an unconscionability determination as it relates to factor No. 4, does that open up the door for me to look at the terms of the -- only the delegation clause? And it seems to me if that's the case then, shouldn't the delegation clause include things like in the delegation clause regarding waiver for right to a trial by a jury and/or by the Court? And those specific issues will be determined by the arbitrator.

You see where I'm going on that?

MR. GORMLEY: I see where you're going. I mean, for that specifically, for instance, that can -- that issue of taking the question out of a jury's hands can never be a part of the unconscionability assessment because that's what Concepcion prohibited because that is essentially being -- prejudicing arbitration which the Federal Arbitration Act and the Courts that have interpreted it have prohibited it.

THE COURT: No, no. I think you're missing what I'm really pointing to. And maybe it's unclear.

But if I'm to consider unconscionability and limit that unconscionability to the delegation clause, what should that include? What do I do?

MR. QUIRK: Your Honor, this is Trevor Quirk for plaintiff. You do exactly what First Options of

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Chicago at the Supreme Court, the United States Supreme Courts case said to do. And it says you look at and determine arbitrability of this dispute because it's clear in this case that the arbitration clause has not included personal injury disputes.

It's in the terms and conditions of that dispute. You don't even need to get into that through, in my view, the unconscionability aspect because the arbitration agreement states on its face what is arbitrable.

Uber can't -- like, if we're delivering paper to Uber today, and I have an Uber app on my phone, and something happens, Uber could -- according to Uber's analysis -- could say, Well, you've got to go to San Francisco and have a arbitrator say, Well, it's not subject to arbitration. That makes -- it's illogical. There has to be some end to this.

And that's what the Court said in First Options of Chicago. It says unless it's -- it is clear that the arbitration clause has not included the dispute, then you can make that decision. Judge. It allows you to make this decision on its face.

THE COURT: I think then you -- you -- then you dropped, and then you said "On its face."

MR. QUIRK: The First Options of Chicago case,

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it's a United States Supreme Court case, states that the issue of arbitrability can be decided by a Court if it's clear that the arbitration agreement did not include the subject matter that's about to be arbitrated. And in this instance it's very clear.

THE COURT: I understand your position, sir. I do.

MR. GORMLEY: Your Honor, this -- counsel for Uber. I believe, the reference Mr. Quirk's making the First Option is sort of that provisional two-part test most cases open with where they say the Court determines the validity, and the Court determines the scope. And that's what First Options is widely cited for and is regularly cited for.

But the problem is here when there is a delegation clause that test doesn't apply. Only the first part does. And that -- that was our first question in the four questions we set forth.

But when there's a delegation clause, that jumps in before the Court gets the chance to determine the scope of the agreement. And then you just go through that inquiry as to the enforceability of the delegation clause.

So, respectfully, First Option, that language from First Option is inapplicable here because there is

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a delegation clause. And the Rent-A-Center decision in 2000 and Henry Schein in 2019, and New Prime and also in 2019 are more applicable to that, the facts at issue here.

And in terms of the absurdity argument, you know, I don't want to say this and insinuate that our -- Uber's argument at issue in this case in terms of scope are absurd because in my opinion they're not. And we think an arbitrator will agree with them.

But either way, it's a question for the arbitrator. And I have -- this is the exact slippery slope argument that Henry -- the Supreme Court dealt with in Henry Schein, and that was the unanimous opinion deciding that it doesn't have any merit because under the language of the FAA that when there's an enforceable delegation clause then it delegates that authority to the arbitrator to determine the scope of the agreement.

And if it's frivolous, then the arbitrator can decide it. And depending on what court you're in, the arbitrator probably makes that decision quicker than the court would.

So there's really -- this idea that being -- that sort of outrageous scenario just doesn't, doesn't really have merit because the arbitrator can do the

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same thing that the Court can do potentially for less money and faster, which is why, one of many reasons why arbitration agreements in delegation clauses are included in, in contracts.

02:11:27 THE COURT: All right. And, sir, I have a question for you. And here's my question. And it's focused on, for example, Ms. -- or plaintiff Eileen Work. And the motor vehicle accident in this case occurred on February 22nd, 2018. And so for the

02:11:57 purposes of this personal injury lawsuit, Ms. Work never solicited or used -- it's probably the best way to say it, never used on that day for that ride her Uber app; right? And I think that's an uncontroverted -- (telephonic audio glitch) -- and so

02:12:23 under those circumstances, there's no contract as it relates to that ride.

And so can't the trial court under those circumstances as it relates to Ms. Work rule as a matter of law since she didn't use the application, the

02:12:43 application -- the app would not cover her ride. There was no -- (telephonic audio glitch) -- she just happened to be a passenger.

MR. GORMLEY: The -- I'm trying to bring up the --

02:13:05 THE COURT: I think Mr. Quick wanted to

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respond to that one, but...

MR. GORMLEY: -- arbitration --

THE COURT: But go ahead, sir.

MR. GORMLEY: This is Ryan Gormley again. I'm trying to bring up the arbitration agreement.

But I don't believe that it includes -- I don't think there's any language that creates any type of condition precedent to whether it's valid or not as to whether or not a ride has been requested by the person that agreed to it.

That would be one response. And two, to the extent the Court's inclined to only compel arbitration as to the passenger that requested the ride and not as to both passengers, then still, a stay of all the claims would be appropriate. And we would still have -- we still submit the third-party beneficiary argument where the -- which would flow down from the passenger who requested the ride to the passenger who did not request the ride.

THE COURT: Mr. Gormley, I thought you also wanted to comment on that.

MR. GORMLEY: That was --

THE COURT: Maybe I'm wrong.

MR. GORMLEY: That was Mr. Gormley talking.

THE COURT: I'm sorry. Mr. Quirk.

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02:14:41 MR. GORMLEY: Okay. Yes.

MR. QUIRK: Well, Judge, the FAA and Henry Schein state that a valid contract, a valid arbitration agreement is a condition precedent to enforcing it.

02:14:54 And so, of course, it's the Court's decision on whether or not that should be -- Ms. Work should be subject to this arbitration agreement that happens to exist in her friend's -- under the terms and conditions of her friend's application.

02:15:15 And so she didn't order the ride. She is not bound by that agreement or that the arbitration agreement that's in her friend's phone. And she's not a third-party beneficiary of that agreement because she didn't even know it existed.

02:15:45 THE COURT: Anything else? And then we'll go back. We'll go back to Mr. Gormley.

This is as a side note. Mr. Quirk, are you related to Ted Quirk.

MR. QUIRK: Negative. I get asked that a lot,

02:16:02 though. He's an intellectual property guy; right?

THE COURT: I was thinking about it, Mr. Gormley. Are you related to John Gormley?

MR. GORMLEY: Yeah. That is my dad.

THE COURT: Okay. I was just sitting here

02:16:13 thinking about maybe we had two legacies to argue this

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issue. But, Mr. Gormley, of course, you get the last word. And I might have another question or two for you.

MR. GORMLEY: The -- on the --

THE COURT: Here's my question. What do you do under these circumstances: For example, you have a, no question, the delegation clause pursuant to a contract. But in the contract itself, it has clearly written exclusions as to what's not to be arbitrated on its face.

How does that -- does the United States Supreme Courts case even address that issue, where there's specific claims that are excluded under the terms and conditions of the contract?

MR. GORMLEY: And is that excluded in the delegation clause or excluded elsewhere?

THE COURT: Elsewhere. Just excluded; right? Excluded.

MR. GORMLEY: Right. If it was elsewhere, then that would go to the arbitrator. And, theoretically, the parties would brief it, and the arbitrator would say, No, your claim here is specifically excluded and so it doesn't apply.

And then you're back in court.

THE COURT: And one last question both of you

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02:17:44 can respond to this: I know you're drilling down kind of deep on this tissue. But I keep coming back to question or inquiry No. 4. How does a trial court make a -- (telephonic audio glitch) -- conduct an inquiry as 02:18:10 to the unconscionability of a delegation clause.

MR. GORMLEY: And --

THE COURT: What facts does it consider?

MR. GORMLEY: Your Honor, I've read a lot of cases looking at that, and I've never seen a delegation 02:18:29 clause determined to be unconscionable. And I think that's because there's just not that much to work with in terms of making procedural or substantive unconscionability arguments. And this was exactly what Rent-A-Center pointed out -- the Supreme Court pointed 02:18:50 out in Rent-A-Center, when it -- when it sort of put that issue to the forefront.

It said that the Court, you know, on remand could potentially assess the unconscionability of the agreement. They said in that case the Court couldn't 02:19:11 assess it because the appellant hadn't raised the issue -- the respondent hadn't raised the issue until the Supreme Court briefing so that argument was waived.

But theoretically, it said that could be a question for remand. And it said to make such a claim 02:19:34 based on the discovery procedures, for instance,

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Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim, that the arbitration agreement is unenforceable to be unconscionable. And the Court said that would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of this fact-found employment discrimination claim unconscionable. And also said, likewise, the unfairness of the fee splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex fact-related aspects of the alleged employment discrimination.

So that's the Supreme Court recognizing that really when it comes to unconscionability of the delegation agreement there probably just isn't, isn't too much to work with. And that's why I can't recall any case where delegation clause has been deemed unconscionable, and there -- no such case was cited in any of the briefs.

THE COURT: You're --

MR. QUIRK: Well, your Honor --

THE COURT: And --

MR. QUIRK: This is Trevor --

THE COURT: Mr. Quirk, I don't want to cut you

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02:20:47 off -- (telephonic audio glitch).

And I don't want to cut anyone off. But I just remember reviewing the points and authorities in here, the issue of procedural and substantive 02:21:07 unconscionability was raised. And that's why I keep coming back to that. And that's the fourth factor.

And, Mr. Quirk, I didn't want to cut you off, sir. I think you were getting ready to go there. But go ahead.

02:21:20 MR. QUIRK: Yeah. Trevor Quirk here. We did raise them. Thank you, your Honor.

And you were asking how you conduct that analysis, and it's simple. You look at the manner in which the contract was negotiated and the circumstances 02:21:32 of the parties at the time.

That's under the procedural element. And I think it's pretty clear at least as to Ms. Work what the answer to that question is going to be.

And then the answer to Ms. Royz may be a 02:21:51 little bit more complicated, but there was no negotiation of the contract whatsoever. You're simply clicking on the little box on the bottom, yes to some terms and conditions. And then under the second aspect, the substantive unconscionability, you just 02:22:11 look at the actual terms of the contract. And look and

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see if whether those are so harsh as to be one sided.

And the terms of this, if you're just narrowly focusing on the delegation clause or if you're -- I guess that's what we're doing here. And you're looking at the terms of the delegation clause, what is the effects of those terms on Ms. Royz? And as to Ms. Work we know it's going to force someone who just happens to have an Uber app on their phone to San Francisco. And the same thing with Ms. Royz.

So, clearly, the delegation clause in our view would be procedurally and substantive unconscionable.

And those cases do talk more broadly about an arbitration agreement. And although they don't deal specifically with a delegation clause in and of itself, counsel said it's severable and should be analyzed under basic contract rules. And those are the ways in which the Nevada Supreme Court has analyzed procedurally and substantive unconscionability. And those are the elements that they've used to analyze those issues.

MR. GORMLEY: Your Honor, this is Ryan Gormley for Uber. If I'm allowed to make a reply.

THE COURT: Of course, sir, you are.

MR. GORMLEY: Thanks.

So I was responding to those arguments. On

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02:23:47 the procedural front, the no negotiation, it's an argument you here a lot when it comes to arbitration agreements. But as the Court's aware, consumer arbitration agreements are enforced all the time.
02:24:04 Those arguments don't hold up.

It's not enough that a party wasn't represented by counsel and entering into an arbitration agreement or that, you know, a user of Uber or any corporation didn't have a chance to negotiate the terms
02:24:23 with an attorney representing Uber, or something like that. So on the procedural front, I think those arguments get made, but there's nothing -- there's nothing here that the Court would determine is procedurally unconscionable.

02:24:43 And in terms of one cited in the substantive argument, Mr. Quirk said it's one sided because look at the result. It results in someone getting sent to arbitration in San Francisco. But that looking at the result of getting sent to arbitration, that's the exact
02:25:07 type of argument that AT&T versus Concepcion said couldn't carry the day. Because that's an argument that's saying that arbitration somehow is unfair compared to the judicial forum or puts it in a worse light. And that's the type of conscionability argument
02:25:34 that AT&T precluded.

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So, you know, just based on those arguments, and I think based on the arguments in the brief, there's no basis for a finding of procedural or substantive unconscionability.

THE COURT: Anything else?

MR. GORMLEY: I think that's it from us, your Honor. That's Ryan Gormley for Uber.

MR. QUIRK: Same here, Trevor Quirk for plaintiff. Nothing further.

THE COURT: All right. And, gentlemen, I want to thank you. I'm going to do two things insofar as this motion is concerned.

Number one, I'm going to rule partially.

Regarding the application and my decision -- (telephonic audio glitch) -- Andrea Eileen Work, and I don't know if my prior decision really clarified this, but the reason why I brought it up was essentially this. A key component as far as my decision is concerned as it relates to her was the fact that at the time of this motor vehicle accident, she had not even used the Uber app; right? All she was, was a passenger in the motor vehicle accident. As a result of that, number one, there's been no consideration. There's no contract in place. She was a mere passenger. I think it would be a stretch, a real stretch, to force her to

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arbitration under those circumstances.

And because I think it's pretty clear for all the reasons I ruled before, but that wasn't clear enough maybe in my minute order, but I want to make sure the record is really clear on top of my prior decision. So, I mean, she's going to -- she's not going to go to arbitration.

And I don't mind saying this from a legal logic perspective, it just doesn't make much sense. It really doesn't.

This is what I'm going to do on the motion to reconsider as to the other plaintiff. I'm going to go back and take a look. And I don't remember before, and maybe it was addressed and I overlooked it, because I'm going to address the unconscionability issue as it relates to the delegation provision under the contract. Because, and I'm going to read AT&T Concepcion. I'm going to go back and read this case. Because it appears to me that at least we know this, based upon the briefing, the issue of unconscionability has been raised. I think it's one -- (telephonic audio glitch) --

The issue of unconscionability has been raised. I don't know if it was fully developed in the first briefing but it has been raised.

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I'm going to focus on the factor No. 4 as it pertains to unconscionability in addition to taking one last look. And so what I'm going to do is this: When I make a decision, I'm also going to address factor 4 as -- (telephonic audio glitch) --

I said I'm -- yeah. I'm going to address factor 4 in addition to looking at my prior decision so we'll have a really clean record here, which I feel is very, very important from an appellate review perspective. Because in many respects maybe -- (telephonic audio glitch) -- this is a case of first impression as it relates to the claim of Ms. Royz.

So that's what I'm going to do.

MR. GORMLEY: And --

THE COURT: All right, gentlemen.

MR. GORMLEY: Your Honor, this is Ryan Gormley for Uber. I just want to clarify one point. I think, I think it's obvious. But just want to clarify it. As of the first person when -- I heard you said as to Ms. Work on the first part of your ruling. And my understanding and in your prior order it said that Ms. Royz was the passenger that did not use the Uber app. But my understanding is that it's just the passenger that did not order the ride; right?

THE COURT: Yes. Whoever didn't use it. And

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I think I've clarified that. So that's probably an important point. For the record Andrea Eileen Work didn't use the app; is that correct?

MR. QUIRK: Judge, looking at it now, and I think I had it confused. That Ms. Work ordered the Uber and Royz was the passenger. I'm the one who stated that during argument.

THE COURT: So we flipped it?

MR. QUIRK: Yes.

THE COURT: All right. And so anyway my prior decision that I've made right now before this, this discussion will be based upon the agreement that Megan Royz was solely the passenger and didn't utilize the Uber app; is that correct?

MR. QUIRK: That's correct.

THE COURT: Okay. I just want to make sure I'm clear on that.

MR. QUIRK: If you can give me a second, I'd like to verify that.

THE COURT: Go ahead, sir.

MR. QUIRK: Okay. So the ride was requested by Andrea Work through her rideshare app, through her Uber app.

THE COURT: Yes.

MR. QUIRK: And Royz was the passenger. So

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that's my -- my fault for making that representation during the argument. I had it backwards.

THE COURT: Okay. So did I have it right in my minute order? I just want to make sure.

MR. QUIRK: Let me look at your minute order here.

Plaintiff Megan Royz did not use the app to request transportation. There we go. That's in your order.

THE COURT: All right. So I got it right.

MR. QUIRK: Yes.

THE COURT: I just want to make sure. Okay.

MR. GORMLEY: And --

THE COURT: I'm going to go back and read these cases. This is a fascinating issue. And I just want to -- put it this way. Number one, we have a great record. Secondly, I just want to make sure that I'm clear with my thoughts and my minute order as to why I ruled the way I did. That's what I want to do. I want to go back and look at it. Because it might be an issue of first impression. I'm not sure yet, but we'll see.

MR. QUIRK: Thank you.

MR. GORMLEY: Thank you, your Honor. We appreciate your time.

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02:33:13 THE COURT: All right. Everyone enjoy your day.

MR. GORMLEY: You too. Bye.

MR. ROBERTS: Thanks for all the time, your Honor. It's good to hear your voice again.

THE COURT: All right.

Mr. Roberts, take care.

MR. ROBERTS: Thank you, your Honor. You too.

02:33:28

(Proceedings were concluded.)

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REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE TELEPHONIC PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF NEVADA.

_____
PEGGY ISOM, RMR, CCR 541

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Steven D. Grierson
CLERK OF THE COURT

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Attorneys for Plaintiffs, Megan Royz & Andrea Eileen Work

DISTRICT COURT OF THE STATE OF NEVADA

FOR THE COUNTY OF CLARK

MEGAN ROYZ, an individual; and ANDREA EILEEN WORK, an individual Plaintiff, 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 **NOTICE OF ENTRY OF ORDER**

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD.

Please take notice: An Order Denying Defendants Uber Technologies, Inc., Rasier, LLC, Rasier-CA, LLC's, Motion to Reconsider the Courts Order Denying Motion to Compel Arbitration

and Stay Action was entered on January 21, 2021 in the matter of Megan Royz, et al. vs. Mark Anthony Jacobs, et al., Clark County District Court, Case No. A-20-810843-C. A copy of said order is attached hereto as Exhibit A.

Dated: January 29, 2021

QUIRK LAW FIRM, LLP

By: _____
Trevor Quirk, Esq.
Attorney for Plaintiffs

EXHIBIT A

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Attorneys for Plaintiffs,
Megan Royz & Andrea Eileen Work

DISTRICT COURT OF THE STATE OF NEVADA

FOR THE COUNTY OF CLARK

MEGAN ROYZ, an individual; and ANDREA EILEEN WORK, an individual Plaintiff, 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 **ORDER DENYING DEFENDANTS UBER TECHNOLOGIES, INC., RAISER, LLC, AND RAISER-CA LLC'S MOTION TO RECONSIDER THE COURT'S ORDER DENYING DEFENDANTS MOTION TO COMPEL ARBITRATION AND STAY ACTION**

ORDER DENYING DEFENDANTS UBER TECHNOLOGIES, INC., RAISER LLC, AND RAISER-CA LLC'S MOTION TO RECONSIDER THE COURT'S ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY ACTION

Case Number: A-20-810843-C

Defendants Uber Technologies, Inc. and Rasier-CA, LLC.'s, Motion for Reconsider the Court's Ordre Denying Defendants' Motion to Compel Arbitration and Stay Action came on for hearing on October 27, 2020, at the hour of 1:15 PM., before Department XVI, the Honorable Judge Timothy Williams, presiding.

Attorneys D. Lee Roberts, Jr. and Ryan Gormley, of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC appeared on behalf of Defendants Uber Technologies, Inc., Rasier, LLC., Rasier-CA, LLC. Attorney Trevor Quirk of Quirk Law Firm, appeared on behalf of Plaintiffs Megan Royz and Andrea Work.

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

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On October 9, 2020, Defendants Uber Technologies, Inc., Raiser, LLC, and Raiser-CA LLC filed a Motion for Leave and Motion To Reconsider The Court's Order Denying Defendants' Motion To Compel Arbitration and Stay Action.

2. On October 13, 2020, Plaintiffs opposed Defendants' Motion for leave and Motion to Reconsider the Court's Order Denying Defendants' Motion to Compel Arbitration and Stay Action.

3. On October 27, 2020, The Court took Defendants' Motion for leave and Motion to Reconsider the Court's Order Denying Defendants' Motion to Compel Arbitration and Stay Action under submission.

4. On December 28, 2020, The Court denied Defendants' Motion for leave and Motion to Reconsider the Court's Order Denying Defendants' Motion to Compel Arbitration and Stay Action.

CONCLUSIONS OF LAW

This Court's role under the Federal Arbitration Act ("F.A.A."), Title 9 U.S.C. §2, is "limited to determining 1) whether a valid agreement to arbitrate exists and, if it does, 2) whether the agreement encompasses the dispute at issue." Cordas v. Uber Technologies, Inc., 228 F.Supp.3d 985, 988 (N.D. Ca. 2017).

The question movants have asked this Court to reconsider is whether 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.

"Whether a dispute arising under contract is arbitrable is a matter of contract interpretation …" Tallman v. Eighth judicial Dist. Ct., 131 Nev. 713, 720, 359 P.3d 113. 118–19 (2015). That is, the answer as to "who has the primary power to decide arbitrability" flows from the fact arbitration is a matter of contract; it is a way to resolve those disputes–but only those disputes–the parties agreed to submit to arbitration. See AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986). Thus, when deciding whether the parties agreed to arbitrate a certain dispute, including arbitrability, courts should apply ordinary state-law principles that govern contracts' formation.

As previously noted, the United States Supreme Court has recognized and enforced a liberal policy favoring arbitration agreement; however, the U.S. Supreme Court has 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).

Here, movants contend that the Delegation Clause in the contract between parties transferred the power to decide threshold questions of arbitrability to the arbitrator. See Defendant Uber Technologies, Inc., and Raiser-CA L.C.'s Motion for Leave and Motion to Reconsider the Court's Order Denying Defendants Uber Technologies Motion to Compel Arbitration and Stay Action on OST filed October 7, 2020, p. 9. Moreover, the movants argue the delegation clause must be considered an agreement separate from the Arbitration Agreement giving the arbitrator exclusive authority to resolve disputes relating to the contract's enforcement without undermining his jurisdiction to do so. Id. The Court declines to follow this interpretation. While the Arbitration Agreement and Delegation clause may be severable, the delegation clause must be read in

conjunction with the "Terms and Conditions" and Arbitration Agreement, which determines the scope of the arbitration or disputes related to what the parties agreed to arbitrate.

After reviewing the "Terms and Conditions," the Arbitration Agreement, and the delegation clause, this Court determines that the agreement to arbitrate is limited to those disputes, claims, or controversies arising out of or relating to the Terms or use of movant's services. As previously set forth within the Court's August 6, 2020 Order, the arbitration clause focuses on "Terms and Conditions" under the contract –not motor vehicle accidents. The arbitration provision does not clearly or unmistakably provide that the parties have agreed to submit a motor vehicle dispute to arbitration. Therefore this Court determines the issue.

Accordingly, Defendant Uber Technologies LLC, Rasier, LLC, and Raiser-CA LLC's Motion to Reconsider the Court's Order Denying Defendants' Motion to Compel Arbitration and Stay Action is **DENIED**.

IT IS SO ORDERED

Dated this 21st day of January 2021 ~~2020~~

DISTRICT COURT JUDGE ZJ

Submitted by:

QUIRK LAW FIRM, LLP

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Approved as to Form and Content:

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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:

NOTICE OF ENTRY OF ORDER

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 January 29, 2021

Esteban Minero
Quirk Law Firm, LLP