

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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DISTRICT COURT

CLARK COUNTY, NEVADA

16
17
18
19 MEGAN ROYZ; and ANDREA EILEEN
WORK,

20 Plaintiffs,

21 vs.

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

25 Defendants.
26
27
28

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.**



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

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



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

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.").

///

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

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

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

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

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

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



1 scope of the agreement . . . as to claims that fall within the scope of the agreement..”

2 Piersing argues that his arbitration agreement incorporates the
3 AAA Rules only as to claims that fall within the scope of the
4 agreement. In other words, he thinks that a court must first
5 determine whether the agreement covers a particular claim before
6 the arbitrator has any authority to address its jurisdiction. But
7 nothing in the relevant provision limits the incorporation in this
8 way. Instead, it simply provides that “the arbitration will be
9 conducted in accordance with then-current [AAA Rules].” R. 61-4,
10 Pg. ID 982. Other courts have read similar references to
11 “arbitration” or “the arbitration” as generally authorizing an
12 arbitrator to decide questions of “arbitrability.” See, e.g., Dish
13 Network, 900 F.3d at 1244–46; Simply Wireless, 877 F.3d at 525,
14 527–28; Awuah, 554 F.3d at 9, 11; Terminix Int’l Co., 432 F.3d at
15 1332. And on its own terms, Piersing’s reading of the agreement
16 doesn’t make much sense. ***He reads the agreement to say that the
17 arbitrator shall have the power to determine the scope of the
18 agreement only as to claims that fall within the scope of the
19 agreement. Yet that reading would render the AAA’s
20 jurisdictional rule superfluous.***

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

23 ***Third***, Plaintiffs’ argument equates to nothing more than the “wholly groundless”
24 argument abrogated by *Henry Schein*. For years, certain courts created and recognized an
25 exception to delegation clauses; they would not enforce a delegation clause where the argument
26 for arbitration was “wholly groundless.” These courts “reasoned that the ‘wholly groundless’
27 exception enables courts to block frivolous attempts to transfer disputes from the court system to
28 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)



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

9 **b. The Delegation Clause is clear and unmistakable.**

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

14 No one disputes that for a delegation clause to be effective, “there must be ‘clear and
15 unmistakable’ evidence that the parties agreed to have an arbitrator decide such issues.” Motion
16 at 11 (quoting *Blanton*, 962 F.3d at 844 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S.
17 938, 944 (1995))). But Plaintiffs’ reliance on this basic principle is misplaced. Plaintiffs’
18 argument fails for several reasons: it is circular, ignores the language of the Delegation Clause,
19 and ignores that every Circuit that has faced the same or similar language at issue here has found
20 it to be “clear and unmistakable.”

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

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



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

2 **Third**, as explained in the Motion, courts have universally held that this type of language
3 in a delegation clause provides “clear and unmistakable” evidence that the parties agreed to
4 arbitrate threshold questions of arbitrability. *See* Motion at 11-12 (citing *Blanton*, 962 F.3d at
5 846 (explaining that every circuit court that has faced the issue, which is eleven out of twelve,
6 has reached this conclusion) and various other decisions that have enforced similar language).
7 Plaintiffs have offered nothing to suggest that a different result is warranted here.

8 **c. The Delegation Clause is not unconscionable.**

9 Next, Plaintiffs argue that “the arbitration agreement and delegation clause are both
10 procedurally and substantively unconscionable . . . and, thus, are not enforceable.” Opposition at
11 17:15-17. As explained below, this argument is wrong for three reasons: it is inapplicable to the
12 Arbitration Agreement, it is waived because Plaintiffs never raised it until their current
13 Opposition, and the Delegation Clause is not unconscionable.

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

17 **Second**, as it relates to the Delegation Clause, the Court should not address this new
18 argument because Plaintiffs raised it for the first time in their Opposition. In Plaintiffs’ own
19 words: “[p]oints or contentions not raised in the original hearing cannot be maintained or
20 considered on rehearing.” Opposition at 6:3-4 (quoting *Achrem v. Expressway Plaza Ltd.*
21 *P’ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996)). Here, Plaintiffs did not question the
22

23 ² *See, e.g., Brennan*, 796 F.3d at 1132 (“But since Brennan failed to make any arguments specific to the delegation
24 provision, and instead argued that the Arbitration Clause as a whole is unconscionable under state law, we need not
25 consider that claim because it is for the arbitrator to decide in light of the parties’ clear and unmistakable delegation
26 of that question.”); *Saizhang Guan v. Uber Techs., Inc.*, 236 F. Supp. 3d 711, 730 (E.D.N.Y. 2017) (“Accordingly,
27 unless a party challenges the delegation clause separately from the arbitration agreement, the court must ‘treat it as
28 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.”).



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

3 Numerous courts have faced this exact issue, and concluded that a challenge to the
4 delegation clause was waived for this very reason. *See Brennan v. Opus Bank*, 796 F.3d 1125,
5 1132 (9th Cir. 2015) (explaining this principle); *Rent-A-Ctr., Inc. v. Ellis*, 827 S.E.2d 605, 613
6 (W. Va. 2019) ("A party resisting delegation to an arbitrator of any question about the
7 enforceability of an arbitration agreement must specifically challenge the delegation provision
8 first."); *supra*, n. 2. Indeed, in *Rent-A-Center*, the Supreme Court held that even though the
9 respondent questioned the conscionability of the agreement to arbitrate, his failure to do so until
10 briefing before the Court resulted in waiver:

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

14 561 U.S. at 76; Here, the result should be the same.

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

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

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

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

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

18 To make such a claim based on the discovery procedures, Jackson
19 would have had to argue that the limitation upon the number of
20 depositions causes the arbitration of his claim that the [arbitration]
21 Agreement is unenforceable to be unconscionable. That would be,
22 of course, a much more difficult argument to sustain than the
23 argument that the same limitation renders arbitration of his
24 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.

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

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



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

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



1 law that distinguishes their arguments from this reality.³

2 It is precisely for this reason that courts regularly toss aside similar cries of procedural
3 unconscionability. *See Crawford Profl Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 264
4 (5th Cir. 2014) (rejecting these same arguments and noting that the plaintiff failed to present any
5 evidence it “could not have abstained from contracting with the Defendants at all,” which applies
6 equally here); *Ellis*, 827 S.E.2d at 617 (rejecting all the same arguments and “acknowledge[ing]
7 the realities of consummating standardized business transactions and the attendant unworkability
8 of individualized bargaining”); *Burch v. Second Judicial Dist.*, 118 Nev. 438, 442, 49 P.3d 647,
9 649 (2002) (explaining that adhesion contracts are enforceable, but the one at issue was not
10 because the consumer “did not receive a copy” until after assenting and, as a result, “did not have
11 an opportunity” to read it, which did not occur here).

12 Accordingly, Plaintiffs’ argument that the Delegation Clause is unconscionable fails.⁴

13 **2. To see why this Court should grant the Motion, it should look to Department**
14 **22’s erroneous decision.**

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

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

21 _____
22 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.

23 ⁴ In addition, Plaintiffs argue that enforcing the Delegation Clause is “impracticable.” Opposition at 23:6. They do
24 not support this argument with any explanation. Needless to say, the doctrine of impracticability is inapposite to
25 enforcing the Delegation Clause. There was no event that occurred that rendered enforcement of the Delegation
26 Clause impracticable. *See Max Baer Prods., Ltd. v. Riverwood Partners, LLC*, No. 309-CV-00512-RCJRAM, 2010
27 WL 3743926, at *3 (D. Nev. Sept. 20, 2010) (providing that under the doctrine of impracticability, “performance is
28 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.



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

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

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

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

16 Three, the order rings of an anti-arbitration sentiment that courts and legislators have
17 tried to eliminate for decades. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S.
18 265, 281 (1995) (“What States may not do is decide that a contract is fair enough to enforce all
19 of its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The
20 Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses
21 on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”); *Kindred*
22 *Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1428 (2017) (“A rule selectively finding
23 arbitration contracts invalid because improperly formed fares no better under the Act than a rule
24 selectively refusing to enforce those agreements once properly made.”).

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

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

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

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

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

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

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

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



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

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

19 *Id.* at 22, 366 P.3d at 697–98. Therefore, given these facts and law, *Principal Investments* does
20 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.

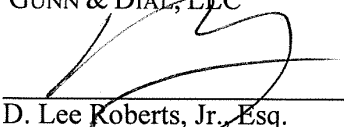
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III. CONCLUSION

Given the above, Raiser 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.

WEINBERG, WHEELER, HUDGINS,
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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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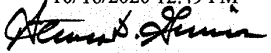
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EXHIBIT 1

EXHIBIT 1


CLERK OF THE COURT

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3 DISTRICT COURT

4 CLARK COUNTY, NEVADA

5 YOLANDA HAUFF, individually,

6 Plaintiff,

7 Vs.

8 KEVIN HEWARD, individually; RASIER,
9 LLC d/b/a UBER; UBER
10 TECHNOLOGIES, INC. d/b/a UBER;
11 DOES I through X; and ROE
12 CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-20-809538-C
Dept. No. XXII

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

16 This matter concerning Defendants RASIER, LLC'S and UBER TECHNOLOGIES, INC.'S
17 Motion for Leave and Motion to Reconsider the Court's Order Denying Defendants' Motion to
18 Compel Arbitration and Stay Action filed September 14, 2020 came on for hearing on an Order
19 Shortening Time on the 24th day of September 2020 at the hour of 9:00 a.m. before Department
20 XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN
21 JOHNSON presiding; Plaintiff YOLANDA HAUFF appeared by and through her attorneys,
22 ABRAHAM SMITH, ESQ. and DANIEL F. POLSENBERG, ESQ. of the law firm, LEWIS ROCA
23 ROTHBERGER CHRISTIE, and FARHAN R. NAQVI, ESQ. and ELIZABETH E. COATS, ESQ.
24 of the law firm, NAQVI INJURY LAW; Defendants UBER TECHNOLOGIES, INC. and RASIER,
25 LLC appeared by and through their attorneys, D. LEE ROBERTS, JR., ESQ. and RYAN T.
26 GORMLEY, ESQ. of the law firm, WEINBERG WHEELER HUDGINS GINN & DIAL; and
27
28

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

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

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

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

3 As previously noted, this Court's role under the Federal Arbitration Act (referred to as
4 "FAA" herein), Title 9 U.S.C. §2,² is "limited to determining (1) whether a valid agreement to
5 arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." Cordas
6 v. Uber Technologies, Inc., 228 F.Supp.3d 985, 988 (N.D.Ca. 2017), *quoting* Chiron Corp. v. Ortho
7 Diagnostic Systems, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). If the response is affirmative on both
8 counts, the FAA requires the Court to enforce the arbitration agreement in accordance with its terms.
9 While, ordinarily, both questions set forth above are for the court to determine, the parties can enter
10 into an arbitration agreement that delegates to the arbitrator the power to decide whether a particular
11 claim is arbitrable. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S.Ct. 588, 154
12 L.Ed.2d 491 (2002). The United States Supreme Court has repeatedly made clear "parties can agree
13 to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate
14 or whether their agreement covers a particular controversy." Rent-A-Center, West, Inc. v. Jackson,
15 561 U.S. 63, 68-69, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010), *citing* Howsam, 537 U.S. at 83-85, 123
16 S.Ct. 588.
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19 The question movants have now asked this Court to reconsider—whether the arbitrability of
20 the personal injury dispute must be delegated to the arbitrator--is a narrow one. To understand the
21 narrowness of the issue, the parties must appreciate there are actually three disagreements that are
22 the subject of this litigation and movants' Motion to Compel Arbitration and Stay Action filed June
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25 ¹See Defendants RASIER, LLC'S and UBER TECHNOLOGIES, INC.'S Motion for Leave and Motion to
26 Reconsider the Court's Order Denying Defendants' Motion to Compel Arbitration and Stay Action filed September 14,
2020, p. 6.

27 ²This section provides in relevant part: "A written provision in any maritime transaction or a contract
28 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."

1 12, 2020. The first deals with the merits of the dispute itself; that is, the parties disagree whether
2 Defendants were negligent or liable for causing Plaintiff's personal injuries and/or damages, if any.
3 Second, the parties differ whether they agreed to arbitrate the merits of the personal injury claim;
4 that challenge is about the arbitrability of the dispute. Third, the parties disagree who should have
5 the primary power—the court or arbitrator—to decide the second dispute, and that is the limited
6 question to be decided now.
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8 Although the third inquiry identified above is a narrow one, it has certain practical
9 importance. That is because, normally, a party who has not agreed to arbitrate would have a right to
10 a court's decision concerning the merits of his or her dispute. Where a party has agreed to arbitrate,
11 he or she, in effect, has relinquished much of that right's practical value; the party still can ask a
12 court to review the arbitrator's decision, but the court will set that decision aside only in very
13 unusual or limited circumstances. See Title 9 U.S.C. §10 (for example, award procured by
14 corruption, fraud or undue means; arbitrator exceeded his powers). Thus, whether it is the court or
15 arbitrator who has the primary authority to decide whether a party has agreed to arbitrate can make a
16 critical difference to a party resisting arbitration. See First Options of Chicago, Inc. v. Kaplan, 514
17 U.S. 938, 942, 115 S.Ct. 1920, 1923, 131 L.Ed.2d 985 (1995).
18

19 Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to
20 arbitrate their differences, the question "who has the primary power to decide arbitrability" also
21 turns upon what the parties bargained for concerning that issue. That is, the answer as to "who has
22 the primary power to decide arbitrability" flows from the fact arbitration simply is a matter of
23 contract; it is a way to resolve those disputes—but only those disputes—the parties agreed to submit
24 to arbitration. AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649, 106 S.Ct.
25 1415, 1418, 89 L.Ed.2d 648 (1986). Thus, when deciding whether the parties agreed to arbitrate a
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1 certain matter, including arbitrability, courts generally should apply ordinary state law principles that
2 govern the formation of contracts.³

3 The United States Supreme Court, however, has added an important qualification applicable
4 when courts decide whether a party has agreed the arbitrator should decide arbitrability. Courts
5 should not assume the parties agreed to arbitrate arbitrability unless there is “clea[r] and
6 unmistakabl[e]” evidence they did so. AT&T Technologies, Inc., 475 S.Ct. at 649, 106 S.Ct. at
7 1418-1419, *cited and quoted by* First Options of Chicago, Inc., 514 U.S. at 944, 115 S.Ct. at 1924;
8 *also see* Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 n.7, 80 S.Ct. 1347,
9 1353 n.7, 4 L.Ed.2d 1409 (1960). “In other words, there is a presumption that courts will decide
10 which issues are arbitrable; the federal policy in favor of arbitration does not extend to deciding
11 questions of arbitrability.” Howsam, 537 U.S. at 83, 123 S.Ct. 588, 154 L.Ed.2d 491. Clear and
12 unmistakable evidence of an agreement to arbitrate arbitrability “might include...a course of conduct
13 demonstrating assent...or...an express agreement to do so.” Mohamed v. Uber Technologies, Inc.,
14 848 F.3d. 1201, 1208 (9th Cir. 2016), *quoting* Momot v. Mastro, 652 F.3d 982, 988 (9th Cir. 2011), *in*
15 *turn, quoting* Rent-A-Center, West, Inc., 561 U.S. at 79-80, 130 S.Ct. 2772, 177 L.Ed.2d 403
16 (Stevens, J. dissenting), That is, the law treats silence or ambiguity about the question “*who*
17 primarily should decide arbitrability” differently from the way it treats silence or ambiguity
18 concerning “*whether* a particular merits-related dispute is arbitrable because it is within the scope of
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25 ³As this Court previously noted in its original decision, in Nevada, basic contract principles require, for an
26 enforceable contract, an offer and acceptance, meeting of the minds and consideration. May v. Anderson, 121 Nev. 668,
27 672, 119 P.3d 1254, 1257 (2005), *citing* Keddie v. Beneficial Insurance, Inc., 94 Nev. 418, 421, 580 P.2d 955, 956
28 (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).

1 a valid arbitration agreement”—for, in respect to this latter inquiry, the law reverses the
2 presumption. *See First Options of Chicago, Inc.*, 514 U.S. at 944-945, 115 S.Ct. at 1924.⁴

3 The difference in treatment is understandable. The latter question arises when the parties
4 have a contract that provides for arbitration of some issues. In such circumstances, the parties likely
5 gave at least some thought to the scope of arbitration. Given the law’s permissive policies in respect
6 to arbitration,⁵ one can understand why the law would insist upon clarity before concluding the
7 parties did *not* want to arbitrate a related matter. *First Options of Chicago, Inc.*, 514 U.S. at 945, 115
8 S.Ct. at 1924, *citing Domke on Commercial Arbitration* §12.02, p. 156 (rev. ed. Supp. 1993) (issues
9 will be deemed arbitrable unless “it is clear that the arbitration clause has not included” them). On
10 the other hand, the former question—the “who primarily should decide arbitrability” question—is
11 rather arcane. A party often might not focus upon that question or the significance of having
12 arbitrators decide the scope of their own powers. *Id.*, 514 U.S. at 945, 115 S.Ct. at 1925, *citing Cox*,
13 “Reflections Upon Labor Arbitration,” 72 Harv.L.Rev. 1482, 1508-1509 (1959), *also cited in*
14 *Steelworkers*, 363 U.S. at 583 n.7, 80 S.Ct. at 1353 n.7. Given the principal a party can be forced to
15 arbitrate only those issues he or she specifically has agreed to submit to arbitration, one can
16 understand why courts, including this one, might hesitate to interpret silence or ambiguity on the
17 “who should decide arbitrability” point as giving the arbitrator that power, for doing so might too
18 often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an
19 arbitrator, would decide. *First Options of Chicago, Inc.*, 514 U.S. at 945, 115 S.Ct. at 1925; *also see*
20 *generally Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213-219-220, 105 S.Ct. 1238, 1241-1242,
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25 ⁴*See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353, 87
26 L.Ed.2d 444 (1985), *quoting Moses H Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103
27 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in
28 favor of arbitration.”).

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

1 84 L.Ed.2d 158 (1985) (FAA's basic purpose is to "ensure judicial enforcement of privately made
2 agreements to arbitrate").

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

6 The parties agree that the arbitrator ("Arbitrator"), and not any federal, state, or local court or
7 agency, shall have exclusive authority to resolve any disputes relating to the interpretation,
8 applicability, enforceability or formation of this Arbitration Agreement, including any claim
9 that all or any part of this Arbitration Agreement is void or voidable. The Arbitrator shall
10 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.

11 Movants argue the delegation clause provides the arbitrator shall have exclusive authority to resolve
12 disputes relating to the interpretation, applicability, enforceability or formation of the Arbitration
13 Agreement and such is completely severable from the "Terms & Conditions" and Arbitration
14 Agreement. That is, the delegation clause must be considered an agreement separate from the
15 Arbitration Agreement thus imparting the arbitrator's exclusive authority to resolve disputes relating
16 to the enforcement of the contract without undermining his jurisdiction to do so. While there is no
17 question it is severable from the Arbitration Agreement, the delegation clause cannot be read in a
18 vacuum as movants propose. It must be read in conjunction with the "Terms & Conditions" and
19 Arbitration Agreement which determines the scope of the arbitration or the particular merits-related
20 disputes the parties agreed to arbitrate. To allow otherwise would produce absurd results. It would
21 give the arbitrator unfettered, exclusive authority to interpret, apply and enforce the Arbitration
22 Agreement to include virtually any dispute a litigant or claimant may have with UBER
23 TECHNOLOGIES, INC. and RASIER, LLC. For example, applying the scenario movants urge this
24 Court to follow, a person who previously downloaded the Uber app onto his or her phone could be
25 forced to submit his personal injury claims caused by an *adverse* Uber driver to arbitration. A
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27
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1 person who provides supplies to UBER TECHNOLOGIES, INC. and/or RASIER, LLC that are
2 unrelated to movants' services described in the "Terms & Conditions" could be forced to submit his
3 business disputes to arbitration simply because he had an Uber rider app on his phone. Thus, while
4 there is no question the delegation clause provides the arbitrator exclusive authority to resolve
5 disputes relating to the interpretation, applicability, enforceability or formation of the Arbitration
6 Agreement, the arbitrator's authority is also limited to deciding those disputes identified within the
7 four corners of the "Terms & Conditions" and Arbitration Agreement. That is, he can determine
8 arbitrability of disputes or issues--unless "it is clear that the arbitration clause has not included"
9 them. First Options of Chicago, Inc., 514 U.S. at 945, 115 S.Ct. at 1924, *citing Domke on*
10 Commercial Arbitration §12.02, p. 156.
11

12 As set forth within this Court's August 28, 2020 decision, the "Terms & Conditions" identify
13 the "contractual relationship" of the parties within Section 1. It specifically states "[t]hese Terms of
14 Use...govern your access or use...of the applications, websites, content, products and services" as
15 more fully defined in Section 3 by UBER. "By accessing or using the Services, you confirm your
16 agreement to be bound by these Terms. If you do not agree to these Terms, you may not access or
17 use the Services." The "services," identified in Section 3, "comprise mobile applications and related
18 services..., which enable users to arrange and schedule transportation, logistics and/or delivery
19 services and/or to purchase certain goods, including with third party providers of such services and
20 goods under agreement with Uber or certain of Uber's affiliates...." The user of such "services"
21 acknowledges in capitalized wording "THE USE OF THE SERVICES DOES NOT ESTABLISH
22 UBER AS A PROVIDER OF TRANSPORTATION." (Emphasis in original)
23
24

25 By agreeing to the "Terms," the user agrees he/she is required to resolve any claim he/she
26 may have against UBER in arbitration as specified in Section 2 of the "Terms & Conditions." While
27 the first sentence of Section 2 indicates "you are required to resolve *any* claim that you may have
28

1 against Uber on an individual basis in arbitration,⁶ the term “any claim” is described and identified
2 “as set forth in this Arbitration Agreement.” The agreement to binding arbitration indicates the user
3 and UBER agree “any dispute, claim or controversy arising out of or relating to (a) these Terms or
4 the existence, breach, termination, enforcement, interpretation or validity thereof, or (b) your access
5 to or use of the Services at any time, whether before or after the date you agreed to the Terms, will
6 be settled by binding arbitration between you and Uber, and not in a court of law.” That is, the
7 agreement to arbitrate is limited to those disputes, claims or controversies arising out of or relating
8 to the Terms or use of movants’ Services—the use of which do not establish UBER as a provider of
9 transportation.
10

11 As previously set forth within the Court’s August 28, 2020 Order, MS. HAUFF’S personal
12 injury claims do not concern the mobile applications and related services which enabled MS.
13 HAUFF to arrange and schedule transportation as described within the parties’ “Contractual
14 Relationship.” Her disputes or claims do not arise out of or relate to the “Terms” or “Services”
15 described within Section 2, or Arbitration Agreement. MS. HAUFF is suing movants and MR.
16 HEWARD for alleged personal injuries she sustained in a motor vehicle collision caused by a driver
17 hailed through the Uber app; such claims are not included within the perimeters of the “Terms &
18 Conditions” or Arbitration Agreement and the arbitrator has no authority to conclude otherwise.
19

20 To be clear, there is no question the parties may agree to delegate the issue of arbitrability to
21 the arbitrator pursuant to the delegation clause. However, the delegation is limited to the parties’
22 issues and disputes relating to movants’ mobile applications and related services described in the
23 “Contractual Relationship.” To allow otherwise would force a party to arbitrate issues he or she had
24 not specifically agreed to submit to arbitration. Accordingly,
25

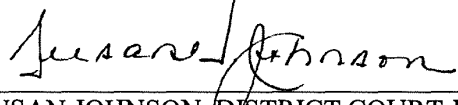
26 ...
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28 ⁶Emphasis added.

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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

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 Yolanda Hauff, Plaintiff(s)

CASE NO: A-20-809538-C

7 vs.

DEPT. NO. Department 22

8 Kevin Heward, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 10/16/2020

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1 CASE NO. A-20-810843-C

2 DOCKET U

3 DEPT. XVI

4

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6

DISTRICT COURT

7

CLARK COUNTY, NEVADA

8

* * * * *

9

MEGAN ROYZ,

)

10

Plaintiff,

)

11

vs.

)

12

MARC JACOBS,

)

13

Defendant.

)

14

15

REPORTER'S TRANSCRIPT

16

OF

17

MOTION

(VIA TELEPHONIC CONFERENCE CALL)

18

19

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

20

DISTRICT COURT JUDGE

21

22

DATED TUESDAY, OCTOBER 27, 2020

23

24

25

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

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Pursuant to NRS 239.053, illegal to copy without payment.

000287

1 APPEARANCES:

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

4

5

6 FOR THE PLAINTIFF:

6

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15 FOR THE DEFENDANT:

16

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

17

BY: RYAN GORMLEY, ESQ.

18

BY: LEE ROBERTS, ESQ.

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Pursuant to NRS 239.053, illegal to copy without payment.

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1 LAS VEGAS, NEVADA, TUESDAY, OCTOBER 27, 2020

2 1:16 P.M.

3 P R O C E E D I N G S

4 * * * * *

01:16:07

5
6 THE COURT: Okay. I'd like to say good
7 afternoon to everyone. And this is the time set for
8 the afternoon 1:15 p.m. October 27th, 2020, law and
9 motion calendar. We have one matter on calendar this
10 afternoon and that happens to be Megan Royz versus Marc
11 Anthony Jacobs, et al. And let's go ahead and place
12 our appearances on the record we'll start first with
13 the plaintiff and then we'll move to the defense.

14 MR. QUIRK: Trevor Quirk for plaintiffs.

01:16:41

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

18 MR. ROBERTS: Good afternoon, your Honor.

01:16:58

19 THE COURT: Good morning to everyone. I mean,
20 good afternoon.

21 And as we all probably know now we're
22 connected via audio on BlueJeans working remotely. And
23 what we'll try to do is take our time as far as making
24 a record in this matter. We do have a court reporter
25 available, and that's Ms. Peggy Isom. And my first

01:17:12

01:17:16 1 question is this: Does anyone want to have this matter
2 court reported?

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

01:17:25 5 THE COURT: Okay, sir. We'll do that.

6 MR. GORMLEY: Thank you.

7 THE COURT: Everyone's appearances on the
8 record.

9 THE COURT REPORTER: I got the appearances,
01:17:32 10 Judge.

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

12 And what we'll try to do just take our time
13 because for whatever reason, especially with the
14 computerized link, from time to time it will cut us
01:17:50 15 off. And I don't know why it does that.

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

01:18:01 20 THE COURT REPORTER: Judge, you are cutting
21 out.

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

24 And it's my understanding we have defendant's
01:18:11 25 motion to reconsider; is that correct?

01:18:14 1 MR. QUIRK: Yes, your Honor.

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

4 MR. GORMLEY: Great. This is Ryan Gormley for
01:18:22 5 defendants. As you just mentioned, this is Uber's
6 motion for reconsideration of the Court's order denying
7 Uber's motion to compel arbitration. I have an
8 argument prepared but before delving into that, I was
9 wondering if the Court had any questions they would
01:18:40 10 like me to address off the bat before going into the
11 argument.

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

01:18:50 15 MR. GORMLEY: Okay.

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

01:19:01 20 MR. GORMLEY: Okay. Great. So I'll go into
21 what I have prepared. So basically today I was hoping
22 to cover four issues. So start with the first one is
23 pretty brief. It's why this motion should be
24 considered. And, your Honor, we're not making a new
01:19:17 25 argument in bringing this motion for reconsideration.

01:19:20 1 We're simply honing in on a nuanced legal issue.

2 There's really no question that reconsideration is
3 procedurally appropriate under Nevada precedent.

4 And, candidly, we just thought it was more
01:19:36 5 fair to file this motion now than rush to an
6 interlocutory appeal. So that's why we brought this
7 motion and why we think it should be considered on the
8 merits, and there's no bar against doing so.

9 So moving into the second main issue is why
01:19:59 10 reconsideration is warranted. And I think to answer
11 that it's helpful to actually go back in time a little
12 bit before the Supreme Court's opinion in Henry Schein
13 in 2019 which, as you saw in the briefing, is a case we
14 cited to numerous times.

01:20:14 15 So prior to Henry Schein in determining
16 whether to enforce delegation clauses in arbitration
17 agreements there is a circuit split --

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

23 MR. GORMLEY: Yeah. No problem. I appreciate
24 that, your Honor. Hopefully, hopefully what I'm saying
01:20:41 25 is worthwhile so, one, it doesn't get cut off, I'll be

01:20:46 1 willing to say it again. So no problem.

2 So I just said prior to the Henry Schein in
3 2019 there was a circuit split on how to enforce
4 delegation clauses in arbitration agreements.

01:20:59 5 And at least three circuits recognized the
6 wholly groundless exception. So what that means is the
7 courts would ask five questions when it came to enforce
8 the delegation clause.

9 One, is there an arbitration agreement under
01:21:14 10 the FAA?

11 Two, does it contain a delegation clause?

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

14 Four, is the severable delegation clause
01:21:31 15 conscionable?

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

01:21:47 20 In Henry Schein, the Supreme Court had to
21 decide if that five question, the wholly groundless
22 exception, is actually a legitimate question under the
23 Federal Arbitration Act. And the court came in and
24 said that there's no basis for that question, and it
01:22:03 25 abrogated the wholly groundless inquiry.

01:22:06 1 So what that means today, it means that a
2 court cannot look to the scope of the arbitration
3 agreement to decide whether to enforce the delegation
4 clause.

01:22:18 5 Now, in Henry Schein in an effort to save that
6 exception, the respondents made all the policy
7 arguments they could come up with, which would have
8 been expected from high level appellate counsel that
9 have been retained for the Supreme Court briefing and
01:22:36 10 argument.

11 They argued that eliminating that inquiry
12 would result in grave inefficiency. They argued it
13 would promote frivolous motions to compel as a tactic
14 by large corporations and raise various other types of
01:22:51 15 sky-is-falling arguments.

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

01:23:06 20 So since Henry Schein in 2019, that means all
21 courts interpreting any arbitration agreement and
22 delegation clause only look -- can only look to those
23 first four questions.

24 And I think I quote from the Fifth Circuit in
01:23:26 25 Kubala, that's 830 F.3d at 202 and cited in our papers

01:23:33 1 really brings this to a fine point. So I'm going to
2 read that. It says, quote:

3 "But the only question after finding that
4 there is, in fact, a valid agreement is whether
01:23:45 5 the purported delegation clause is, in fact, a
6 delegation clause. That is if it evidences an
7 intent to have the arbitrator decide whether a
8 given claim must be arbitrated.

9 "If there is a delegation clause, the
01:24:01 10 motion to compel arbitration should be granted
11 in almost all cases."

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

01:24:16 15 "The only exception for why it shouldn't be
16 granted is the wholly groundless exception."

17 And that's because the Fifth Circuit
18 recognized the wholly groundless exception and Kubala
19 was decided in 2016. But since Henry Schein the wholly
01:24:32 20 groundless exception has been abrogated, so now the
21 only reason not to enforce a delegation clause is no --
22 is no longer a valid reason.

23 So with that, I'm just going to turn to those
24 four questions as applied to the facts here. So the
01:24:52 25 first one is there an arbitration agreement under the

01:24:57 1 FAA? And that's yes as to both plaintiffs. There's
2 really been no argument raised that there's not an
3 arbitration agreement under the FAA at issue here.

4 Second, does it contain a delegation clause
01:25:13 5 that delegates threshold questions of arbitrability to
6 the arbitrator? And that is also yes as to both
7 plaintiffs.

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

14 So that leads to the third question, is this
01:25:50 15 delegation language clear and unmistakable? And the
16 answer to that is yes.

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

01:26:05 20 MR. GORMLEY: Okay.

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

24 MR. GORMLEY: Yeah. So the second question is
01:26:16 25 does it contain a delegation clause that delegates

01:26:22 1 special questions of arbitrability? And the answer as
2 to both plaintiffs is yes.

3 The delegation clause consists of two
4 paragraphs. The first paragraph delegates the
01:26:35 5 authority to decide threshold questions of
6 arbitrability to the incorporation of the AAA rules.
7 And the second paragraph does so explicitly. And those
8 paragraphs are cited or quoted verbatim on page 10 of
9 the motion.

01:26:53 10 So then the third question is, is this
11 delegation language clear and unmistakable? And the
12 answer is yes, as to both paragraphs separately. And
13 when they're combined as they are here, it makes it all
14 the more clear.

01:27:09 15 So the first paragraph incorporates the AAA
16 rules. Every circuit to have faced this issue, which
17 is 11 out of 12 so far, has determined that this
18 language, this same language is clear and unmistakable.

19 And that was dated as recently as 2020 by the
01:27:30 20 Sixth Circuit in Blanton.

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

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

01:28:15 25 The second paragraph, so you heard where I

01:28:18 1 talked about the AAA language?

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

01:28:37 5 So the first paragraph incorporates the AAA
6 language, and the second paragraph explicitly delegates
7 threshold questions of arbitrability to the arbitrator.
8 And these paragraphs are quoted verbatim on page 10 of
9 the motion.

01:28:58 10 So that leads us to our third question, which
11 is: Is this delegation language clear and
12 unmistakable? And the answer to that is "yes". When
13 it comes to the AAA language in the first paragraph,
14 every circuit to have faced this issue, 11 out of 12,
01:29:16 15 has determined that this AAA language is clear and
16 unmistakable. And now that was found as recently in
17 2020 by the Sixth Circuit in Blanton.

18 And then moving to the second paragraph, the
19 explicit language, this is the same explicit language
01:29:36 20 that was deemed as clear and unmistakable by the
21 Supreme Court in the Rent-A-Center and has also been
22 deemed clear and unmistakable by numerous courts
23 including the Fifth Circuit in Kubala.

24 So even taking -- if the delegation clause
01:29:54 25 only contained one of those paragraphs, there would

01:29:57 1 still be clear and unmistakable. But the fact that it
2 contains both makes it all the more clear and
3 unmistakable. And this isn't surprising because the
4 language was carefully drafted to adhere to the law
01:30:10 5 which is why it's been enforced in numerous courts
6 around the country, and that we've cited to some of
7 those -- some of those cases in the papers.

8 So and on this third inquiry whether the
9 delegation language is clear and unmistakable this is
01:30:29 10 respectfully, your Honor, where it appears that the
11 Court's order went awry. It identified the clear and
12 unmistakable inquiry. But then instead of just looking
13 at the delegation language, it looked to Section 6 of
14 the terms and conditions. And it said that based on
01:30:46 15 Section 6:

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

01:30:59 20 So there's a few issues with this. The first
21 one is that this usurps the arbitrator's authority to
22 decide the scope of the arbitration agreement under the
23 delegation clause.

24 And the reasoning is circular because it's
01:31:16 25 essentially deciding that the arbitrator does not have

01:31:20 1 authority to decide the scope of the arbitration
2 agreement by determining the scope of the arbitration
3 agreement. And this same argument was made to the
4 Sixth Circuit in Blanton.

01:31:35 5 And what the Court said in response was:

6 "And on its own terms, plaintiffs' reading
7 of the agreement doesn't make much sense. He
8 reads the agreement to say that the arbitrator
9 shall have the power to determine the scope of
01:31:50 10 the agreement only as to the claims that fall
11 within the scope of the agreement. Yet that
12 reading would render the AAA jurisdictional
13 rule superfluous."

14 So that is the -- that's exactly what happened
01:32:07 15 here. And in doing so, it also renders the delegation
16 clause superfluous.

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

19 MR. GORMLEY: Yeah. I said -- I closed the
01:32:21 20 quote on Blanton. And I said that, essentially, the
21 Court -- the Court's ruling here also had the same
22 effect. It rendered the delegation clause language
23 superfluous.

24 And then the Court's reasoning is also
01:32:41 25 essentially equivalent to the wholly groundless

01:32:44 1 exception that was abrogated in Henry Schein because
2 the Court is determining that the arbitration agreement
3 does not apply instead of letting the arbitrator decide
4 the scope based on the delegation clause.

01:32:58 5 And there's really no support for the inquiry
6 that the Court performed especially since Henry Schein
7 was decided.

8 And there's also one factual issue so with the
9 Court's holding is that it references Section 6 from
01:33:17 10 the terms. But Section 6 was from the February 2015
11 terms. And the applicable terms to both plaintiffs
12 were the November 2016 terms, not the February 2015
13 terms. But this is sort of besides the point because
14 the Court's inquiry shouldn't even go to looking
01:33:38 15 outside the delegation clause as that's been -- that
16 authority has been delegated to the arbitrator.

17 So moving to the fourth and last question. Is
18 this severable delegation clause conscionable? And
19 that's also, "yes". It's important that this inquiry
01:33:58 20 only focuses on the delegation clause. It doesn't
21 focus on -- it doesn't relate to conscionability of the
22 terms. It doesn't concern the conscionability of the
23 arbitration agreement.

24 It doesn't concern the conscionability of the
01:34:14 25 personal injury dispute being arbitrated.

01:34:16 1 It only focuses on whether the delegation
2 clause is enforced for an arbitrator to decide
3 threshold questions of arbitrability. And so in the
4 briefing all the plaintiffs' arguments generally relate
01:34:32 5 to the personal injury law in the underlying dispute.
6 And that has nothing to do with the question at hand.
7 And the answer as to whether the severable delegation
8 clause is conscionable is a resounding yes.

9 So since the wholly groundless exception has
01:34:51 10 been abrogated as decided by the Sixth Circuit this
11 basically is one of those cases that must be sent to
12 arbitration for the arbitrator to decide the threshold
13 questions of arbitrability. And there's really no --
14 they're all legal questions that are bound by
01:35:09 15 precedent. And there's no room for really any
16 discretion in that decision.

17 So moving to the -- quickly moving to the
18 third issue is just as we pointed out as plaintiffs
19 brought up in their opposition and we discussed more at
01:35:27 20 length in our reply, Department 22 has faced the same
21 issue recently and denied the motion for
22 reconsideration.

23 THE COURT: Wait, wait, wait. I don't want to
24 cut you off but I think you dropped. You said the
01:35:39 25 department, and then it dropped from what I can tell.

01:35:42 1 But go ahead, sir.

2 MR. GORMLEY: Oh, I just said as for the third
3 issue I want to discuss just quickly is we pointed
4 out -- discussed it in the reply, but Department 22
01:35:53 5 recently faced the same issue on a motion for
6 reconsideration and denied it. And just wanted to
7 highlight again why this Court should not follow
8 Department 22's lead. Department 22's reasoning
9 suffered from the same circular type of reasoning that
01:36:11 10 I just discussed.

11 And it also essentially brought back to life
12 the wholly groundless exception that's been abrogated
13 and rendered the delegation clause superfluous by
14 taking that -- by taking those questions out of the
01:36:28 15 arbitrator's hands and deciding it on its own. And the
16 motivation for the Court was the belief that not doing
17 so would be absurd. The quote -- the Court stated in
18 the order it would give the arbitrator unfettered
19 exclusive authority to interpret, apply, and enforce
01:36:47 20 the arbitration agreement to include virtually any
21 dispute a litigant or claimant may have with Uber or
22 Raiser.

23 But the issue is those are the exact same
24 policy arguments that were explicitly rejected by the
01:37:03 25 United States Supreme Courts in *Henry Schein*. They're

01:37:07 1 the same arguments I discussed earlier. And one quote
2 from Henry Schein that particularly applies is the
3 Court stated that arbitrators can efficiently dispose
4 of frivolous cases by quickly ruling that a claim is
01:37:22 5 not, in fact, arbitrable. So the concern of frivolous
6 motions or the concern of things going to the
7 arbitrator instead of being decided by the Court is not
8 a legitimate concern under Henry Schein.

9 So, and then moving to the last issue is,
01:37:43 10 quickly, why is there no basis for a waiver discovery.
11 In the opposition plaintiff asks for discovery as to
12 whether Uber sought to compel arbitration in different
13 actions with different parties and different facts to
14 potentially make a waiver argument.

01:38:02 15 There's no legal support for waiver discovery
16 in cases featuring different parties and different
17 facts. This argument was raised in the Central
18 District of California once, and the court called it
19 absurd and that authority cited in the reply brief.

01:38:18 20 And the plaintiff cites the one case in
21 support of the argument Principle Investments vs.
22 Harrison. But there the corporation Rapid Cash sued
23 debtors in court, and then sought to send those same
24 debtors to arbitration. Thus, the waiver that was
01:38:38 25 found stemmed from proceedings involving the same

01:38:41 1 parties and facts. And here that would not be the
2 case, so there's really no basis for that request.

3 So with that, your Honor, we submit that the
4 motion should be granted. And plaintiffs' claims
01:38:57 5 against Uber and its affiliated entities should be sent
6 to arbitration. The case should be stayed pending the
7 arbitration and plaintiffs' request for waiver
8 discovery should be denied.

9 Do you have any questions?

01:39:16 10 THE COURT: Just, I just want to make sure I
11 have the right case. And because I think I've had this
12 issue a couple of times. And is there an issue as to
13 whether or not we have two parties to this case? We
14 have Megan Royz and Andrea Eileen Work. And wasn't --
01:39:40 15 was there an issue as to whether or not, for example,
16 one of them would come under the arbitration provision
17 because they were not the individual that employed, for
18 lack of a better term, Uber at the time of this
19 accident?

01:40:01 20 MR. GORMLEY: Right. They were both
21 passengers. My understanding is they were both
22 passengers in this same vehicle. And there's the
23 allegation that only one of them would have actually
24 requested the ride under the Uber app. Is that what
01:40:16 25 you're referring to?

01:40:18 1 THE COURT: That's exactly it, sir.

2 MR. GORMLEY: Okay. Yeah. And so when it
3 comes to that, all of that analysis is for the
4 arbitrator. So that the inquiry for the Court is the
01:40:31 5 same for both. The arbitrator might view that
6 differently when it comes to whether -- may or may not
7 view it differently when it comes to whether the
8 delegate -- the arbitration applies to them.

9 But when it comes to the Court's inquiry, the
01:40:51 10 delegation clause instructs that only the arbitrator
11 has the authority to decide the scope and applicability
12 of the arbitration agreement. So those sort of
13 background facts don't have any impact on what the
14 Court's inquiry is today.

01:41:13 15 THE COURT: Would the Court be -- would a
16 court under those circumstances where, for example,
17 there was no contract triggered, why wouldn't a court
18 make some sort of initial inquiry as to whether or not
19 there was a valid and existing contract as a condition
01:41:32 20 to triggering the delegation clause pursuant to the
21 arbitration agreement?

22 MR. GORMLEY: If the argument is, is there a
23 valid contract, meaning a contract that's been signed
24 by the parties, then that is -- that does fall under
01:41:52 25 the Court's jurisdiction to decide.

01:41:57 1 But here that argument wasn't necessarily
2 raised. It was more looking at the terms of the
3 arbitration agreement and whether it applies to the
4 person who did not request the ride.

01:42:17 5 Here it seems it's undisputed that the
6 plaintiff that did not request the ride has entered
7 into an arbitration agreement and has had executed that
8 arbitration agreement.

9 THE COURT: And I just want to make sure the
01:42:35 10 record is real clear, and I think this is important
11 because I think you cut off for a second.

12 But I'm just trying to -- it's been a while
13 since I looked at this issue. I don't know if I've had
14 other cases. But say hypothetically you have this
01:42:47 15 scenario. There's a service agreement between AT&T.
16 And we have the AT&T Concepcion case which, really and
17 truly, I think is a landmark case as far as the
18 application of the Federal Arbitration Act. And it's
19 my recollection it dealt specifically with a decision
01:43:11 20 by the California Supreme Court. This is going back
21 maybe 8, 10, 12 years ago. I forget the exact time
22 period, but you have that, right? And it's pretty
23 clear. And it dealt with class action cases and so on.
24 And this is just off of rote memory. I haven't read
01:43:25 25 that case in quite a while.

01:43:26 1 But here's my point: Say you have your
2 telephone or cellular service with AT&T, they're
3 driving down the street and lo and behold they're rear
4 ended by an AT&T truck, right? Under those
01:43:43 5 circumstances, would the trial court be required to
6 make a threshold determination as to whether or not
7 this "arbitration provision" as it pertains to services
8 under the agreement for cell service would apply --
9 (telephonic audio glitch) --

01:44:06 10 Okay. What did you -- what did I leave off
11 at, Peggy? I'll just say it again.
12 Would the judge have to make an initial
13 inquiry as to whether or not the terms and conditions
14 as it relates to the service agreement would --
01:44:21 15 between, say, the driver of the motor vehicle and AT&T
16 vis-à-vis the service agreement whether that even
17 applies to the facts of that case.
18 MR. GORMLEY: I -- I think I heard the
19 buildup, your Honor, of what -- in the AT&T but I think
01:44:48 20 it cut out a little bit in the --
21 THE COURT: I understand. And I don't want to
22 cut you off. This is what I'm thinking. Because
23 here's my scenario. You have a rear end motor vehicle
24 accident. Clearly, there is a service agreement and
01:45:00 25 the AT&T is the carrier for the plaintiff, that's an

01:45:03 1 operator of a motor vehicle; right?

2 And so if they're involved, and, say, they
3 were involved in a rear end motor vehicle accident with
4 a company vehicle owned by AT&T, would that service
01:45:19 5 contract and its applicability even if it had a
6 delegation clause be decided by the trial court?

7 MR. GORMLEY: And even -- as silly as the
8 answer may seem, your Honor, is that if their service
9 agreement with AT&T had a delegation clause like the
01:45:41 10 one at issue here, then and AT&T made the argument that
11 should -- that under that there should be -- the case
12 should go to arbitration, it would be -- that would
13 delegate the authority to make that scope determination
14 to the arbitrator.

01:45:59 15 And that's the exact type of policy arguments
16 that the Supreme Court wrestled with in Henry Schein
17 and that the other side made. I have the respondents'
18 brief in Henry Schein here, and they --

19 THE COURT: Sir. You're like me. You
01:46:18 20 dropped. You said, "the other side", and then you
21 dropped.

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

24 You heard me -- you heard me answer the
01:46:33 25 question. And then I was saying that the other side in

01:46:36 1 Henry Schein made those arguments; does that sound
2 right?

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

01:46:43 5 MR. GORMLEY: I was saying it would --
6 basically that would be a question for the arbitrator
7 under Henry Schein. The respondent in Henry Schein
8 made those same type of arguments and in their
9 answering brief they painted the same type of pictures
01:47:00 10 of that that, you know, if you have contracts with
11 entities completely unrelated to the situation, then
12 that would still -- they could still try to delay the
13 case by -- by sending some scope determination to
14 arbitration.

01:47:21 15 But the Court said that that's not -- that's
16 not the Court's concern under the Federal Arbitration
17 Act, and the Federal Arbitration Act doesn't allow that
18 inquiry. And essentially to the extent it becomes too
19 many frivolous motions to compel arbitration, then that
01:47:41 20 would be something for the legislature to deal with.

21 I'd also want to point out too as it applies
22 to the passenger who did not request the ride is we
23 make an argument in Footnote 6 in the motion pointing
24 out that that passenger would also be a third party
01:48:03 25 intended beneficiary under the passenger who did

01:48:08 1 request the ride. So under that doctrine, there's also
2 another basis that, that there was an arbitration
3 agreement in place and the delegation clause applies to
4 both plaintiffs.

01:48:27 5 THE COURT: Here's my --

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

8 THE COURT: I'm sorry. Okay. The third-party
9 beneficiary issue, I'm trying to figure out what would
01:48:45 10 be the basis for that. Because at the end of the day I
11 would anticipate you'd have to have as a threshold
12 question an enforceable contract in place; right? And
13 so I'm trying to -- (telephonic audio glitch) -- how
14 you have a third-party beneficiary that results in
01:49:09 15 waivers of specific rights under the Seventh Amendment
16 of the United States Constitution and also under the
17 Nevada Constitution as it relates to a right to a jury
18 trial.

19 To me, it seems like that one would be a
01:49:22 20 stretch.

21 MR. GORMLEY: Your Honor. I think it's -- I'm
22 not sure if any cases has resolved that issue before.
23 Here I think the first inquiry is you don't need to
24 resolve it because they both have delegation clauses
01:49:49 25 that would result in this scope determination being

01:49:54 1 sent to the arbitrator.

2 But that fits into a tough issue of the
3 delegation clause doesn't only delegate the authority
4 to determine the scope, it also delegates the authority
01:50:12 5 to determine enforceability and all other questions of
6 contract formation.

7 So the Court having to do -- attempting to do
8 so in order to rule on the third-party beneficiary
9 argument would also be usurping the arbitrator's
01:50:33 10 authority to do so.

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

01:50:44 15 MR. GORMLEY: I think --

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

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

01:50:59 20 THE COURT: Okay.

21 MR. GORMLEY: Which --

22 THE COURT: Go ahead.

23 MR. GORMLEY: No I was just going to say --
24 but if just -- I wasn't sure if you were referring to
01:51:06 25 clear and unmistakable or conscionability.

01:51:10 1 THE COURT: Conscionability.

2 MR. GORMLEY: Okay.

3 THE COURT: How do I make that determination?

4 MR. GORMLEY: What's the inquiry for the

01:51:21 5 determining the conscionability?

6 THE COURT: Yes.

7 MR. GORMLEY: The -- it's laid out in our

8 reply. The -- it's a normal evaluation under Nevada

9 law looking at procedural and substantive

01:51:39 10 unconscionability principles. But the key is that it

11 only focuses on the delegation clause.

12 THE COURT: No, I understand that.

13 MR. GORMLEY: Yeah.

14 THE COURT: So for -- fascinating. And

01:51:55 15 understand this. I know Mr. Roberts understands this.

16 I have no problems with motions for reconsideration, I

17 just don't, as a threshold question.

18 Secondly, what other trial judges do, I really

19 don't pay much attention to. What I try to do is I try

01:52:12 20 to dig down deep and into the issues as they're being

21 presented and then make my best call.

22 And that is this, and this is what I find so

23 fascinating by this issue. It appeared to --

24 (telephonic audio glitch) --

01:52:32 25 MR. GORMLEY: You cut out at "fascinating".

01:52:34 1 THE COURT: Okay. Yeah. What I find
2 fascinating about this motion and that recent US
3 Supreme Court case in this regard. And if my
4 recollection is incorrect, I have no problem with
01:52:47 5 saying, Judge, that's not exactly how it happened. But
6 it's been a while since I raised -- I mean, I've read
7 the AT&T case coming out of California. But it's --
8 (telephonic audio glitch) --

9 And that's why I'm going real slow, Peggy.
01:53:11 10 It's my recollection in the AT&T case one of
11 the issues that was raised by the California Supreme
12 Court was unconscionability, both procedural and
13 substantive; right?

14 MR. GORMLEY: Right.

01:53:31 15 THE COURT: Now, and to a general extent, our
16 US Supreme Court took that off the table. But it
17 appears now at this stage of the Federal Arbitration
18 Act, and when it deals specifically with delegation,
19 that procedural and substantive unconscionability are
01:54:00 20 on the table as part four of my analysis.

21 Does that make sense?

22 MR. GORMLEY: I'm not exactly versed in
23 your -- in your recall of the AT&T Concepcion case, but
24 it -- under the Rain for Rent decision, which is sort
01:54:24 25 of the precedential leading decision in 2010 that

01:54:28 1 decided that the delegation clauses are completely
2 severable, the court does reference how courts can look
3 to the conscionability of the severable delegation
4 clause. And the court kind of -- courts have done
01:54:45 5 that.

6 (Reporter clarification)

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

01:55:11 10 THE COURT: I understand, sir. Those are all
11 the questions I have.

12 At this point we'll hear from the plaintiff.

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

01:55:21 15 I think, as I'm listening to your conversation
16 with Uber's counsel that you've hit the nail on the
17 head, if you will, because there is -- there is no end
18 under Uber's analysis. And your recollection of this
19 case, Judge, is correct in that here Ms. Royz is the
01:55:47 20 one who ordered the Uber. Her friend just happened to
21 have an Uber app on her phone. And Uber concedes to
22 you just because Ms. Work happens to have an Uber app
23 on her phone that she is bound by this arbitration
24 agreement just by virtue of having her -- this
01:56:13 25 application on her phone. And that makes no sense I

01:56:20 1 think to the average person. And it -- and it doesn't
2 pass muster according to the court.

3 And the courts have looked at this. And when
4 you looked at this previously, they say what is it that
01:56:36 5 you are agreeing to arbitrate. Because the arbitrator
6 can only resolve the disputes that the people have
7 agreed to arbitrate. You have to look within the four
8 corners of the arbitration agreement and determine what
9 it is that you're agreeing to arbitrate.

01:56:59 10 And that's what you already did, your Honor.
11 You looked at it. You said the terms and conditions of
12 the arbitration agreement specifically exclude personal
13 injury claims because it states as much in the
14 arbitration agreement. And you said this matter is not
01:57:18 15 subject to arbitration. And so I think for Uber to
16 stretch their argument to include something that they
17 specifically previously excluded, it doesn't -- it
18 doesn't pass muster. So I think your initial
19 inclination was right.

01:57:43 20 The other thing I heard counsel state is that
21 he kept referring to the Schein case, the Supreme Court
22 case. And that case specifically states that the --
23 under the Federal Arbitration Act the Court is to look
24 and determine -- let me find the quote. Oh, there it
01:58:10 25 is.

01:58:18 1 "Is that the dispute or controversy must
2 arise out of the contract in which the
3 arbitration agreement exists."

4 That -- so even under the most recent Supreme
01:58:33 5 Court case, this dispute or controversy does not arise
6 out of the arbitration agreement because then, again,
7 you go back to the terms and conditions of the
8 contract.

9 So this matter should not be sent to San
01:58:45 10 Francisco to have an arbitrator determine the
11 arbitrability of a personal injury case when Uber's own
12 arbitration agreement says that this matter is not
13 subject to arbitration according to its terms and
14 conditions.

01:59:18 15 THE COURT: Anything else?

16 MR. QUIRK: No.

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

01:59:26 20 All right. We'll hear from the moving party.

21 MR. GORMLEY: Hello. Can you hear me?

22 THE COURT: Yes, sir, we can.

23 MR. GORMLEY: I think it -- the plaintiffs'
24 counsel's last argument might have cut off, so I wasn't
01:59:52 25 able to --

01:59:53 1 THE COURT: If you didn't hear it, sir, we'll
2 go ahead back to Mr. Quirk and have Mr. Quirk, I guess,
3 summarize that last sentence or two for the record so
4 you have a fair and full opportunity to respond.

02:00:10 5 MR. QUIRK: Okay. I guess I can just restate
6 what I was stating earlier.

7 And that is that, look, un -- plaintiffs in
8 this case, Ms. Royz and Ms. Works, can only be required
9 to submit to arbitration a dispute that they've agreed
02:00:27 10 to arbitrate.

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

02:00:42 15 That's what the Schein case says. And if you
16 follow the Court's previous analysis that it did
17 correctly here that under this arbitration agreement,
18 the parties did not specifically agree to arbitrate
19 personal injury disputes because they were specifically
02:01:04 20 excluded under the terms and conditions section of the
21 contract.

22 So the Court is correct to make that initial
23 inquiry because otherwise anything would be subject to
24 arbitration like any case. And that makes no sense --
02:01:23 25 it's just not reasonable for that to happen.

02:01:28 1 So I don't know if that was the first or last
2 argument that I made, but that's the basic premise of
3 the argument. And I think it gets to the heart of what
4 we've been discussing.

02:01:40 5 MR. GORMLEY: And this is Uber's counsel
6 again. Thank you for that. That was the part that got
7 cut off. That, I was able to hear that now.

8 So the -- quickly, your Honor, I wanted to
9 make one point about AT&T. I quickly sort of refreshed
02:02:03 10 my recollection on that. And the key inquiry in AT&T
11 was that unconscionability can't be determined based on
12 the sort of, for lack of a better term, natural aspects
13 of arbitration. The fact that it's being decided by an
14 arbitrator instead of a jury or a judge and things like
02:02:26 15 that.

16 But it didn't -- it didn't eliminate the
17 unconscionability inquiry. It only said that you can't
18 take the innate aspects of arbitration and use those as
19 arguments to argue that an arbitration agreement is
02:02:45 20 unconscionable is my understanding of the holding for
21 Concepcion.

22 THE COURT: Well --

23 MR. GORMLEY: And --

24 THE COURT: I don't want to cut you off, sir,
02:02:54 25 I really and truly don't. But the reason why I brought

02:02:58 1 that up if that's the fourth prong of my analysis, I
2 guess, in many respects I have to look at the
3 delegation. This is what it seems to me. Because I
4 understand unconscionability as it relates to
02:03:14 5 arbitration.

6 This is why I bring up the AT&T Concepcion
7 case. And understand I haven't read it in a long time.
8 And this is more of a thumbnail-type recollection and
9 analysis. One of the issues as it pertained to that
02:03:31 10 specific case that the California Supreme Court focused
11 on as a basis in denying the motion as it related to
12 arbitration in a class action case was essentially
13 this: The provisions under the search. -- (telephonic
14 audio glitch) -- the contract. They made a
02:03:53 15 determination.

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

02:04:11 20 And so my question is this -- I'm glad we're
21 spending a lot of time on this because I've had a
22 chance to sit back and really reflect. If I'm
23 making -- if I'm called to make an unconscionability
24 evaluation -- (telephonic audio glitch) --

02:04:25 25 Okay. If I'm -- hopefully, you heard me from

02:04:30 1 here. If I'm called to make an unconscionability
2 determination as it relates to factor No. 4, does that
3 open up the door for me to look at the terms of the --
4 only the delegation clause? And it seems to me if
02:04:51 5 that's the case then, shouldn't the delegation clause
6 include things like in the delegation clause regarding
7 waiver for right to a trial by a jury and/or by the
8 Court? And those specific issues will be determined by
9 the arbitrator.

02:05:26 10 You see where I'm going on that?

11 MR. GORMLEY: I see where you're going. I
12 mean, for that specifically, for instance, that can --
13 that issue of taking the question out of a jury's hands
14 can never be a part of the unconscionability assessment
02:05:48 15 because that's what Concepcion prohibited because that
16 is essentially being -- prejudicing arbitration which
17 the Federal Arbitration Act and the Courts that have
18 interpreted it have prohibited it.

19 THE COURT: No, no. I think you're missing
02:06:09 20 what I'm really pointing to. And maybe it's unclear.

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

24 MR. QUIRK: Your Honor, this is Trevor Quirk
02:06:33 25 for plaintiff. You do exactly what First Options of

02:06:36 1 Chicago at the Supreme Court, the United States Supreme
2 Courts case said to do. And it says you look at and
3 determine arbitrability of this dispute because it's
4 clear in this case that the arbitration clause has not
02:06:52 5 included personal injury disputes.

6 It's in the terms and conditions of that
7 dispute. You don't even need to get into that through,
8 in my view, the unconscionability aspect because the
9 arbitration agreement states on its face what is
02:07:09 10 arbitrable.

11 Uber can't -- like, if we're delivering paper
12 to Uber today, and I have an Uber app on my phone, and
13 something happens, Uber could -- according to Uber's
14 analysis -- could say, Well, you've got to go to
02:07:25 15 San Francisco and have a arbitrator say, Well, it's not
16 subject to arbitration. That makes -- it's illogical.
17 There has to be some end to this.

18 And that's what the Court said in First
19 Options of Chicago. It says unless it's -- it is clear
02:07:39 20 that the arbitration clause has not included the
21 dispute, then you can make that decision. Judge. It
22 allows you to make this decision on its face.

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

02:07:55 25 MR. QUIRK: The First Options of Chicago case,

02:07:58 1 it's a United States Supreme Court case, states that
2 the issue of arbitrability can be decided by a Court if
3 it's clear that the arbitration agreement did not
4 include the subject matter that's about to be
02:08:18 5 arbitrated. And in this instance it's very clear.

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

8 MR. GORMLEY: Your Honor, this -- counsel for
9 Uber. I believe, the reference Mr. Quirk's making the
02:08:34 10 First Option is sort of that provisional two-part test
11 most cases open with where they say the Court
12 determines the validity, and the Court determines the
13 scope. And that's what First Options is widely cited
14 for and is regularly cited for.

02:08:51 15 But the problem is here when there is a
16 delegation clause that test doesn't apply. Only the
17 first part does. And that -- that was our first
18 question in the four questions we set forth.

19 But when there's a delegation clause, that
02:09:04 20 jumps in before the Court gets the chance to determine
21 the scope of the agreement. And then you just go
22 through that inquiry as to the enforceability of the
23 delegation clause.

24 So, respectfully, First Option, that language
02:09:20 25 from First Option is inapplicable here because there is

02:09:23 1 a delegation clause. And the Rent-A-Center decision in
2 2000 and Henry Schein in 2019, and New Prime and also
3 in 2019 are more applicable to that, the facts at issue
4 here.

02:09:40 5 And in terms of the absurdity argument, you
6 know, I don't want to say this and insinuate that
7 our -- Uber's argument at issue in this case in terms
8 of scope are absurd because in my opinion they're not.
9 And we think an arbitrator will agree with them.

02:10:05 10 But either way, it's a question for the
11 arbitrator. And I have -- this is the exact slippery
12 slope argument that Henry -- the Supreme Court dealt
13 with in Henry Schein, and that was the unanimous
14 opinion deciding that it doesn't have any merit because
02:10:28 15 under the language of the FAA that when there's an
16 enforceable delegation clause then it delegates that
17 authority to the arbitrator to determine the scope of
18 the agreement.

19 And if it's frivolous, then the arbitrator can
02:10:49 20 decide it. And depending on what court you're in, the
21 arbitrator probably makes that decision quicker than
22 the court would.

23 So there's really -- this idea that being --
24 that sort of outrageous scenario just doesn't, doesn't
02:11:09 25 really have merit because the arbitrator can do the

02:11:11 1 same thing that the Court can do potentially for less
2 money and faster, which is why, one of many reasons why
3 arbitration agreements in delegation clauses are
4 included in, in contracts.

02:11:27 5 THE COURT: All right. And, sir, I have a
6 question for you. And here's my question. And it's
7 focused on, for example, Ms. -- or plaintiff Eileen
8 Work. And the motor vehicle accident in this case
9 occurred on February 22nd, 2018. And so for the
02:11:57 10 purposes of this personal injury lawsuit, Ms. Work
11 never solicited or used -- it's probably the best way
12 to say it, never used on that day for that ride her
13 Uber app; right? And I think that's an
14 uncontroverted -- (telephonic audio glitch) -- and so
02:12:23 15 under those circumstances, there's no contract as it
16 relates to that ride.

17 And so can't the trial court under those
18 circumstances as it relates to Ms. Work rule as a
19 matter of law since she didn't use the application, the
02:12:43 20 application -- the app would not cover her ride. There
21 was no -- (telephonic audio glitch) -- she just
22 happened to be a passenger.

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

02:13:05 25 THE COURT: I think Mr. Quick wanted to

02:13:07 1 respond to that one, but...

2 MR. GORMLEY: -- arbitration --

3 THE COURT: But go ahead, sir.

4 MR. GORMLEY: This is Ryan Gormley again. I'm
02:13:12 5 trying to bring up the arbitration agreement.

6 But I don't believe that it includes -- I
7 don't think there's any language that creates any type
8 of condition precedent to whether it's valid or not as
9 to whether or not a ride has been requested by the
02:13:36 10 person that agreed to it.

11 That would be one response. And two, to the
12 extent the Court's inclined to only compel arbitration
13 as to the passenger that requested the ride and not as
14 to both passengers, then still, a stay of all the
02:14:07 15 claims would be appropriate. And we would still
16 have -- we still submit the third-party beneficiary
17 argument where the -- which would flow down from the
18 passenger who requested the ride to the passenger who
19 did not request the ride.

02:14:28 20 THE COURT: Mr. Gormley, I thought you also
21 wanted to comment on that.

22 MR. GORMLEY: That was --

23 THE COURT: Maybe I'm wrong.

24 MR. GORMLEY: That was Mr. Gormley talking.

02:14:40 25 THE COURT: I'm sorry. Mr. Quirk.

02:14:41 1 MR. GORMLEY: Okay. Yes.

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

02:14:54 5 And so, of course, it's the Court's decision
6 on whether or not that should be -- Ms. Work should be
7 subject to this arbitration agreement that happens to
8 exist in her friend's -- under the terms and conditions
9 of her friend's application.

02:15:15 10 And so she didn't order the ride. She is not
11 bound by that agreement or that the arbitration
12 agreement that's in her friend's phone. And she's not
13 a third-party beneficiary of that agreement because she
14 didn't even know it existed.

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

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

19 MR. QUIRK: Negative. I get asked that a lot,
02:16:02 20 though. He's an intellectual property guy, right?

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

23 MR. GORMLEY: Yeah. That is my dad.

24 THE COURT: Okay. I was just sitting here
02:16:13 25 thinking about maybe we had two legacies to argue this

02:16:20 1 issue. But, Mr. Gormley, of course, you get the last
2 word. And I might have another question or two for
3 you.

4 MR. GORMLEY: The -- on the --

02:16:27 5 THE COURT: Here's my question. What do you
6 do under these circumstances: For example, you have a,
7 no question, the delegation clause pursuant to a
8 contract. But in the contract itself, it has clearly
9 written exclusions as to what's not to be arbitrated on
02:16:53 10 its face.

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

02:17:09 15 MR. GORMLEY: And is that excluded in the
16 delegation clause or excluded elsewhere?

17 THE COURT: Elsewhere. Just excluded, right?
18 Excluded.

19 MR. GORMLEY: Right. If it was elsewhere,
02:17:22 20 then that would go to the arbitrator. And,
21 theoretically, the parties would brief it, and the
22 arbitrator would say, No, your claim here is
23 specifically excluded and so it doesn't apply.

24 And then you're back in court.

02:17:43 25 THE COURT: And one last question both of you

02:17:44 1 can respond to this: I know you're drilling down kind
2 of deep on this tissue. But I keep coming back to
3 question or inquiry No. 4. How does a trial court make
4 a -- (telephonic audio glitch) -- conduct an inquiry as
02:18:10 5 to the unconscionability of a delegation clause.

6 MR. GORMLEY: And --

7 THE COURT: What facts does it consider?

8 MR. GORMLEY: Your Honor, I've read a lot of
9 cases looking at that, and I've never seen a delegation
02:18:29 10 clause determined to be unconscionable. And I think
11 that's because there's just not that much to work with
12 in terms of making procedural or substantive
13 unconscionability arguments. And this was exactly what
14 Rent-A-Center pointed out -- the Supreme Court pointed
02:18:50 15 out in Rent-A-Center, when it -- when it sort of put
16 that issue to the forefront.

17 It said that the Court, you know, on remand
18 could potentially assess the unconscionability of the
19 agreement. They said in that case the Court couldn't
02:19:11 20 assess it because the appellant hadn't raised the
21 issue -- the respondent hadn't raised the issue until
22 the Supreme Court briefing so that argument was waived.

23 But theoretically, it said that could be a
24 question for remand. And it said to make such a claim
02:19:34 25 based on the discovery procedures, for instance,

02:19:36 1 Jackson would have had to argue that the limitation
2 upon the number of depositions causes the arbitration
3 of his claim, that the arbitration agreement is
4 unenforceable to be unconscionable. And the Court said
02:19:48 5 that would be, of course, a much more difficult
6 argument to sustain than the argument that the same
7 limitation renders arbitration of this fact-found
8 employment discrimination claim unconscionable. And
9 also said, likewise, the unfairness of the fee
02:20:05 10 splitting arrangement may be more difficult to
11 establish for the arbitration of enforceability than
12 for arbitration of more complex fact-related aspects of
13 the alleged employment discrimination.

14 So that's the Supreme Court recognizing that
02:20:20 15 really when it comes to unconscionability of the
16 delegation agreement there probably just isn't, isn't
17 too much to work with. And that's why I can't recall
18 any case where delegation clause has been deemed
19 unconscionable, and there -- no such case was cited in
02:20:39 20 any of the briefs.

21 THE COURT: You're --

22 MR. QUIRK: Well, your Honor --

23 THE COURT: And --

24 MR. QUIRK: This is Trevor --

02:20:46 25 THE COURT: Mr. Quirk, I don't want to cut you

02:20:47 1 off -- (telephonic audio glitch).

2 And I don't want to cut anyone off. But I
3 just remember reviewing the points and authorities in
4 here, the issue of procedural and substantive
02:21:07 5 unconscionability was raised. And that's why I keep
6 coming back to that. And that's the fourth factor.

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

02:21:20 10 MR. QUIRK: Yeah. Trevor Quirk here. We did
11 raise them. Thank you, your Honor.

12 And you were asking how you conduct that
13 analysis, and it's simple. You look at the manner in
14 which the contract was negotiated and the circumstances
02:21:32 15 of the parties at the time.

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

19 And then the answer to Ms. Royz may be a
02:21:51 20 little bit more complicated, but there was no
21 negotiation of the contract whatsoever. You're simply
22 clicking on the little box on the bottom, yes to some
23 terms and conditions. And then under the second
24 aspect, the substantive unconscionability, you just
02:22:11 25 look at the actual terms of the contract. And look and

02:22:15 1 see if whether those are so harsh as to be one sided.

2 And the terms of this, if you're just narrowly
3 focusing on the delegation clause or if you're -- I
4 guess that's what we're doing here. And you're looking
02:22:31 5 at the terms of the delegation clause, what is the
6 effects of those terms on Ms. Royz? And as to Ms. Work
7 we know it's going to force someone who just happens to
8 have an Uber app on their phone to San Francisco. And
9 the same thing with Ms. Royz.

02:22:52 10 So, clearly, the delegation clause in our view
11 would be procedurally and substantive unconscionable.

12 And those cases do talk more broadly about an
13 arbitration agreement. And although they don't deal
14 specifically with a delegation clause in and of itself,
02:23:13 15 counsel said it's severable and should be analyzed
16 under basic contract rules. And those are the ways in
17 which the Nevada Supreme Court has analyzed
18 procedurally and substantive unconscionability. And
19 those are the elements that they've used to analyze
02:23:30 20 those issues.

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

23 THE COURT: Of course, sir, you are.

24 MR. GORMLEY: Thanks.

02:23:44 25 So I was responding to those arguments. On

02:23:47 1 the procedural front, the no negotiation, it's an
2 argument you hear a lot when it comes to arbitration
3 agreements. But as the Court's aware, consumer
4 arbitration agreements are enforced all the time.

02:24:04 5 Those arguments don't hold up.

6 It's not enough that a party wasn't
7 represented by counsel and entering into an arbitration
8 agreement or that, you know, a user of Uber or any
9 corporation didn't have a chance to negotiate the terms
02:24:23 10 with an attorney representing Uber, or something like
11 that. So on the procedural front, I think those
12 arguments get made, but there's nothing -- there's
13 nothing here that the Court would determine is
14 procedurally unconscionable.

02:24:43 15 And in terms of one cited in the substantive
16 argument, Mr. Quirk said it's one sided because look at
17 the result. It results in someone getting sent to
18 arbitration in San Francisco. But that looking at the
19 result of getting sent to arbitration, that's the exact
02:25:07 20 type of argument that AT&T versus Concepcion said
21 couldn't carry the day. Because that's an argument
22 that's saying that arbitration somehow is unfair
23 compared to the judicial forum or puts it in a worse
24 light. And that's the type of conscionability argument
02:25:34 25 that AT&T precluded.

02:25:36 1 So, you know, just based on those arguments,
2 and I think based on the arguments in the brief,
3 there's no basis for a finding of procedural or
4 substantive unconscionability.

02:25:58 5 THE COURT: Anything else?

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

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

02:26:14 10 THE COURT: All right. And, gentlemen, I want
11 to thank you. I'm going to do two things insofar as
12 this motion is concerned.

13 Number one, I'm going to rule partially.

14 Regarding the application and my decision --
02:26:28 15 (telephonic audio glitch) -- Andrea Eileen Work, and I
16 don't know if my prior decision really clarified this,
17 but the reason why I brought it up was essentially
18 this. A key component as far as my decision is
19 concerned as it relates to her was the fact that at the
02:26:49 20 time of this motor vehicle accident, she had not even
21 used the Uber app; right? All she was, was a passenger
22 in the motor vehicle accident. As a result of that,
23 number one, there's been no consideration. There's no
24 contract in place. She was a mere passenger. I think
02:27:15 25 it would be a stretch, a real stretch, to force her to

02:27:26 1 arbitration under those circumstances.

2 And because I think it's pretty clear for all
3 the reasons I ruled before, but that wasn't clear
4 enough maybe in my minute order, but I want to make
02:27:45 5 sure the record is really clear on top of my prior
6 decision. So, I mean, she's going to -- she's not
7 going to go to arbitration.

8 And I don't mind saying this from a legal
9 logic perspective, it just doesn't make much sense. It
02:27:59 10 really doesn't.

11 This is what I'm going to do on the motion to
12 reconsider as to the other plaintiff. I'm going to go
13 back and take a look. And I don't remember before, and
14 maybe it was addressed and I overlooked it, because I'm
02:28:21 15 going to address the unconscionability issue as it
16 relates to the delegation provision under the contract.
17 Because, and I'm going to read AT&T Concepcion. I'm
18 going to go back and read this case. Because it
19 appears to me that at least we know this, based upon
02:28:38 20 the briefing, the issue of unconscionability has been
21 raised. I think it's one -- (telephonic audio
22 glitch) --

23 The issue of unconscionability has been
24 raised. I don't know if it was fully developed in the
02:28:56 25 first briefing but it has been raised.

02:28:59 1 I'm going to focus on the factor No. 4 as it
2 pertains to unconscionability in addition to taking one
3 last look. And so what I'm going to do is this: When
4 I make a decision, I'm also going to address factor 4
02:29:17 5 as -- (telephonic audio glitch) --

6 I said I'm -- yeah. I'm going to address
7 factor 4 in addition to looking at my prior decision so
8 we'll have a really clean record here, which I feel is
9 very, very important from an appellate review
02:29:48 10 perspective. Because in many respects maybe --
11 (telephonic audio glitch) -- this is a case of first
12 impression as it relates to the claim of Ms. Royz.

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

14 MR. GORMLEY: And --

02:30:04 15 THE COURT: All right, gentlemen.

16 MR. GORMLEY: Your Honor, this is Ryan Gormley
17 for Uber. I just want to clarify one point. I think,
18 I think it's obvious. But just want to clarify it. As
19 of the first person when -- I heard you said as to
02:30:19 20 Ms. Work on the first part of your ruling. And my
21 understanding and in your prior order it said that
22 Ms. Royz was the passenger that did not use the Uber
23 app. But my understanding is that it's just the
24 passenger that did not order the ride, right?

02:30:38 25 THE COURT: Yes. Whoever didn't use it. And

02:30:39 1 I think I've clarified that. So that's probably an
2 important point. For the record Andrea Eileen Work
3 didn't use the app; is that correct?

4 MR. QUIRK: Judge, looking at it now, and I
02:30:52 5 think I had it confused. That Ms. Work ordered the
6 Uber and Royz was the passenger. I'm the one who
7 stated that during argument.

8 THE COURT: So we flipped it?

9 MR. QUIRK: Yes.

02:31:06 10 THE COURT: All right. And so anyway my prior
11 decision that I've made right now before this, this
12 discussion will be based upon the agreement that Megan
13 Royz was solely the passenger and didn't utilize the
14 Uber app; is that correct?

02:31:29 15 MR. QUIRK: That's correct.

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

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

02:31:36 20 THE COURT: Go ahead, sir.

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

24 THE COURT: Yes.

02:31:49 25 MR. QUIRK: And Royz was the passenger. So

02:31:50 1 that's my -- my fault for making that representation
2 during the argument. I had it backwards.

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

02:32:03 5 MR. QUIRK: Let me look at your minute order
6 here.

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

02:32:38 10 THE COURT: All right. So I got it right.

11 MR. QUIRK: Yes.

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

13 MR. GORMLEY: And --

14 THE COURT: I'm going to go back and read
02:32:47 15 these cases. This is a fascinating issue. And I just
16 want to -- put it this way. Number one, we have a
17 great record. Secondly, I just want to make sure that
18 I'm clear with my thoughts and my minute order as to
19 why I ruled the way I did. That's what I want to do.
02:33:02 20 I want to go back and look at it. Because it might be
21 an issue of first impression. I'm not sure yet, but
22 we'll see.

23 MR. QUIRK: Thank you.

24 MR. GORMLEY: Thank you, your Honor. We
02:33:11 25 appreciate your time.

02:33:13 1 THE COURT: All right. Everyone enjoy your
2 day.
3 MR. GORMLEY: You too. Bye.
4 MR. ROBERTS: Thanks for all the time, your
02:33:18 5 Honor. It's good to hear your voice again.
6 THE COURT: All right.
7 Mr. Roberts, take care.
8 MR. ROBERTS: Thank you, your Honor. You too.
9
02:33:28 10
11
12
13 (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 STENOGRAPHY ALL OF THE
TELEPHONIC PROCEEDINGS HAD IN THE BEFORE-ENTITLED
MATTER AT THE TIME AND PLACE INDICATED, AND THAT
THEREAFTER SAID STENOGRAPHY 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

MR. GORMLEY: [59] MR. QUIRK: [22] 3/14 5/1 29/13 31/16 32/5 35/24 36/25 41/2 41/19 44/22 44/24 45/10 48/8 51/4 51/9 51/15 51/18 51/21 51/25 52/5 52/11 52/23 MR. ROBERTS: [3] 3/18 53/4 53/8 THE COURT REPORTER: [2] 4/9 4/20 THE COURT: [76]	5 541 [2] 1/25 54/17 6 6358 [1] 2/19 650-7778 [1] 2/12 7 702 [2] 2/22 2/23 7778 [1] 2/12 8 805 [1] 2/12 830 [1] 8/25 89128 [1] 2/11 89188 [1] 2/21 9 938-3838 [2] 2/22 2/23 : :SS [1] 54/2 A AAA [8] 10/11 11/6 11/15 12/1 12/5 12/13 12/15 14/12 ABILITY [1] 54/11 able [2] 31/25 33/7 about [8] 12/1 12/3 28/2 33/9 37/4 41/21 41/25 46/12 abrogated [5] 7/25 9/20 15/1 16/10 17/12 absurd [3] 17/17 18/19 38/8 absurdity [1] 38/5 accident [6] 19/19 22/24 23/3 39/8 48/20 48/22 according [3] 30/2 31/13 36/13 ACCURATE [1] 54/11 Act [9] 7/23 8/19 21/18 24/17 24/17 28/18 30/23 32/12 35/17 action [2] 21/23 34/12 actions [1] 18/13 actual [1] 45/25 actually [3] 6/11 7/22 19/23 addition [2] 50/2 50/7 address [5] 5/10	42/12 49/15 50/4 50/6 addressed [2] 5/18 49/14 adhere [1] 13/4 ADMINISTRATIVE [1] 2/2 affiliated [1] 19/5 after [2] 9/3 10/18 afternoon [6] 3/7 3/8 3/10 3/15 3/18 3/20 again [9] 7/1 10/22 14/18 17/7 22/11 31/6 33/6 40/4 53/5 against [2] 6/8 19/5 ago [1] 21/21 agree [2] 32/18 38/9 agreed [4] 13/18 30/7 32/9 40/10 agreeing [2] 30/5 30/9 agreement [54] 7/9 8/3 8/21 9/4 9/25 10/3 13/22 14/2 14/3 14/7 14/8 14/10 14/11 15/2 15/23 17/20 20/12 20/21 21/3 21/7 21/8 21/15 22/8 22/14 22/16 22/24 23/9 25/3 29/24 30/8 30/12 30/14 31/3 31/6 31/12 32/14 32/17 33/19 36/9 37/3 37/21 38/18 40/5 41/4 41/7 41/11 41/12 41/13 43/19 44/3 44/16 46/13 47/8 51/12 agreements [5] 6/17 7/4 39/3 47/3 47/4 ahead [7] 3/11 17/1 26/22 32/2 40/3 45/9 51/20 al [1] 3/11 all [30] 2/2 3/21 7/16 8/6 8/17 8/20 9/11 9/13 11/13 13/2 16/4 16/14 20/3 26/5 29/10 31/20 34/19 39/5 40/14 47/4 48/10 48/21 49/2 50/15	51/10 52/10 53/1 53/4 53/6 54/5 allegation [1] 19/23 alleged [1] 44/13 allow [1] 24/17 allowed [1] 46/22 allows [1] 36/22 almost [2] 9/11 9/12 alone [1] 11/21 already [1] 30/10 also [19] 10/6 10/23 12/21 14/15 14/21 14/24 15/8 15/19 17/11 24/21 24/24 25/1 25/16 26/4 26/9 38/2 40/20 44/9 50/4 although [1] 46/13 Amendment [1] 25/15 American [1] 10/12 analysis [8] 20/3 28/20 29/18 32/16 34/1 34/9 36/14 45/13 analyze [1] 46/19 analyzed [2] 46/15 46/17 Andrea [4] 19/14 48/15 51/2 51/22 anew [1] 10/22 another [3] 25/2 26/11 42/2 answer [10] 6/10 10/16 11/1 11/12 12/12 16/7 23/8 23/24 45/18 45/19 answered [1] 26/12 answering [1] 24/9 Anthony [1] 3/11 anticipate [1] 25/11 any [16] 5/9 5/17 8/19 8/21 16/15 17/20 19/9 20/13 25/22 32/24 38/14 40/7 40/7 44/18 44/20 47/8 anyone [2] 4/1 45/2 anything [5] 5/17 31/15 32/23 41/15 48/5	anyway [2] 4/18 51/10 app [14] 19/24 29/21 29/22 36/12 39/13 39/20 46/8 48/21 50/23 51/3 51/14 51/22 51/23 52/7 appeal [1] 6/6 APPEARANCE [1] 2/3 appearances [4] 2/1 3/12 4/7 4/9 appeared [1] 27/23 appears [3] 13/10 28/17 49/19 appellant [1] 43/20 appellate [2] 8/8 50/9 applicability [2] 20/11 23/5 applicable [2] 15/11 38/3 application [6] 21/18 29/25 39/19 39/20 41/9 48/14 applied [1] 9/24 applies [6] 18/2 20/8 21/3 22/17 24/21 25/3 apply [5] 15/3 17/19 22/8 37/16 42/23 appreciate [2] 6/23 52/25 appropriate [2] 6/3 40/15 arbitrability [10] 7/17 10/5 11/1 11/6 12/7 16/3 16/13 31/11 36/3 37/2 arbitrable [2] 18/5 36/10 arbitrate [6] 30/5 30/7 30/9 32/10 32/13 32/18 arbitrated [4] 9/8 15/25 37/5 42/9 arbitration [90] arbitrator [30] 9/7 10/6 12/7 13/25 14/8 15/3 15/16 16/2 16/12 17/18 18/7 20/4 20/5 20/10 23/14 24/6 26/1 30/5 31/10
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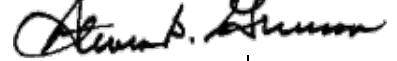
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<p>you [107]</p> <p>you'd [1] 25/11</p> <p>you're [15] 6/20</p>
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DISTRICT COURT OF THE STATE OF NEVADA

FOR THE COUNTY OF CLARK

MEGAN ROYZ, an individual; and ANDREA)
EILEEN WORK, an individual) Case No.: A-20-810843-C

Plaintiff,

Dept.: XVI

v.

NOTICE OF ENTRY OF ORDER

MARK ANTHONY JACOBS, an individual,
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

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

NOTICE

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

4
5 Dated: January 29, 2021

QUIRK LAW FIRM, LLP

6
7 By:


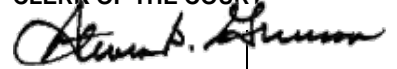

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Attorney for Plaintiffs

EXHIBIT A



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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 individual,
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**

ORDER

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

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

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

11 **FINDINGS OF FACT AND PROCEDURAL HISTORY**

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

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

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

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

24 **CONCLUSIONS OF LAW**

25 This Court's role under the Federal Arbitration Act ("F.A.A."), Title 9 U.S.C. §2, is "limited
26 to determining 1) whether a valid agreement to arbitrate exists and, if it does, 2) whether the
27 agreement encompasses the dispute at issue." Cordas v. Uber Technologies, Inc., 228 F.Supp.3d
28 985, 988 (N.D. Ca. 2017).

1 The question movants have asked this Court to reconsider is whether the Delegation Clause
2 transferred the power to decide threshold questions of arbitrability to the arbitrator, including
3 whether the Arbitration Agreement encompasses the subject dispute and whether Royz entered
4 into an enforceable agreement to arbitrate.

5 "Whether a dispute arising under contract is arbitrable is a matter of contract interpretation
6 ..." Tallman v. Eighth judicial Dist. Ct., 131 Nev. 713, 720, 359 P.3d 113. 118–19 (2015). That
7 is, the answer as to "who has the primary power to decide arbitrability" flows from the fact
8 arbitration is a matter of contract; it is a way to resolve those disputes—but only those disputes—the
9 parties agreed to submit to arbitration. See AT&T Technologies, Inc. v. Communications Workers,
10 475 U.S. 643, 649 (1986). Thus, when deciding whether the parties agreed to arbitrate a certain
11 dispute, including arbitrability, courts should apply ordinary state-law principles that govern
12 contracts' formation.

13 As previously noted, the United States Supreme Court has recognized and enforced a
14 liberal policy favoring arbitration agreement; however, the U.S. Supreme Court has carved out an
15 exception where the dispute focuses on whether the parties have submitted a particular dispute to
16 arbitration. See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002). Such a
17 determination is "an issue for judicial determination unless the parties clearly and unmistakably
18 provide otherwise." Id. (quoting AT&T Technologies, Inc. v. Communications Workers, 475 U.S.
19 643, 649 (1986).

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

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

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

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

13 IT IS SO ORDERED

14
15
16 Dated this 21st day of January ~~2020~~ 2021

17 
18 DISTRICT COURT JUDGE ZJ

19
20 Submitted by:

Approved as to Form and Content:

21 QUIRK LAW FIRM, LLP

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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

☒ by e-filing and electronic service and/or

☐ by hand delivery

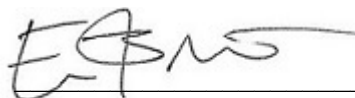
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Executed on January 29, 2021



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