No. 82556

In the Supreme Court of the State of Nevada

UBER TECHNOLOGIES, INC.; RASIER LLC and RASIER-CA, LLC,

Appellants,

v.

MEGAN ROYZ and ANDREA EILEEN WORK

Respondents.

On Appeal from
Eighth Judicial District Court, Case No. A:20-810843-C

RESPONDENTS' ANSWERING BRIEF

QUIRK LAW FIRM

Counsel of Record
Trevor Quirk
2421 Tech Center Court, Ste. 100
Las Vegas, Nevada 89128

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Lawyers from the following law firms have appeared for Respondents Royz and Work in the case or are expected to appear on their behalf in this Court: (1) Quirk Law Firm, LLP; and (2) Glancy Prongay & Murray LLP (*pro hac vice* forthcoming).

STANDARD OF REVIEW

This case is subject to the de novo standard of review with the findings of fact underlying the District Court's decision reviewed for clear error. *See Lim v. TForce Logistics, LLC*, 8 F.4th 992, 999 (9th Cir. 2021).

Moreover, since part of the District Court's ruling (with respect to Ms. Royz) is based on the District Court's conclusion that by "not using the app" Ms. Royz had not entered an agreement with Uber with respect to this ride, *that* conclusion of fact is subject to the "clearly erroneous" standard. "[T]he question of whether a contract exists is one of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence." *May v. Anderson*, 121 Nev. 668, 672–73 (2005).

ISSUES PRESENTED

The District Court denied Appellant's motion to compel arbitration and Appellant's motion to reconsider, finding: (i) that the parties' controversy did not arise out of or relate to their agreement, (ii) that Ms. Royz and Uber did not have a valid agreement, and (iii) the parties did not clearly and unmistakably agree to delegate arbitrability of their dispute to the arbitrator. Respondents' counsel made additional arguments in opposition to the motion to compel arbitration and the subsequent motion to reconsider, which could also support the denial of the motions. The issue presented is: did the District Court err by ruling against delegating these issues to an arbitrator?

STATEMENT OF FACTS

A. "Uber on Uber" Accident

On February 22, 2018, Respondents Megan Royz ("Ms. Royz") and Andrea Eileen Work ("Ms. Work") were passengers in an "Uber Ride" being driven by Defendant Marco Antonio Herida-Estrada ("Estrada").[1] 1 AA 7. [2] Ms. Work used the Uber app on her phone to request and pay for the ride. 3 AA 337. Ms. Royz was Ms. Work's guest in the car whom neither used nor accessed the Uber app during her ride as a guest of Ms. Work. *Id.*; 4 AA 371.

During their ride, Ms. Royz and Ms. Work were injured when they were involved in a collision with a vehicle driven by Defendant Mark Anthony Jacobs ("Jacobs").[3] *See* 1 AA 1-15. Jacobs was under the influence of intoxicating

[1] Estrada has not responded to the complaint. Although his default has not been reduced to judgment by virtue of the stay pending this Court's decision, the default papers are on file.

[2] "AA" refers to Appellant's Appendix submitted in conjunction with Appellant's Opening Brief (citations to "Op. Br.__" refer to Appellant's Opening Brief). The number preceding AA indicates the volume; the number following AA indicates the bates number excluding any preceding zeroes.

[3] Jacobs has answered the complaint and, other than filing a one paragraph "joinder" to Uber's motion to compel arbitration (without any supporting evidence or argument), Jacobs has not pursued arbitration. 1 AA 21-32, 133-34. Jacobs did not appeal the District Court's ruling rejecting the motion to compel arbitration in which he had summarily joined. 4 AA 372-73. There is, therefore, no basis to compel any aspect of arbitration with respect to claims against Jacobs.

substances at the time of the accident. 1 AA 4-5. Jacobs was, like Estrada, driving on behalf of Uber at the time of the accident. *Id.*

Respondents allege that both Estrada and Jacobs were employees of Defendants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC at the time of the accident (collectively, "Uber" or "Appellant"). 1 AA 4-6.

Respondents sued each of the drivers directly involved in the accident as well as Uber (under the doctrine of *respondeat superior*) for the conduct of the drivers with respect to the accident. 1 AA 3-6. Respondents also sued Uber for negligent hiring, supervision, and retention with respect to the impaired driver Jacobs. 1 AA 14-15.

B. The Uber Terms of Use Specifically Apply to "Use" of Uber Services, Which by Their Definition, Do NOT Include Transportation

The 2016 "U.S. Terms of Use" ("Terms") (1 AA 79-88), which Appellant contends are the operative agreement, clearly define the circumstances in which the Terms apply.

First, the Terms only apply to events or claims arising from the actual "use" of the Uber app. 1 AA 79. Specifically, the Terms say: "By **accessing or using the Services**, you confirm your agreement to be bound by these Terms." *Id.* (emphasis added).

Next, the Terms say that they exclusively apply to the "services" which Uber defines with precision:

> These Terms of Use govern your access or use, from within the United States and its territories and possessions, **of the applications, websites, content, products, and services** (the 'services,' as more fully defined below in Section 3) made available in the United States and its territories and possessions by Uber USA, LLC and its parents, subsidiaries, representatives, affiliates, officers, and directors (collectively, 'Uber').

1 AA 79 (emphasis added).

It is widely known that Uber contrives and goes out of its way to disclaim and deny that it is a provider of transportation.[4] Uber's Terms thus highlight that Uber is not a provider of transportation.

> The Services comprise mobile applications and related services (each, an 'Application'), which enable users to arrange and schedule transportation, logistics and/or delivery services and/or purchase certain goods, including with third party providers of such services and goods under agreement with Uber or certain of Uber's affiliates ('Third Party Providers'). In certain instances the Services may also include an option to receive transportation logistics and/or delivery services for an upfront price, subject to acceptance by the respective Third Party Providers. Unless otherwise agreed by Uber in a separate written agreement with you, the Services are made available solely for your personal, noncommercial use. YOU ACKNOWLEDGE THAT YOUR ABILITY TO OBTAIN TRANSPORTATION, LOGISTICS AND/OR DELIVERY SERVICES THROUGH THE US OF

[4] *See* Greg Bensinger, *Uber: The ride hailing app that says it has 'zero' drivers – The Silicon Valley company's word games help shelter it from liability lawsuits*, THE WASHINGTON POST (Oct. 14, 2019), https://www.washingtonpost.com/technology/2019/10/14/uber-ride-hailing-app-that-says-it-has-zero-drivers/.

> THER SERVICES DOES NOT ESTABLISH UBER AS A PROVIDER OF TRANSPORTATION, LOGISTICS OR DELIVERY SERVICES OR AS A TRANSPORTATION CARRIER.

1 AA 82.

C. The District Court's Denial of the Motion to Compel Arbitration and Subsequent Motion to Reconsider.

The District Court twice denied Uber's attempts to compel arbitration (a motion to compel arbitration (4 AA 365-71) and a motion to reconsider the District Court's denial of the motion to compel arbitration (3 AA 356-61)). During the hearing on Uber's motion to reconsider and in its order denying the motion to compel arbitration, the District Court articulated its belief that Ms. Royz was not using any element of Uber's defined "services" at the time of the accident and therefore was not bound by any arbitration agreement at the time of the accident. 3 AA 334-38; 4 AA 371. Further, the District Court found that Uber's Terms clearly disclaim any involvement in "transportation" and thus the alleged arbitration delegation provision did not "clearly and unmistakably" delegate questions regarding an auto accident to an arbitrator for resolution. 3 AA 359; 4 AA 371.

SUMMARY OF ARGUMENT

Uber's Terms of Service (which is the basis for the alleged arbitration agreements here) apply each time the Uber app is used. Ms. Royz was riding as a guest when the accident occurred. There is no arbitration agreement applicable to Ms. Royz. In addition, Uber's Terms specify the services to which they apply. The Terms state that transportation is not one of Uber's services. This case involves personal injuries resulting from a traffic accident. Thus, Uber's Terms (and its embedded arbitration provisions, including the alleged delegation provision) simply do not apply to this case. In short, there is no enforceable arbitration contract here.

ARGUMENT

A. The District Court Did Not Err in the Proceedings Below.

i. The District Court properly decided that Uber did not have a contract with Ms. Royz.

Whether a valid arbitration agreement exists is a question of contract, properly decided by the trial court. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."). "*Schein* 'did not change—to the contrary, it reaffirmed—the rule that courts must first decide whether an arbitration agreement exists at all.'" *Belyea v. GreenSky, Inc*., 2020 WL 3618959, at *4 (N.D. Cal. July 2, 2020) (quoting *Lloyd's Syndicate 457 v. FloaTEC, L.L.C*., 921 F.3d 508, 515 n.4 (5th Cir. 2019). "State contract law controls whether the parties have agreed to arbitrate …. [A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Knutson v. Sirius XM Radio Inc*., 771 F.3d 559, 565 (9th Cir. 2014) (internal citations and quotations omitted).[5]

"Basic contract principles require, for an enforceable contract, an offer and

[5] In the parties' briefing below on both the motion to compel arbitration and motion to reconsider, both Appellant and Respondents applied federal law, California law, and Nevada law. *See e.g.,* 1 AA 47 (applying federal law and Nevada law); 1AA 169 (applying federal law, Nevada law and California law); 2 AA 219-220 (applying federal law and California law).

acceptance, meeting of the minds, and consideration." *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 378 (2012). Where any of these elements is missing, a court may properly deem a contract unenforceable. *See Braun v. Nevada Land, LLC*, 2013 WL 461254 (Nev. Sup. Ct. Feb. 5, 2013) (district court properly found lease term unenforceable due to lack of consideration). The District Court ruled during oral argument on the motion to reconsider that there was no consideration for Ms. Royz to be bound by the arbitration provision (including the delegation clause) because she was not using the Uber app at the time of the accident and as such, there was no contract in place:

> A key component as far as my decision is concerned as it relates to her was the fact that at the time of this motor vehicle accident, she had not even used the Uber app; right? All she was, was a passenger in the motor vehicle accident. As a result of that, number one, there's been no consideration. There's no contract in place. She was a mere passenger. I think it would be a stretch, a real stretch, to force her to arbitration under those circumstances. And because I think it's pretty clear for all the reasons I ruled before, but that wasn't clear enough maybe in my minute order, but I want to make sure the record is really clear on top of my prior decision. So, I mean, she's going to -- she's not going to go to arbitration.

3 AA 334-38.

The District Court's ruling is consistent with Uber's Terms, which expressly apply only when "accessing or using the Services." 1 AA 79. Specifically, the Terms provide: "By accessing or using the Services, you confirm your agreement to be bound by these Terms." *Id.* Since Ms. Royz was not "accessing or using the

Services" as defined in the Terms, she was not bound by any aspect of the Terms, including the delegation provision contained within them.

"[T]he question of whether a contract exists is one of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence." *May*, 121 Nev. at 672–73. The evidence presented to the District Court prior to its rulings consisted of, *inter alia,* the agreement at issue, copies of Uber's records, copies of emails sent by Uber to Respondents, and declarations by Uber's Senior Legal Program Manager. 1 AA 57-88, 90-120. It is a tenet of black letter law that consideration is a necessary element of an enforceable contract. *See Certified Fire Prot.*, 128 Nev. at 378. Thus, the District Court's conclusion that Ms. Royz did not enter a valid contract that could compel her claims to arbitration should be upheld as it was both supported by substantial evidence and was not clearly erroneous. 3 AA 371 (Conclusion of Law 2).[6]

[6] Appellant incorrectly claims that Ms. Royz and Ms. Work did not raise any "question as to the existence or validity to of the agreements." Op. Br. at 7, n.4. This issue was addressed in Respondents' opposition to the motion to compel arbitration (1 AA 148-150) and in Respondents' opposition to the motion to reconsider (2 AA 244-253). Further, this Court can consider issues not raised by the parties below if the District Court considered such issues. *See Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1054 (9th Cir. 2007) ("even if a party fails to raise an issue in the district court, we generally will not deem the issue waived if the district court actually considered it.").

ii. There are limits to the reach of a delegation clause, even after *Schein.*

Uber posits that under *Schein*, the mere existence of Uber's delegation clause requires an arbitrator to decide whether the arbitration clause should be enforced, and to what extent, no matter what and regardless of whether the parties' dispute arises out of their contract. *See e.g.,* 3 AA 307-09. "Appellants' proffered construction of the delegation clause would not only transcend the purpose and terms of the[…] agreement[] … but would operate to deprive both sides of all future rights to either a jury trial or court resolution of completely unrelated matters arising potentially decades in the future." *Moritz v. Universal City Studios LLC*, 268 Cal. Rptr. 3d 467, 475 (2020). The Court in *Schein* did not contemplate such an infinite construction of delegation clauses as that proffered by Uber.[7] As Appellant

[7] Uber claims that "courts across the country have found Uber's delegation provision dispositive and effective." Op. Br. at 16. However, the cases Uber cites for this proposition are easily distinguishable. *See Heller v. Rasier, LLC,* 2020 WL 413243, at *12 (C.D. Cal. Jan. 7, 2020) (deciding whether plaintiffs assented to the arbitration provisions in agreements with Uber before addressing whether the parties clearly and unmistakably agreed to delegate gateway issues of arbitrability to the arbitrator; plaintiffs did not dispute that their claims fell under the scope of the agreement and did not challenge the validity of the delegation clause); *Mohamed v. Uber Techs., Inc*., 848 F.3d 1201, 1208 (9th Cir. 2016) (finding delegation clause in 2013 and 2014 versions of arbitration agreements Uber drivers signed with Uber was not procedurally unconscionable; drivers did not dispute that their claims were within the scope of the arbitration agreement); *Lathan v. Uber Techs., Inc.*, 266 F. Supp. 3d 1170, 1173 (E.D. Wis. 2017) (finding December 12, 2015 version of the agreement between Uber driver and Uber delegated arbitrability to arbitrator where plaintiff did "not dispute that his substantive claims are within the scope of the arbitration provision."); *Olivares v. Uber Techs., Inc*., 2017 WL 3008278, at *3 (N.D. Ill. July

concedes, the Supreme Court addressed one discrete issue in *Schein*: whether a district court could elect to decide arbitrability if it found that the argument in favor of arbitration was "wholly groundless." Op. Br. at 13. Neither Respondents nor the District Court invoked the "wholly groundless" exception in the proceedings below.

iii. The instant dispute does not arise out of the alleged contract.

In *Schein,* the parties did not debate whether their dispute arose from their contract. *See* 139 S. Ct. at 528. Instead, in *Schein,* the parties disagreed about whether the arbitration agreement applied to plaintiff's claim seeking injunctive relief when the agreement had a carve-out for actions seeking injunctive relief. *See id.* Though seemingly a matter of inconsequential semantics, the distinction between deciding whether a dispute ***arises out of*** the contract versus deciding whether an arbitration agreement ***applies*** to a particular dispute is important here. Indeed,

> [] ***Schein presupposes a dispute arising out of the contract or transaction, i.e., some minimal connection between the contract and the dispute. That is so because under the FAA, contractual arbitration clauses are "valid, irrevocable, and enforceable" if they purport to require arbitration of any "controversy thereafter arising out of such contract."*** (9 U.S.C. § 2.) *Schein* expressly understood that the Act requires

14, 2017) (finding that delegation clause in December 2015 agreement between Uber driver and Uber delegated the issue of whether driver's relationship with Uber is that of employee or independent contractor to arbitrator); *Lee v. Uber Techs., Inc*., 208 F. Supp. 3d 886, 892-93 (N.D. Ill. 2016) (finding that delegation clause in agreement between Illinois Uber drivers and Uber was not unconscionable due to fee-splitting provision and lack of opportunity to negotiate terms).

> enforcement of arbitration clauses with respect to disputes 'thereafter arising out of such contract.'

See Moritz, 268 Cal. Rptr. 3d at 475-76 (emphasis added) (trial court, applying FAA and despite delegation clause, properly decided arbitrability and denied a motion to compel arbitration where parties' dispute did not arise out of or relate to their contract).

The Appellate Court in *Moritz* cited to a Tenth Circuit case, which—similar to Respondents' auto accident claim not arising out of Uber's app use contract—gives the example of an assault claim not arising out of a business agreement:

> For example, if two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship. (*Coors Brewing Co. v. Molson Breweries* (10th Cir. 1995) 51 F.3d 1511, 1516.)

268 Cal. Rptr. 3d at 474-75. *Moritz* concludes this section by noting: "'When an arbitration provision is 'read as standing free from any [underlying] agreement,' 'absurd results ensue.'" *See id.* at 475 (quoting *Smith v. Steinkamp*, 318 F.3d 775, 777 (7th Cir. 2003)).

Under the plain language of the FAA, *Schein* only applies to controversies "arising out of such contract." *See* 9 U.S.C. § 2. Where, as here, the parties dispute whether their controversy arises out of their contract, under the FAA, courts

necessarily must address that question. Consistent with the FAA, the District Court below found that the underlying lawsuit for personal injuries resulting from an automobile accident did not arise out of the underlying Uber contract (the "Terms"). 3 AA 359.

Uber argues that the District Court's reasoning would "render every delegation clause superfluous[,]" noting that the Sixth Circuit declined to apply such reasoning in *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842 (6th Cir. 2020), *cert. denied sub nom. Piersing v. Domino's Pizza Franchising LLC*, 141 S. Ct. 1268 (2021). Op. Br. at 20-21. But the District Court's reasoning would not have this result. Instead, the District Court's reasoning comports with the FAA's plain language. *See* 9 U.S.C. § 2; *Moritz*, 268 Cal. Rptr. 3d at 476 (Appellant's argument that a delegation clause "creates a perpetual obligation to arbitrate any conceivable claim that [Respondents] might ever have against them is plainly inconsistent with the FAA's explicit relatedness requirement.").

Appellant's reasoning would allow a delegation clause to transcend and trump the entirety of the rest of the contract it resides within, rendering every contract superfluous and in contravention of the FAA. *See Revitch v. DIRECTV, LLC*, 977 F.3d 713, 719 (9th Cir. 2020) ("The FAA's savings clause was intended to make arbitration agreements as enforceable as other contracts, but not more so.") (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967));

Moritz, 268 Cal. Rptr. 3d at 475. Accordingly, the District Court did not err in conducting its inquiry. The Ninth Circuit has declined to interpret agreements to arbitrate "all disputes … arising out of or relating to any aspect of the relationship between" parties as boundless, noting "we are not persuaded that the FAA preempts California's rule requiring that courts interpret contracts [including arbitration agreements] to avoid absurd results." *See Revitch,* 977 F.3d at 719.[8] At bottom, the District Court properly found that the parties' controversy did not arise out of their contract (4 AA 365-71; 3 AA 359) and as such, the holding in *Schein* is not applicable.

iv. The parties' intent to delegate arbitrability to the arbitrator is not supported by clear and unmistakable evidence.

Even if the parties' controversy arose out the contract and triggered application of *Schein*—which it did not—the parties did not clearly and unmistakably intend to delegate arbitrability to the arbitrator. In answering the question of "who has the primary power to decide arbitrability," the court is to "apply both a presumption and a heightened evidentiary requirement ***against arbitrability***." *See SEIU Loc. 121RN v. Los Robles Reg'l Med. Ctr.*, 976 F.3d 849, 855 n.6 (9th Cir.

[8] The court in *Revitch* further explained, "We are merely following the Supreme Court's command that a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Interpreting Revitch's agreement to arbitrate a dispute with AT&T Mobility as a consent to arbitrate any and all disputes with unknown corporate entities to be acquired by AT&T, Inc. years in the future is undoubtedly absurd." *See id.* at n.3 (internal quotations and citations omitted).

2020) (emphasis added). The mere incorporation of AAA Rules and the wording of Uber's delegation clause are insufficient for Uber to carry this high evidentiary burden to demonstrate the parties' clear and unmistakable intent to delegate arbitrability to the arbitrator.

Significantly, after the Court decided *Schein,* remanding the question of whether the parties clearly and unmistakably delegated the question of arbitrability to an arbitrator, the Fifth Circuit again refused to order arbitration of the issues. *See Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 277 (5th Cir. 2019), *cert. granted,* 141 S. Ct. 107 (2020), and *cert. denied,* 141 S. Ct. 113 (2020), and *cert. dismissed as improvidently granted sub nom. Henry Schein, Inc. v. Archer & White Sales, Inc.*, 141 S. Ct. 656 (2021) (*"Schein II"*). In *Schein II*, the Fifth Circuit held that the delegation clause delegated "the threshold arbitrability inquiry to the arbitrator for at least some category of cases." *See id.* at 280. However, the *Schein II* court held that the "plain language" of the arbitration agreement carved out claims seeking injunctive relief, such that there was no clear and unmistakable evidence that the parties intended an arbitrator to decide such claims. *See id.* at 280-82. The *Schein II* court held that the district court had the power to decide arbitrability and further affirmed the district court's denial of the motion to compel arbitration. *See id.* at 277.

Similar to *Schein II*, Uber's agreement carves out claims such as those brought by Ms. Work and Ms. Royz. Uber's arbitration agreement, by its plain language, applies to "claims arising out of or relating to" the "Terms" (defined as access or use of its "Services" in the United States and its territories) or access/ or use of Uber's "Services." 1 AA 79-80. In defining its "Services," Uber's agreement expressly disclaims its status as a transportation provider or carrier.[9] Further, the delegation clause on its face expressly applies to and incorporates the Terms and the arbitration clause. 1 AA 80. "The most natural reading of the arbitration clause at issue here …. [g]iven the carve-out," fails to evince a clear and unmistakable intent to delegate arbitrability to the arbitrator under these circumstances. *See Schein II,* 935 F.3d at 281-82. As the *Schein II* court aptly noted and as is applicable here, "The parties could have unambiguously delegated this question, but they did not, and we are not empowered to re-write their agreement." *See id* at 282. The U.S. Supreme Court declined to consider the question of whether the Fifth Circuit appropriately ruled in *Schein II* (*see Henry Schein, Inc v. Archer & White Sales, Inc*., 141 S. Ct. 656 (2021)) and this question is also a matter of first impression for the Nevada Supreme Court.

[9] 1 AA 82 ("YOU ACKNOWLEDGE THAT YOUR ABILITY TO OBTAIN TRANSPORTATION … THROUGH THE USE OF THE SERVICES DOES NOT ESTABLISH UBER AS A PROVIDER OF TRANSPORTATION … OR AS A TRANSPORTATION CARRIER.").

Moreover, while the Ninth Circuit has held that incorporation of the AAA Rules can constitute clear and unmistakable evidence of the intent to delegate arbitrability to the arbitrator in ***certain circumstances***, it has declined to adopt any bright line rule. *See Aviles v. Quik Pick Express, LLC*, 703 F. App'x 631, 632 (9th Cir. 2017) ("there is a preliminary question whether the district court should have ruled on arbitrability at all, or whether, under the incorporated [AAA] rules, the dispute over which claims should be arbitrated" "is both highly technical and explicitly open in this circuit."). In *Brennan v. Opus Bank*, 796 F.3d 1125, 1131 (9th Cir. 2015) the court found the clear and unmistakable standard met where the parties incorporated AAA Rules into their agreement, but specifically stated,

> ***[W]e limit our holding to the facts of the present case, which do involve an arbitration agreement between sophisticated parties***. [I]t is undisputed that Brennan was a sophisticated party, an experienced attorney and businessman … who executed an executive-level employment contract with Opus Bank, a sophisticated, regional financial institution.

(Internal citations and quotations omitted) (emphasis added). Uber put forth no evidence that Ms. Royz and Ms. Work are sophisticated parties like those in *Brennan*. The Ninth Circuit recently held that incorporation of the AAA Rules into an arbitration agreement alone was insufficient to meet the clear and unmistakable standard. *See Lim*, 8 F.4th at 1001. Like the Ninth Circuit, other circuit courts have held that in certain circumstances, incorporation of the AAA Rules is sufficient to meet the clear and unmistakable standard but have also declined to adopt a bright

line rule. *See e.g., Simply Wireless, Inc v. T-Mobile US, Inc*, 877 F.3d 522, 528 (4th Cir. 2017), *abrogated on other grounds by Schein*, 139 S. Ct. 524 ("We agree with our sister circuits and therefore hold that, ***in the context of a commercial contract between sophisticated parties***, the explicit incorporation of JAMS Rules serves as "clear and unmistakable" evidence of the parties' intent to arbitrate arbitrability.") (emphasis added); *Shivkov v. Artex Risk Sols., Inc*., 974 F.3d 1051, 1068 (9th Cir. 2020), *cert. denied sub nom. Shivkov v. Artex Risk Sols*., 2021 WL 2637867 (U.S. June 28, 2021) (describing circuit split on whether incorporation of the AAA Rules is sufficient evidence that the parties clearly and unmistakably delegated the gateway issue of class arbitration to the arbitrator).

Further, the Nevada Supreme Court has held that the mere incorporation of "general language," such as that in Uber's delegation clause, which requires arbitration of "any claim, dispute or controversy ... that arises from or relates in any way to ... the validity, enforceability[,] [applicability] or scope of this Arbitration Provision," "falls short of the 'clear and unmistakable evidence' required to overcome the presumption that [arbitrability] is for the court to decide." *See Principal Invs. v. Harrison*, 132 Nev. 9, 19–20, 366 P.3d 688, 695–96 (2016).

In sum, given the lack of clear and unmistakable evidence that the parties intended to delegate arbitrability to the arbitrator, the District Court had the power to decide the arbitrability issue.

v. There was no mutual assent to enter into the delegation clause.

Although the parties did not clearly and unmistakably intend to delegate arbitrability to the arbitrator, even assuming *arguendo* that they had, the delegation clause is unenforceable. "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts." *Moritz*, 268 Cal. Rptr. 3d at 474 (quoting *Cullinane v. Uber Techs.*, 893 F.3d 53, 61 (1st Cir. 2018)); *see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

"To form a valid contract there must be a meeting of the minds, i.e., mutual assent." *See Moritz,* 268 Cal. Rptr. 3d at 474. "If a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto." *Knutson*, 771 F.3d at 566.

Here, no reasonable person in Ms. Work's or Ms. Royz's position would understand that by creating an Uber account, they had assented to delegate all threshold questions of arbitrability to an arbitrator, under all circumstances. *See Moritz*, 268 Cal. Rptr. 3d at 474 (rejecting interpretation of delegation clause requiring arbitration of disputes unrelated to the arbitration agreement as "no reasonable person in their position would have understood the [] arbitration

provisions to require arbitration of any future claim of whatever nature or type, no matter how unrelated to the agreements nor how distant in the future the claim arose.").

Moreover, Uber provides no evidence that Respondents had actual knowledge of the delegation clause. Nor does Uber provide evidence that Respondents had sufficient inquiry notice of the delegation clause. Indeed, Respondents had to click a hyperlink to be able to see the Terms of the agreement, which include the delegation clause. 1 AA 59, 92. *See Nguyen v. Barnes & Noble Inc*., 763 F.3d 1171, 1179 (9th Cir. 2014) ("even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice …. the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers."). Regardless of whether an offeree's actions or lack thereof, such as by clicking "Create Account" or using the Uber app, constitutes outward "apparent manifestation of [their] consent," an offeree cannot be "bound by inconspicuous contractual provisions of which [they were] unaware[.]" *See Knutson,* 771 F.3d at 566.

vi. The delegation clause is unconscionable.

While all courts, including the U.S. Supreme Court in *Schein* agree that an unconscionable delegation provision in an arbitration contract will not be enforced, there is relatively little law on what constitutes an "unconscionable" delegation

provision.[10] As discussed below, the Ninth Circuit Court of Appeals very recently upheld a trial court's ruling that a delegation clause was unconscionable (and therefore unenforceable) in *Lim*, 8 F.4th 992 under circumstances not dissimilar from those present here.

a) The delegation clause is procedurally unconscionable.

"Unconscionability requires a showing of both procedural unconscionability and substantive unconscionability …. Both components must be present, but not in the same degree; by the use of a sliding scale, a greater showing of procedural or substantive unconscionability will require less of a showing of the other to invalidate the claim." *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 793 (2012). "The procedural element of unconscionability focuses on oppression or surprise due to unequal bargaining power. The oppression that creates procedural unconscionability arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." *Lim*, 8 F.4th at 1000 (internal citations and quotations omitted).

Similar to *Lim,* here, with respect to unfair surprise, nothing in the text of the agreement called Respondents' attention to the delegation clause in the agreement's

[10] Indeed, Appellant's counsel noted during the hearing on its motion to reconsider that it was unaware of any cases where a delegation clause was deemed unconscionable. 3 AA 329-30.

ten pages of small font, and Respondents were not required to sign or initial that specific provision. *See Lim,* 8 F.4th at 1001 ("delegation clause in the middle of 31 numbered paragraphs, within more than nine pages of single-spaced, 10-point font[]" was procedurally unconscionable). In addition, Uber did not include a copy of the AAA Rules with its agreement. Numerous courts have found that the failure to provide or attach a copy of the AAA (or similar rules) to an agreement supports a finding of procedural unconscionability. *See e.g., Ajamian*, 137 Cal. Rptr. 3d at 794 (failure to attach AAA or NASD rules supported procedural unconscionability).[11]

Further, the delegation clause was presented on a take-it-or-leave-it basis by Uber, the drafter and party with superior bargaining power, to Ms. Work and Ms. Royz, both of whom are unsophisticated parties. *See Pinela v. Neiman Marcus Group, Inc*., 190 Cal. Rptr. 3d 159, 172-73 (2015). Uber did not provide Respondents with the opportunity to discuss, negotiate, or change any aspect of the delegation clause. *See id.* Uber presented the agreement to Respondents to view on the small screen of their smart phones. *See Cabatit v. Sunnova Energy Corp*., 274 Cal. Rptr. 3d 720, 725 (2020) (agreement presented to plaintiffs on electronic device supported procedural unconscionability). Uber provided no explanation of the

[11] *See also Parada v. Super. Ct.*, 176 Cal.App.4th 1554, 1572 (2009) (failure to attach or provide JAMS rules or fee schedule supported finding of procedural unconscionability); *Zullo v. Super. Ct.*, 197 Cal.App.4th 477, 485 (2011) (failure to attach AAA rules supported finding of procedural unconscionability).

delegation clause to Respondents. *See Cabatit*, 274 Cal. Rptr. 3d at 725-26 (arbitration provision procedurally unconscionable where "salesperson did not explain anything about arbitration …. And the arbitration clause was not called to the [plaintiffs'] attention.").

Respondents could have opted not to enter the agreement at all, but this would have precluded them from being able to access any services provided by Uber. The agreement is an impermissible adhesion contract which "relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *See Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 113 (2000) (quoting *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694 (1961)). Existence of alternative services, goods or options, does not negate a finding of procedural unconscionability. *See Cabatit*, 274 Cal. Rptr. 3d at 726 (rejecting defendant's argument that there was no procedural unconscionability because plaintiffs could have chosen another solar company or decided not to do a solar lease plan).

The choice of law provision in the agreement further supports a finding of procedural unconscionability, particularly as to Ms. Work, a Nevada resident. *See Pinela*, 190 Cal. Rptr. 3d at 173 (finding choice of law clause would make "it even less likely that an unsophisticated layperson [] would understand how arbitrability questions are to be resolved under the Agreement."). "Without going to the expense of hiring a lawyer—not just any lawyer, but a [California] lawyer skilled in the

intricacies of arbitrability, with the choice of law overlay presented here—and then having sufficient time to seek and obtain legal advice from that lawyer, [Ms. Work] was not in a position to make an informed assessment of the consequences of agreeing to delegate all questions concerning [arbitrability] to the arbitrator." *See id.* at 173-74.

b) The delegation clause is substantively unconscionable.

"Substantive unconscionability examines the fairness of a contract's terms. The substantive unconscionability doctrine is concerned with terms that are unreasonably favorable to the more powerful party, not just a simple old-fashioned bad bargain." *Lim*, 8 F.4th at 1001–02 (internal citations and quotations omitted).

While the arbitration agreement states that Appellant waives its rights to recover attorneys' fees and expenses if it prevails in ***arbitration***, there is no provision that "preclude[s] eventual recovery for attorney's fees arising from the arbitrator's initial decision on arbitrability …. This creates a chilling effect on [Respondents] enforcing [their] rights[.]" *See id.* at 1003 (finding delegation clause substantively unconscionable where prevailing party could recover fees and costs arising from arbitrator's decision on arbitrability).

Moreover, as to Ms. Work, the choice of law provision in the agreement is substantively unconscionable, requiring that the arbitrator be a retired judge or attorney "specifically licensed to practice law in the state of California[.]" 1 AA 81.

The effect of the choice of law provision would restrict the legal arguments that Ms. Work, a Nevada resident who suffered bodily injuries in a car accident that occurred in Nevada[12], could make if required to arbitrate the issue of arbitrability. *See Pinela*, 190 Cal. Rptr. 3d at 175.

CONCLUSION

As set forth above, there is abundant evidence and argument in the record below to support the District Court's ruling. For the reasons set forth above, and those set forth in the record below, the decision of the District Court should be affirmed.

Respectfully submitted,

QUIRK LAW FIRM

Dated: October 15, 2021

By: */s/ Trevor Quirk*
Trevor Quirk
2421 Tech Center Court, Ste. 100
Las Vegas, Nevada 89128

Attorneys for Respondents

[12] 1 AA 2 ("Plaintiff, Andrea Eileen Work, is and was a resident of County of Clark, State of Nevada.").

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated: October 15, 2021

By: */s/ Trevor Quirk*
Trevor Quirk
QUIRK LAW FIRM
2421 Tech Center Court, Ste. 100
Las Vegas, Nevada 89128

Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRS 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Times New Roman font.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,679 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters to the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

Dated: October 15, 2021

By: */s/ Trevor Quirk*
Trevor Quirk
QUIRK LAW FIRM
2421 Tech Center Court, Ste. 100
Las Vegas, Nevada 89128

Attorneys for Respondents

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby affirm that I am an employee of Quirk Law Firm, LLP and that I caused the foregoing:

RESPONDENTS' ANSWERING BRIEF

to be served as follows:

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

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

[X] by e-filing and electronic service through the Court's electronic filing system and/or

[ ] by hand delivery

to the party(ies) listed below

D. Lee Roberts, Jr., Esq.
E: lroberts@wwhgd.com
Ryan T. Gormley, Esq.
E: rgormley@wwhgd.com
Weinberg, Wheeler, Hudgins,
Gunn & Dial, LLC.
6385 South Rainbow Blvd., Ste. 400
Las Vegas, Nevada 89118
T: (702) 938-3838
F: (702) 938-3864
Attorney for Appellants, Rasier-CA, LLC., Rasier, LLC., and Uber Technologies, Inc.

Karen Bashor, Esq.
E: .Karen.Bashor@wilsonelser.com
Douglas Rowan, Esq.
E: Douglas.Rowan@qilsonesler.com
Wilson Elser Moskowitz Edelman & Dicker LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
E: .Karen.Bashor@wilsonelser.com
T: (702)727-1400
F: (702) 727-1401
Attorney for Appellants, Rasier-CA, LLC., Rasier, LLC., and Uber Technologies, Inc.

Executed on October 15, 2021

/s/ Esteban B. Minero
An Employee of Quirk Law Firm, LLP