No. _____

In the Supreme Court of the United States

LIVE NATION ENTERTAINMENT, INC. ET AL.,
Petitioners,
v.
SKOT HECKMAN ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Arbitration Act (FAA) requires courts to "place arbitration agreements on an equal footing with other contracts" and "enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The FAA thus gives parties wide "discretion in designing arbitration processes" that offer "efficient, streamlined procedures tailored to the type of dispute" at hand. *Id.* at 344.

Recently, plaintiffs' firms have exerted massive settlement pressure and overwhelmed arbitration providers by simultaneously filing thousands of materially identical arbitration claims. Arbitration providers have responded by adopting new procedures designed to process mass filings fairly and efficiently. In the decision below, the Ninth Circuit stated that "the FAA simply does not apply to and protect" alternative arbitration procedures that "did not exist in 1925," when the statute was enacted. App.30a. And applying California's arbitration-focused severability doctrine, the Ninth Circuit deemed the parties' entire arbitration agreement unenforceable, as a supposedly "'systematic effort to impose arbitration'" as "'an inferior forum.'" App.28a.

The questions presented are:

1. Whether the FAA protects all arbitration agreements (as this Court and five circuits have stated) or only a subset of traditional, bilateral arbitration agreements that the FAA's drafters specifically envisioned (as the Ninth Circuit stated).

2. Whether the FAA preempts California's severability doctrine because it specifically targets and disproportionately invalidates arbitration agreements.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Live Nation Entertainment, Inc. and Ticketmaster L.L.C. were defendants-appellants in the United States Court of Appeals for the Ninth Circuit.

Respondents Skot Heckman, Luis Ponce, Jeanene Popp, and Jacob Roberts were plaintiffs-appellees in the United States Court of Appeals for the Ninth Circuit.

RULE 29.6 STATEMENT

Petitioner Live Nation Entertainment, Inc. states that Liberty Media Corporation owns more than 10% of its outstanding stock.

Petitioner Ticketmaster L.L.C. states that it is a wholly owned subsidiary of Live Nation Entertainment, Inc.

RELATED PROCEEDINGS

Skot Heckman et al. v. Live Nation Entertainment, Inc. et al., No. 23-55770, U.S. Court of Appeals for the Ninth Circuit. Order affirming denial of motion to compel arbitration entered October 28, 2024; rehearing denied December 6, 2024.

Skot Heckman et al. v. Live Nation Entertainment, Inc. et al., No. 22-cv-00047-GW-GJS, U.S. District Court for the Central District of California. Order denying motion to compel arbitration entered August 10, 2023.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

APPENDIX

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion (App.1a-43a) is reported at 120 F.4th 670. The district court's opinion (App.44a-94a) is reported at 686 F. Supp. 3d 939.

JURISDICTION

The Ninth Circuit entered its order on October 28, 2024 (App.1a-43a) and denied petitioners' rehearing petition on December 6, 2024 (App.95a-96a). On January 25, 2025, Justice Kagan extended the time to file this petition until May 5, 2025. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in the appendix. App.97a-101a.

INTRODUCTION

This case raises two frequently recurring questions of exceptional importance regarding the Federal Arbitration Act (FAA). The first is whether the FAA requires courts to enforce all arbitration agreements, not just arbitration agreements providing for the traditional, bilateral arrangements that Congress specifically had "in mind when it passed the FAA" in 1925. App.30a. The second is whether California's arbitration-specific severability doctrine violates the FAA by inviting courts to invalidate arbitration agreements whenever they perceive a "systematic effort to impose arbitration" as "an inferior forum." App.28a. In answering no to both questions, the Ninth Circuit's decision below flouts the FAA's text, defies this Court's precedents, and threatens to block sensible measures for addressing the new phenomenon of mass arbitration filings.

Here, petitioners Live Nation Entertainment, Inc. and Ticketmaster L.L.C. (together, Live Nation), amended their longstanding arbitration agreement to send disputes to a new arbitration provider, New Era ADR. Live Nation took that step after respondents' counsel pioneered the tactic of filing thousands of virtually identical arbitration claims at once to pressure companies into settling often meritless claims. That tactic works by leveraging massive liability for up-front filing fees under traditional arrangements, while simultaneously crippling arbitrators' ability to adjudicate the underlying claims. New Era has adopted procedures for handling such mass arbitrations, along with a fee structure that ensures the feasibility of arbitration for companies and consumers alike.

In an opinion by Judge Fletcher, the Ninth Circuit deemed New Era's procedures unconscionable under California law and nullified the parties' entire arbitration agreement. Two aspects of that deeply flawed decision warrant this Court's review.

First, the Ninth Circuit stated that the FAA "simply does not apply" to mass arbitration procedures that "did not exist in 1925," when Congress enacted the FAA. App.29a-30a. But the FAA's text protects *all* "arbitration" agreements, not just some. 9 U.S.C. § 2. And this Court has repeatedly held that "parties are 'generally free to structure their arbitration agreements as they see fit,'" without forfeiting FAA protection. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010).

By stating that the FAA does not "protect" any form of "class-wide," "aggregative," or "mass" arbitration procedure, App.30a-31a, the decision below creates a split with five other circuits. Consistent with this Court's precedents, the Second, Third, Fifth, Tenth, and Eleventh Circuits all hold that class arbitration *is* "arbitration" within the meaning of the FAA—and thus parties can be "compelled under the FAA to submit to class arbitration," so long as "there is a contractual basis for concluding that [they] *agreed* to do so." *Stolt-Nielson*, 559 U.S. at 684. The Ninth Circuit alone holds otherwise. Only this Court can enforce its precedents and resolve the 5-1 split.

Second, the Ninth Circuit also held that several unconscionable provisions relating to New Era's mass arbitration procedures rendered the *entire* arbitration agreement unenforceable. That conclusion likewise merits review. The Ninth Circuit applied California's

arbitration-specific severability framework, which violates the FAA's bedrock rule that state law may not "singl[e] out [arbitration] contracts for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 252 (2017). California's severability doctrine requires courts to consider whether "the stronger party engaged in a systematic effort to impose arbitration on the weaker party not simply as an alternative to litigation, but to secure a forum that works to the stronger party's advantage." *Ramirez v. Charter Commc'ns, Inc.*, 551 P.3d 520, 547 (Cal. 2024). That test violates the FAA twice over, by explicitly targeting arbitration agreements and by disproportionately invalidating them as compared to other contracts.

This Court has already recognized the need to address the conflict between the FAA and California's arbitration-specific severability test. It previously granted certiorari on that question, only to see the case settle before oral argument. Cert. Pet. i, *MHN Gov't Servs., Inc. v. Zaborowski*, 576 U.S. 1095 (2015) (No. 14-1458), 2015 WL 3637766, *dismissed*, 578 U.S. 917 (2016). The issue is now even more worthy of review because the California Supreme Court has since reaffirmed the state's anti-arbitration severability framework. That biased test exemplifies the kind of "judicial hostility to arbitration agreements" that the FAA was designed to preempt—and that will remain entrenched in California law until this Court intervenes. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

The Court's review is urgently needed on both questions presented. If allowed to stand, the Ninth Circuit's decision threatens highly disruptive consequences. The first holding threatens to

invalidate many kinds of arbitration procedures, including much-needed efforts to address the challenges posed by mass arbitration filings. The second holding compounds the problem by ensuring that any supposedly flawed attempt to address those challenges will lead courts to invalidate longstanding agreements to arbitrate by mutual consent. This is scarcely the first time that the Ninth Circuit and California law have defied the FAA's text and this Court's arbitration precedents. The Court should once again right the ship and enforce the FAA. The petition should be granted.

STATEMENT OF THE CASE

In 1925, Congress enacted the FAA to replace "widespread judicial hostility to arbitration agreements" with a "'liberal federal policy favoring arbitration.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The FAA commands that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That directive requires courts to enforce "arbitration agreements according to their terms," unless a "generally applicable contract defense[], such as fraud, duress, or unconscionability," applies. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 505-06 (2018).

FAA protection extends to the agreed-upon "rules under which th[e] arbitration will be conducted." *Id.* at 506. So under the statute, "parties are 'generally free to structure their arbitration agreements as they see fit.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (quoting *Mastrobuono v.*

Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995)). By safeguarding private parties' "discretion in designing arbitration processes," the FAA promotes "efficient, streamlined procedures tailored to the type of dispute" at hand. *Concepcion*, 563 U.S. at 344. Yet in this case, the Ninth Circuit deemed a longstanding arbitration agreement unenforceable, just because it was amended to address the challenges posed by mass arbitration filings.

A. Factual Background

Live Nation operates websites that sell tickets to entertainment events, such as concerts and sporting events. The websites' Terms of Use have long required arbitration of "**ANY DISPUTE, CLAIM, OR CONTROVERSY**" relating to the Terms, use of the website, or ticket purchases. 2-ER-114–15 (¶27); 2-ER-123. The arbitration agreement includes a class action waiver, forbidding claims to be brought "**IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING**." 2-ER-123. The agreement also includes a "[d]elegation" clause giving the arbitrator—not a court—"exclusive authority" to resolve threshold disputes over "the interpretation, applicability, enforceability, or formation" of the agreement. 2-ER-124. Over the years, numerous courts—including the Ninth Circuit, until this case—have upheld the Terms' arbitration agreement and its delegation clause as valid and enforceable. *See, e.g.*, *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 509 (9th Cir. 2023); *Hansen v. Ticketmaster Ent., Inc.*, 2020 WL 7319358, at *5 (N.D. Cal. Dec. 11, 2020); *Himber v. Live Nation Worldwide, Inc.*, 2018 WL 2304770, at *5-6 (E.D.N.Y. May 21, 2018).

Recently, respondents' counsel (Keller Postman LLC) pioneered a tactic designed to undermine arbitration and extract massive settlements for often meritless claims. *See* J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1323 (2022); Andrew J. Pincus et al., *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 18-19, U.S. Chamber of Commerce Inst. for Legal Reform (Feb. 2023), https://tinyurl.com/4dss22nc. Starting in 2018, the firm began filing (or threatening to file) tens of thousands of essentially identical arbitration claims against individual defendants. *See* Pincus, *supra*, at 2-3, 18, 24. This tactic leverages traditional fee structures—under which businesses pay nearly all the costs of consumer arbitrations up front—to apply overwhelming settlement pressure on defendants, even when the underlying claims are meritless. Glover, *supra*, at 1349-50.

Under traditional arrangements, arbitration defendants bear the costs of upfront filing fees, often due within 30 days. Mass arbitration filings thus immediately impose "astounding" costs that "can spell financial catastrophe." *Id.* at 1345, 1349. In 2018, for example, Keller Postman filed over 12,500 arbitration claims against Uber, triggering over $18 million in immediate filing-fee obligations (in addition to other arbitrator fees Uber would have had to pay later). *See* Opp. to Mot. Compel Arbitration 1, *Abadilla v. Uber Techs., Inc.*, No. 18-cv-07343-EMC (N.D. Cal. Jan. 14, 2019), Dkt. No. 53. Upfront obligations to pay millions in filing fees force companies to forego defending themselves on the merits, no matter how strong their defenses. And if the case gets beyond the filing-fee stage, proceedings "[can]not realistically move forward" expeditiously in arbitral systems

ill-equipped for a flood of filings. *Glover*, *supra*, at 1363. After all, arbitration providers have "a limited number of available arbitrators," and it would take an army of lawyers "to litigate tens of thousands of arbitrations simultaneously." Pincus, *supra*, at 43.

Given the recent threat of mass arbitration filings, some companies have given up on arbitration altogether. *See, e.g.*, Amanda Robert, *Amazon drops requirement after facing over 75,000 demands*, ABA J. (June 2, 2021), https://tinyurl.com/y4j6bm6k. Others, however, have sought ways to counter Keller Postman's tactics and restore arbitration as a viable way to resolve disputes.[1]

To that end, Live Nation updated its Terms in July 2021 to designate New Era ADR as its first-choice arbitration provider. 2-ER-196 (¶¶1-2). New Era ADR has special rules for adjudicating large numbers of virtually identical cases. These rules were modeled after the bellwether approach used in federal multi-district litigation (MDL), where "civil actions involving one or more common questions of fact" can be "transferred to any district for coordinated or

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[1] Keller Postman's tactics have come under increasing scrutiny, with one company—Tubi, Inc.—bringing a federal lawsuit against Keller arising from a mass arbitration with nearly 24,000 claimants. Compl. ¶3, *Tubi, Inc. v. Keller Postman LLC*, No. 24-cv-01616-ACR (D.D.C. May 31, 2024), Dkt. 1. Tubi claims that Keller tortiously induced the claimants to breach their contractual agreements to provide basic information and engage in informal dispute resolution as a precondition to arbitration. *Id.* ¶¶72-78. Tubi also alleges that Keller Postman's marketing campaign for recruiting clients deliberately avoids obtaining "basic information that would weed out fraudulent claims"—and that "more than 30% of Keller Postman's claimants have *never* been registered users of Tubi." *Id.* ¶¶23, 27, 50.

consolidated pretrial proceedings." 28 U.S.C. § 1407(a); *see* 2-ER-190 (Rule 6(b)(ii)). MDLs often involve a limited number of "bellwether" trials, in hopes of encouraging a global settlement by informing parties "on the value of the cases." *In re Chevron, U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997).

The July 2021 version of New Era's rules—at issue here—provided that bellwether procedures apply when five or more cases raise common factual and legal issues. 2-ER-190 (Rule 6(b)(ii)(1)). When that happens, three bellwether cases are selected and arbitrated to completion. 2-ER-190–93 (Rule 6(b)(ii)(1), (iii)(3)-(4)). The bellwether results provide a backdrop for mandatory, non-binding settlement discussions, and if no settlement is reached (or if individual claimants opt out), the arbitrator adjudicates the remaining cases. 2-ER-192–93 (Rule 6(b)(iii)(4)).

To streamline proceedings, New Era's rules allowed the arbitrator to apply certain determinations from the bellwethers as "Precedent" in remaining cases. 2-ER-178; 2-ER-193. New Era also introduced a novel fee structure, which lowers the marginal cost of arbitration, alleviates the threat of blackmail settlements premised on prohibitive filing fees, and makes mass arbitration feasible for consumers and defendants alike. 2-ER-164–67.

Like earlier versions of the parties' arbitration agreement, the July 2021 version included a clause delegating to the arbitrator resolution of disputes relating to "the interpretation, applicability, enforceability, or formation" of the arbitration agreement. 2-ER-124. It further provided for backup arbitration providers in the event that New Era cannot arbitrate. Specifically, if New Era "is unable

to conduct the arbitration for any reason, the arbitration will be conducted by FairClaims," a different provider. *Id.* And if FairClaims cannot arbitrate, the arbitration is to be conducted by a "mutually select[ed]" arbitration provider. *Id.*

B. Procedural Background

This case arises from an antitrust lawsuit filed by respondents Skot Heckman, Luis Ponce, Jeanene Popp, and Jacob Roberts (together, Plaintiffs), four consumers who agreed to arbitration by New Era when they bought tickets on Live Nation's websites after the July 2021 changes. 2-ER-152–60. Despite that binding arbitration agreement, Plaintiffs filed their class action complaint against Live Nation in federal district court in January 2022. 2-ER-194–269.

Live Nation moved to compel arbitration under the FAA. App.44a-74a. Plaintiffs argued, among other things, that the FAA does not protect New Era's bellwether procedures because they are not "arbitration" within the meaning of the statute. App.46a-47a. Accordingly, Plaintiffs continued, the Terms' class action waiver is unconscionable under California's so-called *Discover Bank* rule, which says that such waivers are generally unenforceable in consumer contracts of adhesion. *See* App.89a-90a (discussing *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)). And while this Court deemed that rule preempted by the FAA in *Concepcion*, Plaintiffs claimed the purported lack of FAA protection meant the *Discover Bank* rule came back to life here. *See* App.90a. The district court rejected that argument but found the switch to New Era procedurally and substantively unconscionable

under California law for different reasons. App.89a-90a.

Rather than sever the offending provisions, the district court concluded that "unconscionability permeates the arbitration clause," including the delegation clause. App.93a. Even though "the parties ha[d] not briefed" whether arbitration before FairClaims—the contractually agreed backup arbitration provider—"would alleviate the Court's concerns," the district court accused Live Nation of engaging in a "'systematic effort to impose arbitration on a customer as an inferior forum.'" *Id.*. The district court therefore refused to compel arbitration by FairClaims or a mutually agreeable arbitrator, clearing the way for this lawsuit to proceed in federal court. *Id.* at 93a-94a.

The Ninth Circuit affirmed. App.32a. A majority of the panel—Judges Fletcher and Christen—first concluded that the Terms' delegation clause "is procedurally unconscionable to an extreme degree and substantively unconscionable to a substantial degree." App.26a. Accepting Plaintiffs' extreme interpretation of New Era's Rules, the majority held that "four features" of those rules render the delegation clause substantively unconscionable: (1) New Era's "mass arbitration protocol," including the application of precedent from bellwethers to other cases in the mass arbitration; (2) "procedural limitations" applicable to both parties, including discovery limitations; (3) a "limited right of appeal" for grants, but not denials, of injunctive relief; and (4) "arbitrator selection provisions" deviating from the California Arbitration Act. App.18a. *But see* CA9 Live Nation Br. 39-55. The majority then held that

the same provisions "also serve to make the entire agreement unconscionable." App.26a-27a.[2]

Next, the majority turned to the question of remedy. There were two possibilities: (1) sever the unconscionable provisions, allowing arbitration to proceed either with New Era, FairClaims, or another mutually agreeable backup arbitrator; or (2) declare the entire agreement unenforceable and let the litigation proceed in federal court. The majority chose the second option. App.26a-29a. In so doing, it agreed with the district court that this case involved a "systematic effort to impose arbitration" as an "inferior forum," rendering severance inappropriate under California's severability doctrine. App.28a (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 697 (Cal. 2000)). The majority accordingly upheld the district court's bottom-line determination that the "interests of justice" weighed against severance under California law. *Id.*

The majority also endorsed an "alternate and independent ground" to affirm, one that the district court had explicitly rejected. App.29a-30a. Specifically, the majority held that "the FAA simply

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[2] Much of the majority's analysis—including its interpretations of New Era's Rules and Live Nation's Terms—disregards principles of construction mandated by the FAA, this Court's precedents, and California law. CA9 Live Nation Br. 39-55. For example, in holding that New Era's industry-standard procedures for selecting an arbitrator "are inconsistent with California law," App.25a, the panel ignored the FAA's command that a contractually agreed-upon "method of naming or appointing an arbitrator . . . shall be followed," no matter what state law provides to the contrary. 9 U.S.C. § 5. Although this petition does not focus on these errors, they underscore the panel's open hostility to arbitration.

does not apply to and protect" New Era's mass arbitration procedures. App.30a. Because "[c]lass-wide arbitration did not exist" when the FAA was enacted, the majority reasoned, "Congress did not have [such] arbitration in mind when it passed the FAA." *Id.* Accordingly, although this Court held in *Concepcion* that the *Discover Bank* rule declaring class action waivers unenforceable "is pre-empted by the FAA," 563 U.S. at 352, the majority believed that the rule is *not* preempted "as it applies to mass arbitration," App.32a. That left the *Discover Bank* rule free and clear to force this case into federal court, according to the majority.

Judge Van Dyke concurred in the judgment, based solely on the majority's alternative holding that New Era's mass arbitration procedures were "not what Congress set out to protect in the FAA." App.36a. In his view, when Congress enacted the FAA in 1925, it "set out to protect" only "a *particular type* of arbitration"—i.e., "bilateral arbitration"—and nothing else. App.34a. To Judge Van Dyke, the FAA does not protect agreements to engage in mass or class arbitration proceedings any more than it would protect a contract to resolve disputes "through a vigorous, winner-take-all game of ping-pong." App.35a.

REASONS FOR GRANTING THE WRIT

This petition presents two important questions of federal arbitration law. The first question concerns the meaning of "arbitration" under the FAA, an issue on which the decision below creates a 5-1 circuit split. And the second concerns the compatibility of California's anti-arbitration severability doctrine with the FAA, an issue this Court previously granted

certiorari to resolve. The Court's review on both questions is urgently needed to ensure that arbitration remains a viable way to resolve disputes, notwithstanding new attacks from the plaintiffs' bar and old hostility from the bench.

I. THIS COURT SHOULD CONFIRM THAT THE FAA COVERS ALL TYPES OF "ARBITRATION"

The Ninth Circuit's view that "arbitration" under the FAA means only traditional, bilateral arbitration procedures specifically envisioned by the FAA's drafters cannot stand. That conclusion defies this Court's precedents and creates a split with five other circuits. It also calls into question many sensible procedures adopted to address the challenges posed by mass arbitration filings.

A. The Ninth Circuit's Decision Defies The FAA's Text And This Court's Cases

The Ninth Circuit held "that the FAA simply does not apply to and protect the mass arbitration model set forth in [Live Nation's] Terms and New Era's Rules." App.30a; *accord* App.32a-33a (Van Dyke, J., concurring). Based on that holding, the Court resurrected California's defunct *Discover Bank* rule deeming class-action waivers in consumer contracts unconscionable, which this Court held is preempted by the FAA more than a decade ago. *Id.*; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). The Ninth Circuit's ruling violates the FAA's text and this Court's precedent.

1. Section 2 of the FAA provides that any "written provision" in a commercial contract "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." 9 U.S.C. § 2. And under Section 4, a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" may seek "an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.* § 4.

In 1925, as now, "arbitration" meant any "hearing and determination of a cause between parties in controversy by a person or persons chosen by the parties," "instead of by the judicial tribunal provided by law." Arbitration, *Webster's New International Dictionary of the English Language* (1925); *see* John P.H. Soper, *A Treatise on the Law and Practice of Arbitrations and Awards* 1 (4th ed. 1927) ("a method for the settlement of disputes" where "disputes are submitted to the decision of one or more persons specially nominated for the purpose."); 1 Martin Domke et al., *Domke on Commercial Arbitration* § 3:11 (Jan. 2025 update) (similar).

"Consistent with these provisions" and the plain meaning of "arbitration," this Court has "said on numerous occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Thus, under the FAA, parties are "generally free to structure their arbitration agreements as they see fit." *Id.* at 683 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)). "They may choose who will resolve specific disputes," as well as the "rules

under which any arbitration will proceed." *Id.* "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Concepcion*, 563 U.S. at 351.

Nothing in "the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." *Mastrobuono*, 514 U.S. at 57 (quoting *Volt*, 489 U.S. at 479). Parties may therefore agree to arbitration procedures departing from the traditional, bilateral structure "envisioned by the FAA," whether by consenting "to arbitrate pursuant to the Federal Rules of Civil Procedure," permitting an arbitral "discovery process rivaling that in litigation," or "agree[ing] to aggregation." *Concepcion*, 563 U.S. at 351.

Indeed, "in recent years some parties have sometimes chosen to arbitrate on a classwide basis," consistent with their "free[dom] to alter arbitration procedures to suit their tastes" and circumstances. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 509 (2018). Declining to enforce agreements to non-traditional arbitration procedures, such as class arbitration, "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Mastrobuono*, 514 U.S. at 57.

2. Yet that is exactly what the Ninth Circuit did here by holding "that the FAA simply does not apply" to the mass arbitration procedures agreed to by Plaintiffs and Live Nation. App.30a; *see* App.32a-33a (Van Dyke, J., concurring). Neither the majority opinion nor the concurrence offered any defensible basis for stripping FAA protection from the parties' arbitration agreement.

First, the majority opined that the FAA does not apply to New Era's mass arbitration protocol because it is "not arbitration as envisioned by the FAA in 1925." App.31a-32a. The concurrence similarly concluded that the FAA does not protect New Era's mass arbitration procedures because "Congress in 1925 understood [arbitration] to be bilateral in nature, not collective." App.34a (Van Dyke, J., concurring).

Those conclusory assertions cannot be squared with the FAA's plain meaning. The FAA protects any "contract" to "settle [a dispute] by arbitration." 9 U.S.C. § 2; *see id.* § 4 (protecting any "written agreement for arbitration"). Because the FAA does not define "arbitration," the term must be construed "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). And as explained, "arbitration" encompasses any "hearing and determination" of a dispute "by a person or persons chosen by the parties," rather than a "judicial tribunal." Arbitration, *Webster's New International Dictionary of the English Language*; *see supra* at 15. Non-traditional arbitration procedures, like class arbitration or New Era's mass arbitration protocol, fit squarely within that definition.

Nothing changes just because Congress in 1925 may not have specifically envisioned class or mass arbitration. This Court has "long rejected" an approach to statutory interpretation that "displace[s] the plain meaning" of statutory language by limiting its scope to "applications foreseen at the time of enactment." *Bostock v. Clayton County*, 590 U.S. 644, 676 (2020). The plain meaning of the statutory term "arbitration" readily encompasses arbitration

procedures differing from the traditional model. That is enough for FAA protection.

Second, the majority asserted that "aggregative arbitration 'sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.'" App.31a (quoting *Concepcion*, 563 U.S. at 348). But again, the "overarching purpose of the FAA" is "to ensure the enforcement of arbitration agreements *according to their terms* so as to facilitate streamlined proceedings." *Concepcion*, 563 U.S. at 344 (emphasis added). The FAA thus gives parties broad "discretion" to "design[] arbitration processes" that "allow for efficient, streamlined procedures tailored to the type of dispute" at hand. *Id.* "Whatever they settle on, the task for courts" is "to give effect to the intent of the parties"—not to decree that the parties' chosen procedures are insufficiently efficient or streamlined to enforce. *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019).

Moreover, whether given arbitration procedures are efficient and streamlined depends on the baseline against which they are compared. If a dispute is likely to be adjudicated as part of class *litigation* in the absence of an arbitration agreement, then class *arbitration*—and certainly New Era's bellwether approach, which avoids many of class arbitration's procedural complexities—is a more efficient and streamlined option. Under the FAA, parties are free to choose that option without forfeiting statutory protection. The Ninth Circuit's view that FAA-protected "arbitration" encompasses only traditional, bilateral arbitration—but not class or

other non-traditional, aggregated arbitration—directly undermines the FAA's core purpose.

Third, the majority asserted that this Court has "consistently disparaged the use of aggregation in arbitration." App.31a. But this Court has repeatedly held that a party *can* be "compelled under the FAA to submit to class arbitration," so long as "there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielson*, 559 U.S. at 684; *Lamps Plus*, 587 U.S. at 178-79; *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 651 (2022). The "FAA requires courts to honor parties' expectations," even if they agree to atypical procedures. *Concepcion*, 563 U.S at 351.

In holding otherwise, the Ninth Circuit mistook this Court's statements that class arbitration is not "arbitration as envisioned by the FAA" as an indication that the FAA does not apply to anything other than traditional, bilateral arbitration. App.31a (quoting *Concepcion*, 563 U.S. at 351). Those statements say no such thing. Rather, they address issues related to consent—either (1) why classwide arbitration "may not be *required* by state law," *Concepcion*, 563 U.S. at 351 (emphasis added); or (2) why "courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party *agreed* to do so,'" *Lamps Plus*, 587 U.S. at 183-85.

In other words, this Court's "essential insight" has been that "courts may not allow a contract defense to reshape traditional individualized arbitration by *mandating* classwide arbitration procedures without the parties' consent." *Epic Sys.*, 584 U.S. at 509 (emphasis added). Nor may courts construe parties' "mere silence on the issue of class-action arbitration"

as "consent to resolve their disputes in class proceedings." *Stolt-Nielson*, 559 U.S. at 687. But "parties remain free to alter arbitration procedures to suit their tastes"—including by agreeing to class or other non-traditional arbitration procedures, as Plaintiffs and Live Nation did here. *Epic Sys.*, 584 U.S. at 509. Nothing about that "consensual" arrangement is "inconsistent with the FAA." *Concepcion*, 563 U.S. at 348.

3. Worse still, the Ninth Circuit artificially limited the FAA's protections in order to resurrect California's defunct *Discover Bank* rule and evade this Court's seminal decision in *Concepcion* holding that the FAA preempts that rule. App.30a-32a; *accord* App.33a (Van Dyke, J., concurring).

In *Discover Bank v. Superior Court*, the California Supreme Court deemed waivers of class proceedings in consumer contracts of adhesion unconscionable and unenforceable under California law. 113 P.3d 1100, 1103 (Cal. 2005). But in *Concepcion*, this Court held that "California's *Discover Bank* rule is pre-empted by the FAA" because it interferes with private parties' "discretion in designing arbitration processes" and undermines the FAA's "overarching purpose" of "ensur[ing] enforcement of arbitration agreements according to their terms." 563 U.S. at 344, 352.

Despite *Concepcion*'s categorical preemption holding, the Ninth Circuit held in this case that California's *Discover Bank* rule is *not* preempted in the context of "mass arbitration" procedures, because "the FAA simply does not apply to and protect [New Era's] mass arbitration model." App.30a. And "[b]ecause the FAA does not apply," the court

continued, the *Discover Bank* rule "governs the case before us." *Id.*

The Ninth Circuit's ruling turns *Concepcion* and the rest of this Court's arbitration precedents on their head. It shrinks the FAA's protections, constrains parties' contractual choices, and precludes workable solutions to mass arbitration filings. It warrants this Court's review.

B. The Ninth Circuit's Decision Creates A 5-1 Circuit Split

The decision below also creates a 5-1 circuit split. In this case, the Ninth Circuit indicated that only traditional, bilateral procedures qualify as "arbitration" under the FAA. App.2a-3a. Anything else—including class arbitration or New Era's bellwether procedures for handling mass arbitrations—is not FAA-protected "arbitration." *Id.*; *see supra* at 12-13. In sharp contrast, five circuits take the opposite view. They hold that the FAA's references to "arbitration" encompass non-traditional forms of arbitration—such as class arbitration—and that the FAA fully protects parties' agreements to use such arbitration.

To begin, the Second Circuit has applied the FAA in the class arbitration context and held that an "arbitrator's determination that the agreement permits class arbitration" is a binding "arbitration" award within the meaning of the FAA. *Jock v. Sterling Jewelers Inc.*, 942 F.3d 617, 620 (2d Cir. 2019). In so holding, the court applied the FAA's "extremely deferential standard of [judicial] review" for "arbitration" awards and upheld the order compelling class arbitration. *Id.* at 622; *see* 9 U.S.C.

§ 10(a). That holding makes sense only if class arbitration is considered "arbitration" under the FAA.

The Third Circuit has likewise held that an arbitrator's authorization of class arbitration is considered an "arbitration" award under the FAA, subject to the FAA's "deferential standard of review." *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 219 (3d Cir. 2012). This Court affirmed that sound decision, reasoning that the FAA precluded the defendant from "rerun[ning] the matter in a court," notwithstanding the non-traditional nature of class arbitration. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013).

Similarly, the Fifth, Tenth, and Eleventh Circuits all consider an arbitrator's authorization of class arbitration to be an "arbitration" award subject to the FAA's deferential standard of judicial review. *See Sun Coast Res., Inc. v. Conrad*, 956 F.3d 335, 337 (5th Cir. 2020) (applying the FAA and declining to disturb arbitrator's conclusion "that class arbitration was appropriate" given the text of the arbitration agreement); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1248 (10th Cir. 2018) (same); *S. Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352, 1359-60 (11th Cir. 2013) (same).

These decisions treating class arbitration as "arbitration" under the FAA are incompatible with the Ninth Circuit's approach in this case. In contrast to these five circuits, the Ninth Circuit indicated that only traditional, bilateral arbitration is "arbitration" within the meaning of the FAA. App.31a-32a. The decision below thus commands that district courts in the Nation's largest circuit may "*not* read the FAA as protecting [class] arbitration" or other arbitration formats deviating from the traditional, bilateral

model. App.30a-31a (emphasis added). So in the Ninth Circuit, an arbitrator's decision ordering class arbitration would *not* be considered an arbitration award protected by the FAA's deferential standards for judicial review—contrary to what the Second, Third, Fifth, Tenth, and Eleventh Circuits have all squarely held. And district courts within the Ninth Circuit are now apparently powerless to compel parties to participate in class arbitration (or other non-traditional arbitration procedures) under Section 4 of the FAA, much less to confirm a class arbitration award under Section 9. *See* 9 U.S.C. §§ 4, 9.

This Court's review is needed to resolve the split and ensure that arbitration agreements providing for class proceedings or other non-traditional procedures receive consistent treatment nationwide.

C. The Ninth Circuit's Decision Threatens Severe Consequences For Arbitration

The Ninth Circuit's statement that the FAA "simply does not apply to and protect" arbitration procedures deviating from the traditional, bilateral model creates massive uncertainty over whether and how the FAA protects arbitration procedures tailored to address the new wave of mass arbitration filings. App.29a-30a.

In recent years, plaintiffs' firms have bombarded companies with mass arbitration filings designed to apply overwhelming pressure to settle often meritless claims. *Supra* at 7-8. Companies and arbitration providers have responded by adopting alternative procedures for processing such filings. Many of these experimental solutions involve various forms of aggregation or grouping. For example, some

providers have turned to consolidating cases for the purposes of discovery, arbitrator appointments, or merits hearings.[3] Other alternatives include batching (which involves grouping cases to be adjudicated sequentially), and using bellwether cases to help encourage settlements.[4]

The decision below creates massive uncertainty over whether the FAA protects various arbitration procedures tailored to address the new wave of mass arbitration filings. The Ninth Circuit stated that the FAA "simply does not apply to and protect" any form of "class-wide," "aggregative," or "mass" arbitration procedures. App.30a-31a. Thus, under the decision below, countless procedures that arbitration providers have used to address mass arbitration filings have been thrust into limbo.

The decision's destabilizing effects are especially acute given (1) the ubiquity of arbitration agreements across various sectors of the modern economy, and (2) the broad sweep of the Ninth Circuit's appellate jurisdiction, which includes California—by far the most populous state in the Nation, with a GDP larger than India, the United Kingdom, and France.[5] Indeed, a Westlaw search shows that over the last decade, roughly 24% of all district court decisions

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[3] *See* JAMS, *Mass Arbitration Procedures and Guidelines* (effective May 1, 2024), https://www.jamsadr.com/mass-arbitration-procedures.

[4] *See* Maximilian Zorn, *The Response: Divergent Approaches to Mass Arbitration and the Effect on Practice in State and Federal Courts*, 41 Alternatives 87 (June 2023); *Pincus*, *supra*, at 47-57 (describing use of bellwethers).

[5] Gov. Gavin Newsom, *California Remains the World's 5th Largest Economy*, https://tinyurl.com/cfusjb74 (last visited Apr. 24, 2025).

adjudicating motions to compel arbitration came out of the Ninth Circuit.

Keller Postman and other plaintiffs' lawyers have already begun arguing that, under the decision below, whenever an arbitration "agreement provides for something other than traditional, bilateral arbitration, it loses the protection of the FAA." Submission of New Authority 2, *Brooks v. WarnerMedia Direct, LLC*, No. 23-cv-11030-KPF (S.D.N.Y. Nov. 1, 2024), Dkt. 101. The Ninth Circuit's decision thus calls into question various arbitration procedures designed to address mass arbitration filings, such as batching and bellwethers. *See, e.g.*, *id.* (relying on the decision below to argue that the FAA does not protect any "staged arbitration process"); Class Action Compl. ¶¶128-29, *Brown v. Uber Techs., Inc.*, No. 24-cv-9505-KAW (N.D. Cal. Dec. 30, 2024), Dkt. 1 (similar); Answering Br. 58-61, *Pandolfi v. AviaGames, Inc.*, No. 24-5817 (9th Cir. Mar. 17, 2025), ECF No. 32 (similar).

Indeed, Keller Postman recently told another Ninth Circuit panel that under that court's ruling in this case, even the mere "consolidation of claims" is enough to "lose[] [FAA] protection." 28(j) Letter 1, *Jones v. Starz Ent., LLC*, No. 24-1645 (9th Cir. Nov. 1, 2024), ECF No. 42. And while the *Jones* panel ultimately did "not reach the question" whether consolidated arbitration proceedings qualify as "arbitration" under the FAA, it reiterated "serious misgivings" about using "bellwether cases" to address mass arbitration filings. *Jones v. Starz Ent., LLC*, 129 F.4th 1176, 1182, 1185 (9th Cir. 2025).

Commentators have likewise emphasized the "chilling" effect of the Ninth Circuit's holding "for companies relying on batch-and-bellwether protocols"

to address mass filings. *See* Alison Frankel, *Live Nation decision will force companies to rethink consumer arbitration rules*, Reuters (Oct. 29, 2024), https://tinyurl.com/bdfzruws. And law firms have advised clients to now be "wary of any procedures that could be interpreted as limiting individualized arbitration with bilateral processes and procedures." Rodger R. Cole et al., *Ninth Circuit Nixes Live Nation's 'Unconscionable' Arbitration Agreement*, Fenwick & West LLP (Oct. 31, 2024), https://tinyurl.com/yu7nsvmn.

All this uncertainty will have far-reaching consequences for the future of arbitration. For close to a century, the FAA has governed many essential aspects of arbitration, including not only the validity of arbitration contracts (Section 2), but also the appointment of arbitrators (Section 5); the power to compel witnesses (Section 7); the judicial confirmation, modification, and vacatur of arbitration awards (Sections 9-13); and appeals (Section 16). Going forward, it is unclear whether these federal safeguards still apply to many types of arbitration procedures in the Nation's largest circuit.

The Ninth Circuit's decision in this case threatens arbitration in general and hamstrings good-faith efforts to combat the destructive effects of mass arbitration filings. If allowed to stand, the decision below will enable mass arbitration plaintiffs to continue their abusive strategy of "racking up procedural costs to the point of forcing [the defendant] to capitulate to a settlement," rather than "proving the[ir] allegations" and "seek[ing] appropriate redress on the merits." *Jones*, 129 F.4th at 1183. These highly disruptive consequences reinforce the need for review.

II. THE COURT SHOULD ALSO RESOLVE THE SEVERANCE QUESTION

The Ninth Circuit's other holding—refusing to sever the purportedly unconscionable provisions and refusing to compel arbitration before New Era or the designated backup arbitrator—also warrants this Court's review. That conclusion rested on California's severability doctrine, which violates the FAA by specifically targeting and disproportionately invalidating arbitration agreements. This Court previously granted certiorari to address whether the FAA preempts California's arbitration-specific severability rules, but the case settled before oral argument. *See* Cert. Pet. i, *MHN Gov't Servs., Inc. v. Zaborowski*, 576 U.S. 1095 (2015) (No. 14-1458), 2015 WL 3637766, *dismissed*, 578 U.S. 917 (2016); Sup. Ct. R. 46.1. The issue is just as certworthy today.

A. California's Severability Rules Violate The FAA And This Court's Arbitration Precedents

The Ninth Circuit deemed the parties' arbitration agreement unconscionable based on several aspects of New Era's rules. *See* App.26a-29a; *supra* at 12 & n.2. But instead of severing the unconscionable provisions—or enforcing the parties' backup delegation to FairClaims, a different arbitration provider that Plaintiffs have never challenged—the Ninth Circuit invalidated the whole agreement under California's anti-arbitration severability doctrine. That doctrine violates the FAA.

1. Although Section 2 of the FAA generally makes arbitration agreements "valid, irrevocable, and enforceable," it includes a savings clause permitting invalidation based on "such grounds as exist at law or

in equity for the revocation of any contract." 9 U.S.C. § 2. This Court has explained that the savings clause establishes an "'equal-treatment' rule for arbitration contracts." *Epic Sys.*, 584 U.S. at 507. Courts may declare arbitration agreements unenforceable by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Concepcion*, 563 U.S at 339. But they may not "singl[e] out [arbitration] contracts for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 252 (2017).

The FAA thus guards against all efforts—both overt and covert—to treat arbitration agreements less favorably than other contracts. It preempts state contract principles "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339; *see, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (per curiam). And it similarly invalidates facially neutral state rules that, "in practice," have "a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342; *see, e.g.*, *id.* (noting facially neutral applications of "the general principle of unconscionability" preempted by the FAA). Either kind of "uncommon barrier[]" to enforcing arbitration agreements cannot "survive the FAA's edict against singling out those contracts for disfavored treatment." *Kindred Nursing*, 581 U.S. at 253.

2. Here, the Ninth Circuit improperly relied on California's severability doctrine, which violates the FAA's equal-treatment mandate. *See* App.27a-29a.

Under the first part of California's severability doctrine, a contract "cannot be cured" through severance if "'the central purpose of the contract is

tainted with illegality'" or if "reformation by augmentation is necessary." *Ramirez v. Charter Commc'ns, Inc.*, 551 P.3d 520, 546-47 (Cal. 2024) (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 696 (Cal. 2000)). But "[e]ven if a contract *can* be cured" through severance, the California Supreme Court recently reaffirmed that courts must "also ask whether the unconscionability *should* be cured" in "the interests of justice." *Id.* at 547. "This part of the inquiry," the court continued, focuses on whether "the stronger party engaged in a systematic effort to impose arbitration on the weaker party not simply as an alternative to litigation, but to secure a forum that works to the stronger party's advantage." *Id.* It also considers whether severance "could 'create an incentive for [a company] to draft a one-sided arbitration agreement in the hope [a party] would not challenge the unlawful provisions,'" while knowing that a "'court would simply modify the agreement'" after the fact if needed. *Id.*

Applying California's test here, the Ninth Circuit held that "'the interests of justice'" would not "'be furthered' by severance." App.28a (quoting *Ramirez*, 551 P.3d at 547). The Ninth Circuit concluded that Live Nation "engaged in a 'systematic effort to impose arbitration" on Plaintiffs "'as an inferior forum'" for litigating their claims. *Id.* (quoting *Armendariz*, 6 P.3d at 697). And it echoed the California Supreme Court's fears of "an overly generous severability policy" in the arbitration context, under which "'companies could be incentivized to retain unenforceable provisions designed to chill customers' vindication of their rights.'" *Id.*

For at least two reasons, the severability analysis called for by California law and applied in this case violates the FAA.

First, California's freewheeling "interests of justice" inquiry into whether the more powerful party "engaged in a systematic effort to impose arbitration" as "an inferior forum," *Ramirez*, 551 P.3d at 546-47, discriminates against arbitration on its face. That test is "tailor-made to arbitration agreements." *Kindred Nursing*, 581 U.S. at 252. And it directly "target[s]" arbitration "by name." *Epic Sys.*, 584 U.S. at 508.

So too does the requirement that courts examine the "deterrent effect" on companies that might be tempted "to draft a one-sided arbitration agreement." *Ramirez*, 551 P.3d at 547. The "language used" by the California Supreme Court in formulating that aspect of the test likewise "focuse[s] only on arbitration." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 56 (2015). "Framing the question in such terms, rather than in generally applicable terms," shows that California's test is "limited" to "arbitration." *Id.* at 57.

Second, California's interests-of-justice test "ha[s] a 'disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342. Outside the arbitration context, California courts "take a very liberal view of severability, enforcing valid parts of an apparently indivisible contract" and viewing that as "sound application of contract law." *Adair v. Stockton Unified Sch. Dist.*, 77 Cal. Rptr. 3d 62, 73 (Ct. App. 2008); *see* 1 B.E. Witkin, *Summary of California Law* § 423 (11th ed. May 2024 update) (listing cases exemplifying a "very loose view of severability").

In sharp contrast, California courts (along with the Ninth Circuit when applying California law) overwhelmingly refuse to sever unconscionable provisions in arbitration agreements, especially under the interests-of-justice test. The mere presence of multiple unconscionable provisions is often itself treated as proof "that the stronger party engaged in a systematic effort to impose arbitration" as an "'inferior forum.'" *Ramirez*, 551 P.3d at 546-47; *see, e.g.*, *Ronderos v. USF Reddaway, Inc.*, 114 F.4th 1080, 1100-02 (9th Cir. 2024); App.27a-28a.

Empirical data confirm that it is all too easy for hostile courts to discern a supposedly "systematic effort to impose arbitration" as "an inferior forum" and then nullify arbitration agreements that should be enforced under the FAA. *Ramirez*, 551 P.3d at 546-47. Live Nation analyzed 162 decisions by the California Court of Appeal applying California's severability doctrine from May 5, 2015 to May 5, 2025.[6] The results are striking. Whereas the Court of Appeal fully invalidated arbitration agreements with unenforceable provisions 70% of the time, it nullified non-arbitration contracts only 44% of the time.

The disparity is even worse when considering the subset of cases where the court expressly applied California's "interests of justice" test: Arbitration agreements were nullified 81% of the time in that situation, but non-arbitration contracts were invalidated in just 22% of cases. Looking instead at

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[6] Specifically, Live Nation reviewed all such decisions using the word "severability," "severable," or "severance" in the same paragraph as "contract." A complete list of these 162 cases is attached. *See* App.102a-28a.

decisions where the interests-of-justice test was *not* expressly applied, the disparity disappears, with severance granted in roughly half of arbitration and non-arbitration contracts alike. The "disproportionate impact on arbitration agreements" inflicted by California's interests-of-justice test is unmistakable. *Concepcion*, 563 U.S. at 342.

B. The Issue Is Important, As This Court Recognized By Granting Certiorari In *Zaborowski*

The second question presented is a critically important issue that warrants review, as this Court has already recognized. Several years ago, the Court granted certiorari to address the same FAA preemption question. *See Zaborowski* Cert. Pet. i ("The question presented is whether California's arbitration-only severability rule is preempted by the FAA."). But the parties in *Zaborowski* settled before oral argument and voluntarily dismissed the case. *See MHN Gov't Servs., Inc. v. Zaborowski*, 578 U.S. 917 (2016); Sup. Ct. R. 46.1. This case confirms the continued need for review, especially since the California Supreme Court recently reaffirmed California's commitment to severability rules that specifically target and disproportionately affect arbitration. That unlawful regime will persist until this Court intervenes.

1. It is always "a matter of great importance" that "state supreme courts adhere to a correct interpretation of the [FAA]." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17-18 (2012) (per curiam). That is especially true for California's rules governing the severability of unconscionable provisions in arbitration agreements.

Severability doctrine applies every time a court deems a provision in an arbitration agreement unconscionable or otherwise unenforceable. That happens more frequently in California than most anywhere else. Historically, "California's courts have been [especially] likely to hold contracts to arbitrate unconscionable." *Concepion*, 563 U.S. at 342; *accord* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 40-41, 44-48 (2006).

Also, as explained, California is the Nation's most populous state—and *the world's* fifth largest economy. *Supra* at 24 & n.5. Turning a blind eye to California's arbitration-targeting severability rules would thus inflict especially severe harms, given California courts' penchant for invalidating provisions in arbitration agreements and the state's sheer size and economic import.

California courts, as well as the Ninth Circuit, have frequently demonstrated the very "judicial hostility to arbitration agreements" that Congress enacted the FAA to combat. *Concepion*, 563 U.S. at 339. Time and again, this Court has had to remedy their failures to enforce the FAA. *See, e.g.*, *Viking River*, 596 U.S. at 662-63 (reversing California Court of Appeal); *Lamps Plus*, 587 U.S. at 189 (reversing the Ninth Circuit); *DIRECTV*, 577 U.S. at 58-59 (reversing California Court of Appeal); *Concepcion*, 563 U.S. at 337-38 (reversing Ninth Circuit); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (reversing California Court of Appeal). And as many commentators have observed, this Court's intervention has been necessary because "California courts are clearly biased against arbitration" and

"[t]heir disdain manifests" in contract rules that apply only to arbitration agreements. Broome, *supra*, at 39, 40-41, 45-49.[7]

Many judges have lamented this state of affairs. Two decades ago, Justice Brown of the California Supreme Court faulted her court for "violat[ing] the FAA" by creating rules "'applicable only to arbitration provisions.'" *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 999 (Cal. 2003) (concurring in part and dissenting in part). Justice Chin echoed that criticism more recently, pointedly observing that his court applies "very different" principles "in arbitration cases" than it does "in nonarbitration cases." *OTO, L.L.C. v. Kho*, 447 P.3d 680, 765 (Cal. 2019) (Chin, J., dissenting). And just last year, Justice Wiley of the California Court of Appeal implored his colleagues to "get the message" and stop "singl[ing] out arbitration agreements for disfavored treatment." *Hohenshelt v. Super. Ct.*, 318 Cal. Rptr. 3d 475, 481-82 (Ct. App. 2024) (Wiley, J., dissenting) (quoting *Kindred Nursing*, 581 U.S. at 248).

As for the Ninth Circuit, Judge Kozinski decried the "lamentable tendency" of California courts to treat arbitration clauses more harshly than other contracts. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1313 (9th Cir. 2006) (dissenting). Judge N.R.

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[7] *Accord* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185, 209 (2004) ("California courts treat arbitration agreements differently precisely because they are arbitration agreements, in direct contradiction of the [FAA]."); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 78-90 (2005) (similar).

Smith similarly chided his colleagues for "attempt[ing] to find creative ways to get around the FAA" and exemplifying the "same 'judicial hostility' to arbitration" that "ninety years of Supreme Court precedent" has tried to uproot. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 440, 450 (9th Cir. 2015) (dissenting). Judge Bennett, too, criticized his court for applying California law in a way that "singl[es] out [arbitration] contracts for disfavored treatment." *Ronderos*, 114 F.4th at 1104 (dissenting) (alteration in original).

Along these lines, Judge Gould leveled similar criticisms on the very same issue presented in this case. In *Zaborowski v. MHN Government Services, Inc.*, he emphasized that California's arbitration-specific severability regime "has 'a disproportionate impact on arbitration agreements'" and is thus "preempted by the [FAA]." 601 F. App'x 461, 464 (9th Cir. 2014) (concurring in part and dissenting in part) (quoting *Concepcion*, 563 U.S. at 342). Judge Gould was right then—and remains right today.

2. California's severability framework "make[s] it trivially easy" for California courts and the Ninth Circuit to engage in further "blatant discrimination against arbitration." *Kindred Nursing*, 581 U.S. at 255. Take this case, where severability was plainly the proper course under any even-handed analysis.

Here, the parties had a longstanding, unequivocal agreement to arbitrate—one long predating the switch to New Era. 2-ER-154, 156, 158, 161 (¶¶9, 17, 24, 32). The pre-New Era version of their agreement had repeatedly been upheld in court, including at the Ninth Circuit. *Supra* at 6 (collecting cases). The only pertinent change was the switch from JAMS to New Era, with FairClaims or a mutually agreeable

arbitrator as a backup. And there was an obvious, legitimate reason for that change—to restore arbitration as a fair method for adjudicating claims on the merits, despite the proliferation of coercive mass arbitration filings.

Even if there were something unconscionable about New Era's rules, *but see supra* at 12 & n.2, the parties' arbitration agreement reiterated their ironclad intent to arbitrate by providing that if "New Era ADR is unable to conduct the arbitration *for any reason*," then "the arbitration will be conducted by FairClaims" or a "mutually" agreeable "alternative arbitration provider." 2-ER-124 (emphasis added). Plaintiffs have never suggested any problem with FairClaims or using a mutually-agreeable arbitrator. The arbitration agreement also included an express severability clause providing that if any part is deemed unenforceable, then "the remaining parts shall be deemed valid and enforceable." 2-ER-125. The Ninth Circuit had no defensible basis to disregard these provisions.

The decision below also defied this Court's instruction that, "[a]s a matter of substantive federal arbitration law," the parties' agreement to delegate threshold questions of arbitrability to the arbitrator was "severable from the remainder of the contract." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70-71 (2010). So even if the delegation to *New Era* was unconscionable, federal arbitration law *required* the Ninth Circuit to invalidate and sever that discrete delegation—and then to enforce the parties' legally separate, backup delegation to FairClaims. *See id.*

Despite all this, California's anti-arbitration severability doctrine let the Ninth Circuit refuse severance and defy the parties' backup agreement to

arbitrate before FairClaims, an arbitration provider that Plaintiffs never challenged. App.32a. All the Ninth Circuit had to do was declare the parties' switch from JAMS to New Era a "systematic effort to impose arbitration" as "an inferior forum." App.28a. That exemplifies the kind of "judicial hostility to arbitration agreements" that the FAA was enacted to prevent. *Concepcion*, 563 U.S. at 339. California's severability rules are just the latest in a long list of impermissible "'devices and formulas' declaring arbitration against public policy." *Id.* at 342. The FAA preempts those rules.

* * *

This case is an ideal vehicle for this Court resolve two critically important issues involving the FAA. Both are pure questions of law, and each was squarely resolved below. This Court should once again grant certiorari to vindicate the FAA's core protections against judicial hostility to arbitration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 5, 2025

APPENDIX

TABLE OF CONTENTS

[120 F.4th 670]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Skot HECKMAN; Luis Ponce; Jeanene Popp; Jacob Roberts, on behalf of themselves and all those similarly situated, Plaintiffs-Appellees,

v.

LIVE NATION ENTERTAINMENT, INC.; Ticketmaster, LLC, Defendants-Appellants.

No. 23-55770

Argued and Submitted June 14, 2024
Pasadena, California

Filed October 28, 2024

Before: William A. Fletcher, Morgan Christen, and Lawrence VanDyke, Circuit Judges.

Opinion by Judge Fletcher;

Concurrence by Judge VanDyke.

OPINION

W. FLETCHER, Circuit Judge:

Plaintiffs-Appellees Skot Heckman, Luis Ponce, Jeanene Popp, and Jacob Roberts (collectively, "Plaintiffs") brought a putative class action against Live Nation Entertainment, Inc., and Ticketmaster LLC (collectively, "Defendants") in January 2022, alleging anticompetitive practices in violation of the Sherman Act. Live Nation is the largest concert promoter for major entertainment venues in the United States. Ticketmaster is the largest primary

ticket seller for live events at major concert venues in the United States. Live Nation and Ticketmaster merged in 2010.

Plaintiffs bought tickets to live entertainment promoted by Live Nation and sold through Ticketmaster's website. Their online ticket purchase agreement on the Ticketmaster website included an agreement to comply with Ticketmaster's Terms of Use ("Terms"). Ticketmaster's Terms provide that any claim arising out of the ticket purchase, as well as any prior ticket purchase, will be decided by an arbitrator employed by a newly created entity, New Era ADR ("New Era"), using novel and unusual procedures.

The district court denied Defendants' motion to compel arbitration pursuant to the arbitration agreement. It held that the clause delegating to the arbitrator the authority to determine the validity of the arbitration agreement—the "delegation clause"—was unconscionable under California law, both procedurally and substantively. *Heckman v. Live Nation Ent., Inc.*, 686 F. Supp. 3d 939, 967 (C.D. Cal. 2023). Defendants appealed. We have jurisdiction under 9 U.S.C. § 16(a). *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 739, 143 S.Ct. 1915, 216 L.Ed.2d 671 (2023).

We affirm. We hold that the delegation clause of the arbitration agreement, and the arbitration agreement as a whole, are unconscionable and unenforceable under California law. We hold further that the application of California's unconscionability law to the facts of this case is not preempted by the Federal Arbitration Act ("FAA"). Finally, we hold, as an alternate and independent ground, that the FAA does not preempt California's prohibition of class

action waivers contained in contracts of adhesion in large-scale small-stakes consumer cases.

I. Background

In 2011, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), holding that states cannot require companies to use class arbitration in dealing with individual large-scale small-stakes consumer claims. *Id.* at 346–47, 131 S.Ct. 1740. For several years in the wake of *Concepcion*, plaintiff-side attorneys saw no practical way to bring large numbers of individual small-stakes consumer claims. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 550, 138 S.Ct. 1612, 200 L.Ed.2d 889 (2018) (Ginsburg, J., dissenting) ("Expenses entailed in mounting individual claims will often far outweigh potential recoveries."). In recent years, however, plaintiff-side attorneys have had some success in bringing large numbers of parallel individual small-stakes consumer claims in arbitration. This case arises out of an attempt to counter this success.

In *Oberstein v. Live Nation Entertainment, Inc.*, 60 F.4th 505 (9th Cir. 2023), a separate case from the one now before us, we upheld the district court's grant of Defendants' motion to compel individual arbitration of claims by ticket purchasers. *Id.* at 509. However, while proceedings were still underway in the district court in *Oberstein*, Defendants foresaw that if their motion to compel in that case were granted, they would be faced with a large number of parallel individual claims by ticket purchasers. In anticipation of such claims, Defendants sought to gain in arbitration some of the advantages of class-wide litigation while suffering few of its disadvantages.

They turned to New Era, a newly formed arbitration company.

New Era was founded in 2020. Its stated mission is to provide a "critical prophylactic measure for client's mass arbitration risk." *Heckman*, 686 F. Supp. 3d at 962. While the parties dispute the extent of their collaboration, it is undisputed that New Era and Defendants' attorneys, Latham & Watkins LLP, have shown a "remarkable degree of coordination" in devising a set of procedures to be followed when large numbers of similar consumer claims are brought in arbitration. *Id.* at 958 n.13. New Era offered a subscription option under which a client company pays an annual subscription fee. On June 21, 2021, Defendants executed a subscription agreement as New Era's first subscriber. Later that same day, New Era published procedures applicable to large-scale arbitrations in consumer cases.

New Era offered two kinds of arbitration—Standard Arbitration and Expedited/Mass Arbitration. Standard Arbitration is "[g]enerally sought after for complex and/or more evidence intensive disputes. This product is the most similar to a traditional arbitration[.]" New Era Arbitration Rules, ¶ 1.c.ii.1 ("Rules"). Expedited/Mass Arbitration is "[g]enerally sought after for disputes that would benefit from an even more streamlined process [than Standard Arbitration]." Rules, ¶ 1.c.iii.1. A "Mass Arbitration" is "[a] specific type of expedited arbitration where there are Common Issues of Law and Fact among five or more cases." Rules, ¶ 1.c.iii.3.a. With limited exceptions, proceedings in Mass Arbitrations are virtual. *Id.*

On July 2, 2021, while a motion to compel arbitration was pending in the district court in

Oberstein, Ticketmaster amended the Terms on its ticket sales website to require that any person using its website agree to arbitrate any dispute arising out of a ticket purchase, whenever that purchase took place, and to arbitrate under New Era's Rules applicable to Expedited/Mass Arbitrations.

II. Defendants' New Terms and New Era's Expedited/Mass Arbitration Rules

The most salient provisions of Defendants' new Terms and New Era's Rules for Expedited/Mass Arbitration are as follows. In this section of our opinion, we do our best to describe the process established by the Rules. However, we note at the outset that New Era's Rules are internally inconsistent, poorly drafted, and riddled with typos, and that Live Nation's counsel struggled to explain the Rules at oral argument.

Under the new Terms of Ticketmaster's website, a person using the website agrees to Expedited/Mass Arbitration not only for any claim arising out of a current ticket purchase but also for all claims arising out of prior ticket purchases. Terms, § 17. Any updates to the Terms become "effective immediately when [Ticketmaster posts] a revised version of the Terms on the Site." *Heckman*, 686 F. Supp. 3d at 954. By merely "continuing to use [the Ticketmaster] Site after that date, [a consumer] agrees to the changes." *Id.* This provision is particularly disadvantageous to consumers because they often revisit the site in order to use previously purchased digital tickets. It is thus nearly impossible to avoid retroactive application of any changes Ticketmaster imposes.

New Era's Rules for Expedited/Mass Arbitration proceedings differ significantly from the rules of

traditional arbitration fora such as Judicial Arbitration and Mediation Services ("JAMS") or the American Arbitration Association. New Era's Rules provide for Mass Arbitration whenever "more than five" cases involve common issues of law or fact. Rules, ¶ 6.b.ii.1; *compare* Rules, ¶ 1.c.iii.3.a. ("five or more"). The Rules purport to provide that the "[d]etermination of whether case(s) [sic] involve Common Issues of Law and Fact rests solely in the hands of the neutral handling the proceeding or a New Era ADR neutral." Rules, ¶ 2.x.ii. But a close reading of the Rules reveals that New Era, and only New Era, will unilaterally make a determination to group, or "batch," similar cases. Under the Rules' order of operations, the arbitrator assigned to the batched cases cannot be determined without input from the lawyers representing the plaintiffs, and the lawyers representing the plaintiffs cannot be identified until after the batching decision is made. Thus, New Era will always unilaterally decide which cases will proceed in a batch. Rules, ¶ 2.x.ii.2. Live Nation conceded this point at argument.

After cases are batched, a single arbitrator is chosen to decide all cases in the batch. Rules, ¶ 2.j–k. The Rules purport to give plaintiffs an equal say in the selection of the arbitrator through a rank and strike process. Rules, ¶ 2.j. In batched cases specifically, "the attorneys for that party (ies) [sic] are responsible for meeting and conferring internally and achieving consensus for purposes of making selections for the rank/strike process." Rules, ¶ 2.j.v. While plaintiffs may be able to participate in the selection, New Era "may also otherwise replace a neutral at its sole discretion, upon what New Era ADR deems a legitimate request or concern [sic] or upon

unforeseeable circumstances." Rules, ¶ 2.k.iv. The suggestion in the Rules that plaintiffs will have input into the selection of an arbitrator is thus undermined by the fact that the neutral may be replaced at New Era's sole discretion.

Three "bellwether cases" are chosen from the batched cases—one chosen by the plaintiffs, one by the defendant, and one "through a process to be determined by the [arbitrator]." Rules, ¶ 6.b.iii.3.b. The arbitrator's decisions in these cases become "precedent" on all common issues in the batched cases, as well as in any later-filed cases added to the batch. Rules, ¶¶ 6.b.iii.5.a–b. "Only if a party can demonstrate that there are no Common Issues of Law and Fact will a case be removed from the Mass Arbitration." Rules, ¶ 6.b.iii.6.c.

Though decisions in bellwether cases are precedential, the arbitration hearing and award in those cases proceed individually and are confidential, known only to the particular plaintiffs, to the defendant company, and to the arbitrator. Terms § 17. Decisions by the arbitrator in a bellwether case that favors a defendant will thus be binding on non-bellwether plaintiffs, who had no chance to participate in the arbitration and who are ignorant of the decision until it is invoked against them.

A complaint before the arbitrator must set forth the "nature of the dispute, including applicable dates and times, parties involved, as well as the facts," but complaints are limited to ten pages. Rules, ¶ 6.a.ii.1.a–b. There is no right to discovery in Expedited/Mass Arbitration proceedings. Rules, ¶ 2.o.ii. A party in an Expedited/Mass Arbitration proceeding may get discovery only by requesting an "upgrade" to a Standard Arbitration proceeding. The

arbitrator "has discretion" to grant or deny such a request. Rules, ¶¶ 2.o.ii–iii.

Both parties must "upload their documents," which comprise all evidence and briefing, within 14 days of filing the complaint. Rules, ¶ 6.a.vii.2. All "[u]ploads are limited to the lesser of 10 total files, 25 total pages for each file or 25MB of aggregate uncompressed uploads." Rules, ¶ 6.a.vii.3. The arbitrator "has discretion to allow evidence in excess of the stated limits [on documents] as necessary to ensure a fundamentally fair process." Rules, ¶ 6.a.vii.4.

After the parties exchange documents and submit briefs, the arbitrator may (but need not) hold a hearing. Rules, ¶¶ 6.a.viii–ix. There is no separate hearing or briefing allowed for threshold issues such as "arbitrability, governing law, [or] jurisdiction." Rules, ¶ 6.z.ii. Those issues "shall be argued and decided at . . . hearings on the merits of the case, and not through any preliminary hearings or motion practice." Rules, ¶ 6.z.ii. After a hearing, or a ruling that "no hearing is necessary," the parties' briefs on their "final arguments based on the documents and initial arguments submitted earlier in the proceeding" are limited to "15K characters" (about five pages). Rules, ¶ 6.a.x.2.

Once decisions are issued in the three bellwether cases, all plaintiffs batched with those bellwether plaintiffs must participate in a single settlement conference. It is not specified in the Rules, but Live Nation contended during oral argument that Batched Plaintiffs receive bellwether decisions sometime before the settlement conference. Rules, ¶ 6.b.iii.4.b. It is not until after the settlement conference that plaintiffs can finally argue for removal from the mass

arbitration. Rules, ¶ 6.b.iii.6.a. Even then, plaintiffs are removed from the batch only if a they can show their case shares "no Common Issues of Law and Fact" with the bellwether cases. Rules, ¶ 6.b.iii.6.c. It is unclear how a batched plaintiff who did not participate in the bellwether case could demonstrate this, because the Rules do not provide access to the bellwether record for non-bellwether plaintiffs in the batch. Without such access, plaintiffs will struggle to differentiate their cases from the bellwethers. Notably, this lack of access is asymmetrical: the defendant will always have access to the record as a party to bellwether cases.

These hurdles are even greater for later-filed cases that are added to the batch. At oral argument, Live Nation contended that later-filing plaintiffs will receive bellwether decisions after they file. However, the Rules do not state when plaintiffs with later-filed cases will receive the bellwether decisions. Rules, ¶ 6.b.iii.4.b. No provision is made in the Rules for later-filing plaintiffs to receive the associated briefing or discovery from the bellwether cases. This is particularly problematic because the records for earlier-decided cases are permanently deleted 60 days after the end of the proceedings in those cases. Rules, ¶ 2.bb.

An award of injunctive relief by the arbitrator may be appealed to a panel of arbitrators employed by JAMS, but a denial of injunctive relief may not be appealed. Terms, § 17. As a practical matter, given that injunctive relief will virtually always be sought by the plaintiff rather than by the defendant, this provision operates asymmetrically. It provides a right of appeal if the plaintiff's request for an

injunction is granted, but denies a right of appeal if the plaintiff's request is denied.

III. Decision of the District Court

The district court concluded that the delegation clause is unconscionable, both procedurally and substantively, and is therefore unenforceable under California state law. It concluded, further, that the FAA does not preempt the application of California law in this case. The court denied Defendants' motion to compel arbitration. *Heckman*, 686 F. Supp. 3d at 969.

The district court first determined that the delegation clause is procedurally unconscionable "to an extreme degree." *Id.* at 952. The court then identified four elements of New Era's model that rendered the delegation clause substantively unconscionable: (1) the application of precedent from the bellwether decisions to the claimants who had no opportunity to participate in, or even learn the content of, those decisions; (2) the lack of discovery and other procedural limitations; (3) the provisions governing the selection of arbitrators; and (4) the limited right of appeal. *Id.* at 967. The district court declined to sever the unconscionable provisions because "unconscionability permeates" the Terms and Rules. *Id.* at 967–68.

IV. Standard of Review

We review legal questions de novo, but "review for clear error any factual findings underlying the district court's order." *Holley-Gallegly v. TA Operating, LLC*, 74 F.4th 997, 1000 (9th Cir. 2023). "We review a district court's decision not to sever unconscionable portions of an arbitration agreement

for abuse of discretion." *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 999 (9th Cir. 2021).

V. Unconscionability Analysis

"In determining whether a valid arbitration agreement exists, federal courts 'apply ordinary state-law principles that govern the formation of contracts.' " *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). Under the FAA, a court may declare an arbitration agreement unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and may invalidate an arbitration agreement by "generally applicable contract defenses, such as fraud, duress, or unconscionability," *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740 (quoting *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)).

A. Unconscionability of the Delegation Clause

The first question before us is whether the clause delegating to the arbitrator the authority to decide the validity of the arbitration agreement—the delegation clause—is unconscionable and therefore unenforceable. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). In deciding whether a delegation clause is unenforceable, our analysis is not limited to the bare text of the clause. "A party is . . . permitted under *Rent-A-Center* to challenge the enforceability of a delegation clause by explaining how 'unrelated' provisions make the delegation unconscionable." *Holley-Gallegly*, 74 F.4th at 1002. "In evaluating an

unconscionability challenge to a delegation provision under California law, a court must be able to interpret the provision in the context of the agreement as a whole, which may require examining the underlying arbitration agreement as well." *Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1012 (9th Cir. 2023). A court must "consider the parts of the agreement that impact[ ] the delegation provision to decide its enforceability." *Id.* at 1011. "[I]f a court cannot look through the delegation provision to the rest of the contract, a court would fail to see how delegating questions of arbitrability to an arbitrator was unconscionable." *Id.* at 1012.

To demonstrate unconscionability of Defendants' delegation clause under California law, Plaintiffs must show that the clause is both procedurally and substantively unconscionable. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, 690 (2000). "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.* If there is "substantial procedural unconscionability . . ., even a relatively low degree of substantive unconscionability may suffice to render the agreement unenforceable." *OTO, LLC v. Kho*, 8 Cal.5th 111, 251 Cal.Rptr.3d 714, 447 P.3d 680, 693 (2019).

The delegation clause of Ticketmaster's arbitration agreement provided in relevant part:

> **Delegation; Interpretation.** The arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to the extent permitted by law to resolve all disputes

> arising out of or relating to the interpretation, applicability, enforceability, or formation of this Agreement, including but not limited to, any claim that all or any part of this Agreement is void or voidable . . . .

Terms, ¶ 17.

We conclude, as did the district court, that the delegation clause is both procedurally and substantively unconscionable.

1. Procedural Unconscionability

The district court concluded that the delegation clause is "procedurally unconscionable to an extreme degree." *Heckman*, 686 F. Supp. 3d at 952. We agree.

"Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion," *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 689, defined as "a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms," *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.App.4th 846, 113 Cal. Rptr. 2d 376, 381–82 (2001). The parties agree that the delegation clause is part of a contract of adhesion. *See Heckman*, 686 F. Supp. 3d at 952 ("The agreement is certainly contained within a contract of adhesion . . . ."). Some California courts have held that in itself "[a] finding of a contract of adhesion is essentially a finding of procedural unconscionability." *Flores*, 113 Cal. Rptr. 2d at 382; *Aral v. EarthLink, Inc.*, 134 Cal.App.4th 544, 36 Cal. Rptr. 3d 229, 238 (2005); *Baltazar v. Forever 21, Inc.*, 62 Cal.4th 1237, 200 Cal.Rptr.3d 7, 367 P.3d 6, 11 (2016); *Ramirez v. Charter Commc'ns, Inc.*, 16 Cal.5th 478, 322 Cal.Rptr.3d 825, 551 P.3d 520, 530 (2024). The contract between Plaintiffs and

Ticketmaster is much more than a mere garden variety contract of adhesion.

In deciding procedural unconscionability, California courts "focus[ ] on the factors of oppression and surprise." *Patterson v. ITT Consumer Fin. Corp.*, 14 Cal.App.4th 1659, 18 Cal. Rptr. 2d 563, 565 (1993). "Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." *Flores*, 113 Cal. Rptr. 2d at 381. Surprise is a "function of the disappointed reasonable expectations of the weaker party," *Harper v. Ultimo*, 113 Cal.App.4th 1402, 7 Cal. Rptr. 3d 418, 422 (2003), and can arise when "the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms," *Patterson*, 18 Cal. Rptr. 2d at 565 (quoting *A & M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 186 Cal. Rptr. 114, 122 (1982)). The elements of oppression and surprise are "satisfied by a finding that the arbitration provision was presented on a take-it-or-leave-it basis and that it was oppressive due to 'an inequality of bargaining power that result[ed] in no real negotiation and an absence of meaningful choice.' " *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1281 (9th Cir. 2006) (en banc) (quoting *Flores*, 113 Cal. Rptr. 2d at 381) (alteration in original). Both oppression and surprise are present here.

The district court wrote, with respect to oppression, "[I]t is hard to imagine a relationship with a greater power imbalance than that between Defendants and its consumers, given Defendants' market dominance in the ticket services industries." *Heckman*, 686 F. Supp. 3d at 952. Because Ticketmaster is the exclusive ticket seller for almost

all live concerts in large venues, prospective ticket buyers in most instances are faced with a choice. They can either use Ticketmaster's website and accept its Terms, or refuse to use the website and be entirely foreclosed from purchasing tickets on the primary market. *See Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 118 Cal. Rptr. 2d 862, 867 (2002) ("The availability of similar goods or services elsewhere may be relevant to whether the contract is one of adhesion . . . ."), *abrogated in part on other grounds by Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742.

We note, with respect to surprise, that Ticketmaster's Terms state they may be changed without notice and changes apply retroactively. Ticketmaster changed the Terms on its website on July 2, 2021, requiring all website users to agree to arbitration under New Era's Rules. Its website provides that a person merely browsing the website without purchasing a ticket agrees to Ticketmaster's changed Terms. Binding consumers who merely browse a website to the terms specified in the website has been "consistently held . . . to be unenforceable, as individuals do not have inquiry notice." *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024); *see also Nguyen*, 763 F.3d at 1177–79; *Douglas v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 495 F.3d 1062, 1066–67 (9th Cir. 2007).

Ticketmaster's Terms also permit unilateral modification of the Terms without prior notice. The Terms provide that Ticketmaster retains the power to "make changes to the Terms at any time" which would "be effective immediately when we post a revised version of the Terms on the Site." Under California law, "oppression is even more onerous" when a "clause

pegs both the scope and procedure of the arbitration to rules which might change." *Harper*, 7 Cal. Rptr. 3d at 422; *see also Serpa v. Cal. Sur. Investigations, Inc.*, 215 Cal.App.4th 695, 155 Cal. Rptr. 3d 506, 515 (2013).

The changed Terms apply not only prospectively but also retroactively. That is, they apply to "any dispute, claim or controversy . . . irrespective of when that dispute, claim, or controversy arose." *Heckman*, 686 F. Supp. 3d at 954 (alteration in original) (capitalization adjusted). "[A] customer who purchased a ticket prior to the changes to the [Terms] . . . could then be required to bring any dispute regarding that *same* purchase before New Era merely because the customer opened Defendants' website at some later date (regardless of whether they had any intention of transacting business on that occasion)." *Id.* (footnote omitted). Indeed, customers may be *required* to visit the website again to access and use previously purchased tickets. Even standing alone, this provision is procedurally unconscionable under California law. *Peleg v. Neiman Marcus Grp., Inc.*, 204 Cal.App.4th 1425, 140 Cal. Rptr. 3d 38, 42 (2012) ("[A]n arbitration contract containing a modification provision is illusory if . . . a contract change[ ] applies to claims that have accrued or are known."); *see also Szetela*, 118 Cal. Rptr. 2d at 867 (holding that a take-it-or-leave-it amendment to terms "establishe[d] the necessary element of procedural unconscionability").

Finally, the Terms on Ticketmaster's website are affirmatively misleading. For example, they specifically state that all claims will be resolved by "individual arbitration," and not "in any purported class or representative proceeding." This statement is flatly inconsistent with New Era's Rules, to which

the Terms bind any person even browsing the site. As described above, the Rules contemplate that cases with common issues or facts will be batched, and that "batched" claims are not resolved by individual arbitration, but are rather treated in a "class or representative" fashion. The ability to request removal from the batch does not arise until after the arbitration proceedings and settlement conference, and removal is conditioned on a showing of "no Common Issues of Law and Fact" with the bellwether cases.

Read together with the Terms, New Era's Rules form the final element of surprise. They are printed in a legible font and clearly linked to the Terms on Ticketmaster's website, but the Rules are so dense, convoluted and internally contradictory to be borderline unintelligible. *OTO, LLC*, 251 Cal.Rptr.3d 714, 447 P.3d at 692. Given that Live Nation's own experienced appellate counsel strained to explain the Rules during oral argument, we are left with no confidence that a reasonable consumer would have any hope of understanding them.

In sum, the Terms on Ticketmaster's website, and the manner in which Ticketmaster bound users to those Terms, "evince[ ] an extreme amount of procedural unconscionability far above and beyond a run-of-the-mill contract-of-adhesion case." *Heckman*, 686 F. Supp. 3d at 953.

2. Substantive Unconscionability

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." *OTO, LLC*, 251 Cal.Rptr.3d 714, 447 P.3d at 690 (quoting *Pinnacle Museum Tower Assn. v.*

Pinnacle Mkt. Dev. (US), LLC, 55 Cal.4th 223, 145 Cal.Rptr.3d 514, 282 P.3d 1217, 1232 (2012)); *Ramirez*, 322 Cal.Rptr.3d 825, 551 P.3d at 531. When there is "substantial procedural unconscionability . . . even a relatively low degree of substantive unconscionability may suffice to render the agreement unenforceable." *OTO, LLC*, 251 Cal.Rptr.3d 714, 447 P.3d at 693.

The district court held that four features of New Era's Rules support a finding of substantive unconscionability of the delegation clause: (1) the mass arbitration protocol, including the application of precedent from the bellwether decisions to other claimants; (2) procedural limitations, such as the lack of a right to discovery; (3) the limited right of appeal; and (4) the arbitrator selection provisions.[1] *Heckman*, 686 F. Supp. 3d at 957. We agree.

a. Mass Arbitration Protocol

"[A]bsent members [in a class] must be afforded notice, an opportunity to be heard, and a right to opt out of the class." *Concepcion*, 563 U.S. at 349, 131 S.Ct. 1740. This holds true in the arbitral context: "[A]t least this amount of process would presumably be required for absent parties to be bound by the results of arbitration" as well. *Id.*; *Epic Systems*, 584 U.S. at 509–10, 138 S.Ct. 1612.

If the arbitrator in the bellwether cases holds that the delegation clause is valid, that holding is binding on the plaintiffs in all of the batched non-bellwether

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[1] Because we affirm the district court's finding that these four features of the delegation clause render it substantively unconscionable, we do not reach the issue whether plaintiffs plausibly alleged that New Era is biased in favor of Defendants. *Heckman*, 686 F. Supp. 3d at 957–58.

cases. That is, the validity of the delegation clause in all cases is decided in bellwether cases, even though plaintiffs in the non-bellwether cases have no right to participate in the bellwether cases. Indeed, plaintiffs in the non-bellwether cases will not even know the decision in the bellwether case as to the validity of the delegation clause until that decision is invoked against them.

It is black-letter law that binding litigants to the rulings of cases in which they have no right to participate—let alone case of which they have no knowledge—violates basic principles of due process. *Hansberry v. Lee*, 311 U.S. 32, 40–43, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Further, although the procedures set forth in New Era's Rules for Expedited/Mass Arbitrations are superficially similar to the familiar procedures in conventional class actions, they differ in critical respects. A batched plaintiff whose case is not a bellwether case has no notice of the bellwether cases and no opportunity to be heard in those cases. Further, that plaintiff has no guarantee of adequate representation in those cases and has no right to opt out of the batched cases that will be bound by the results in the bellwether cases. *Compare Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Richards v. Jefferson Cnty.*, 517 U.S. 793, 805, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996); *Taylor v. Sturgell*, 553 U.S. 880, 889–90, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008).

Recognizing the dissimilarity between New Era's Rules and the rules governing conventional class actions, Defendants contend that the procedures provided in the Rules are similar to those used in federal multidistrict litigation ("MDL"). *See* 28 U.S.C. § 1407. The comparison is inapt, as a quick review of

MDL procedures makes clear. The MDL statute authorizes temporary consolidation of civil actions that are filed in different district courts but involve common questions of fact. MDL cases are transferred to a single district court for pretrial proceedings pursuant to an order of a special MDL court, but they remain separate cases. A panel of seven Article III judges decides the fairness of transfers after a hearing; proceedings and judicial rulings are public; the court appoints adequate lead counsel to represent all plaintiffs; and any plaintiff has the opportunity to be heard. 28 U.S.C. § 1407; *see* Andrew Bradt, "A Radical Proposal: The Multidistrict Litigation Act of 1968," 165 U. PA. L. REV. 831, 842 (2017). After pretrial proceedings in the transferee court are completed, cases that have not settled are typically transferred back to their original district for trial.

In their brief to us, Defendants contend that the arbitrator's application of "precedent" from the bellwether cases is completely discretionary. It is true that the Rules provide that an arbitrator "may" apply the "precedent" created by the decisions in the bellwether cases. Rules § 2.x, y. However, it is obvious that anything more than an occasional failure to apply precedent established in the bellwether cases would defeat the very purpose of the mass arbitration protocol. Indeed, it is implausible to the point of near impossibility that an arbitrator, absent some compelling reason, would fail to apply the precedent established in the bellwether cases. Defendants have not suggested a compelling reason—or indeed any reason—that would lead an arbitrator to fail to apply those precedents in a significant number of the batched non-bellwether cases. Further, even if some discretion exists as to when bellwether precedent is

applied to non-bellwether cases, the "Rules provide no guidance as to *how* the neutral is to exercise that discretion." *Heckman*, 686 F. Supp. 3d at 961.

The district court concluded, with some understatement, "that the mass arbitration protocol creates a process that poses a serious risk of being fundamentally unfair to claimants, and therefore evinces elements of substantive unconscionability." *Id.* at 963. We agree. New Era's Rules provide to defendants many of the protections and advantages of a class action, but provide to non-bellwether plaintiffs virtually none of its protections and advantages.

b. Lack of Discovery and Procedural Limitations

Under California law, an arbitral forum must provide "such procedures as are necessary to vindicate th[e] claim." *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 684.

New Era's Rules are inadequate vehicles for the vindication of plaintiffs' claims. To recapitulate briefly: There is no right to discovery. Complaints are limited to 10 total pages and must set forth the "nature of the dispute, including applicable dates and times, parties involved, as well as the facts." The evidentiary record and initial briefing is limited to 10 documents, subject to limited exceptions. Closing briefs are limited to 15,000 characters, or about five pages. Rules, ¶¶ 2.o, 6.a.vii, 6.a.x, 6.a.ii.1.a–d.

"The denial of adequate discovery in arbitration proceedings leads to the de facto frustration of" statutory rights. *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 683; *see also Fitz v. NCR Corp.*, 118 Cal.App.4th 702, 13 Cal. Rptr.3d 88, 96 (2004). Discovery is often necessary to decide threshold

issues such as the validity of the delegation clause. For example, a plaintiff may wish to object to the arbitrator charged with ruling on the validity of the delegation clause in one of the bellwether cases on the ground that the arbitrator is unqualified or improperly appointed. Such an objection would ordinarily require discovery as to the background and possible conflicts of the arbitrator. Indeed, the district court in this case deemed discovery necessary to fairly resolve such questions. And the district court evidentiary record in this case is several hundred pages long. Discovery included not only documents requested from Defendants and New Era, but also extensive depositions.

New Era's restrictions on briefing border on the absurd. A bellwether plaintiff would have to work a miracle to successfully brief the merits of his or her claim, make any arbitrability arguments, and provide all evidence in only 10 documents totaling 250 pages, and with 15,000 characters of "final arguments." Rules, ¶ 2.z.ii; 6.a.vii, 6.a.x. We note for comparison that Defendants' memorandum in the district court in support of their motion to compel arbitration—which exclusively addressed threshold issues of arbitrability—was approximately 66,000 characters. Plaintiffs' opposition brief in the district court was approximately 63,000 characters. On appeal to us, Defendants' brief arguing the same threshold issues was approximately 110,000 characters, spanning 82 pages. And in support of its argument, Defendants' submitted over 300 pages of record. The briefing and record on arbitrability alone far exceeds the limits that would apply in a New Era arbitration, which apply to both arbitrability and the merits of a dispute.

It is clear that the procedures specified in the Rules are insufficient to "vindicate" the rights of a single claimant, *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 684, let alone sufficient "to protect the nonparties' interests" in a representative proceeding. *Sturgell*, 553 U.S. at 897, 128 S.Ct. 2161.

c. Right of Appeal

When evaluating substantive unconscionability, California courts consider "mutuality" and whether procedures make "[t]he odds . . . far more likely" for one side. *Harper*, 7 Cal. Rptr. 3d at 423.

The Terms on Ticketmaster's website provide: "[I]n the event that the arbitrator awards injunctive relief against either you or us, the party *against whom injunctive relief was awarded* may . . . appeal that decision to JAMS." Terms § 17 (emphasis added). Because only plaintiffs are likely to pursue injunctive relief, the right to appeal an award of injunctive relief to JAMS is functionally reserved for Defendants. "As a practical matter, the benefit which the [appeals] clause confers on [claimants] is nothing more than a chimera." *Saika v. Gold*, 49 Cal.App.4th 1074, 56 Cal. Rptr. 2d. 922, 925 (1996). There is no right to appeal the denial of injunctive relief.

Defendants contend that the California Supreme Court decision in *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899, 190 Cal.Rptr.3d 812, 353 P.3d 741, 751 (2015), allows the asymmetrical appeal provision. The Court in *Sanchez* upheld a law asymmetrically providing that only arbitral grants of injunctive relief are subject to second arbitration. The Court noted that the review of an order granting injunctive relief furnishes a corporate defendant a " 'margin of safety' that provides the party with

superior bargaining strength a type of extra protection for which it has a legitimate commercial need." *Id.*, 190 Cal.Rptr.3d 812, 353 P.3d at 753 (quoting *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 691).

We agree with the district court that *Sanchez* does not protect the asymmetrical appeal provision in Ticketmaster's Terms. As the district court pointed out, *Sanchez* involved traditional arbitration between two individual parties, and the "fate of the rest of the putative class of claimants was not in jeopardy." *Heckman*, 686 F. Supp. 3d at 965. Here, Ticketmaster created "much more than a 'margin of safety'; they [ ] effectively stacked the deck so they [could] arbitrate thousands of claims in a single go, and if they lose, simply go back to JAMS to take an appeal." *Id.* at 966. The denial of injunctive relief, however, is final for the entire batched class of plaintiffs.

Defendants argue that even if the asymmetric appeal of injunctive relief is unconscionable, that "has nothing to do with the parties' delegation clause." We disagree. Plaintiffs challenging the validity of the delegation clause may be seeking an injunction against the unconscionable arbitration provisions in the rest of the agreement. *See, e.g., Morgan Stanley & Co., LLC v. Couch*, 134 F. Supp. 3d 1215, 1219 (E.D. Cal. 2015) (granting preliminary injunction of arbitration); *Brooks v. AmeriHome Mortg. Co., LLC*, 47 Cal.App.5th 624, 260 Cal. Rptr. 3d 428, 429 (2020) (same); *Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 784 (9th Cir. 2001) (same). Or they may be seeking an injunction barring the use of a New Era arbitrator. *See Heckman*, 686 F. Supp. 3d at 967 n.21. If the arbitrator denies such requests for injunctive relief, the Terms prohibit appeal of any of the

arbitrator's decisions leading to the denial, including the arbitrator's threshold decision under the delegation clause that the parties' dispute is arbitrable.

d. Procedure for Selecting the Arbitrator

Plaintiffs challenge the procedures provided in New Era's Rules for selecting the arbitrator. If the selection Rules are unconscionable, any decision by an arbitrator selected under those Rules, including a decision under the delegation clause, is infected by that unconscionability.

The district court noted three ways in which it is undisputed that the arbitrator selection Rules are inconsistent with California law:

> Plaintiffs point to three features of New Era's Rules that they claim violate California law: (1) New Era has the power to override a claimant's decision to disqualify an arbitrator; (2) each side, rather than each individual party, has a right to disqualify an arbitrator; and (3) a single arbitrator presides over several cases at one time. Defendants do not dispute that New Era's Rules violate these state law requirements[.]

Heckman, 686 F.Supp.3d at 964.

Defendants did not argue in the district court, and do not argue here, that these Rules are consistent with the California Arbitration Act ("CAA"). Instead, they contend that the CAA is preempted by the FAA. We disagree.

The FAA does not "reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477, 109 S.Ct. 1248,

103 L.Ed.2d 488 (1989). The relevant provisions of the CAA do not empower courts to invalidate arbitration agreements; nor do they interfere with or otherwise burden or obstruct arbitration. Rather, they are procedural requirements whose stated purpose is to protect the interests of parties to arbitration and thereby "promote public confidence in the arbitration process." Cal. R. Ct. RB Ethics Standards, Standard 1. They are not "an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA." *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 183, 139 S.Ct. 1407, 203 L.Ed.2d 636 (2019).

3. Unconscionability of the Delegation Clause

Based on the foregoing, we conclude that the delegation clause is procedurally unconscionable to an extreme degree and substantively unconscionable to a substantial degree. Taken in combination, this procedural and substantive unconscionability is fatal to the delegation clause contained in Ticketmaster's Terms.

B. Unconscionability of the Arbitration Agreement

Because the delegation clause is unconscionable and unenforceable, it falls to the district court, and to our court on appeal, to determine whether the arbitration agreement as a whole is unconscionable and unenforceable. We conclude that it is.

1. Unconscionability

The provisions of the arbitration agreement and New Era's Rules that make the delegation clause unconscionable also serve to make the entire

agreement unconscionable, both procedurally and substantively. Even limiting our analysis to the provisions described above, it is plain that it would be impossible for plaintiffs to present their claims on equal footing to Live Nation. Forced to accept Terms that can be changed without notice, a plaintiff then must arbitrate under New Era's opaque and unfair Rules. As explained, the Rules contain multiple interrelated substantive provisions that overtly favor defendants. Read together, the Rules and the Terms are so "overly harsh or one-sided," *OTO, LLC*, 251 Cal.Rptr.3d 714, 447 P.3d at 690, as to unequivocally represent a "systematic effort to impose arbitration . . . as an inferior forum" designed to work to Live Nation's advantage. *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 697.

2. Severability

Ticketmaster's Terms contain a provision stating that in the event New Era cannot conduct the arbitration for any reason, "the arbitration will be conducted by FairClaims pursuant to its FastTrack Rules & Procedures," and, failing that, by an alternative, mutually selected arbitration provider. Terms, § 17. The Terms also include a global severability clause providing that "if any part of the Terms is determined to be illegal, invalid, or unenforceable," then (a) "that part shall nevertheless be enforced to the extent permissible in order to effect the intent of the Terms" and (b) "the remaining parts shall be deemed valid and enforceable." Terms, § 19.

California law grants broad leeway to trial courts to remedy unconscionable contracts: "[T]he court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable

clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Cal. Civ. Code § 1670.5(a). "At the outset, a court should ask whether 'the central purpose of the contract is tainted with illegality' " and whether "the interests of justice would be furthered" by severance. *Ramirez*, 322 Cal.Rptr.3d 825, 551 P.3d at 546 (quoting *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 696). The presence of multiple unconscionable clauses weighs in favor of severance. *Id.*; *Pinela v. Neiman Marcus Grp., Inc.*, 238 Cal.App.4th 227, 190 Cal. Rptr. 3d 159, 183 (2015); *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 696–97. We review the district court's choice for abuse of discretion. *Lim*, 8 F.4th at 999.

The district court found that Defendants engaged in a "systematic effort to impose arbitration . . . as an inferior forum." *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 697. The district court found, further, that the effects of these unconscionable provisions were "entirely foreseeable and intended," and that under an overly generous severability policy, "companies could be incentivized to retain unenforceable provisions designed to chill customers' vindication of their rights." *MacClelland v. Cellco P'ship*, 609 F. Supp. 3d 1024, 1046 (N.D. Cal. 2022); *Ramirez*, 322 Cal.Rptr.3d 825, 551 P.3d at 547 ("In conducting this [severability] analysis, the court may also consider the deterrent effect of each option."); *Mills v. Facility Sols. Grp., Inc.*, 84 Cal.App.5th 1035, 300 Cal. Rptr. 3d. 833, 859 (2022). The district court found that unconscionability permeates all aspects of the arbitration agreement because "the central purpose of the contract" was unlawful and contrary to public interest, *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251,

1273 (9th Cir. 2017), and the agreement contained multiple unconscionable provisions. The district court did not abuse its discretion in so finding and in declining to sever the offending provision of Ticketmaster's Terms and New Era's Rules.

C. Preemption

The application of California's unconscionability law to the Terms and Rules challenged here is not preempted by the FAA. Under the FAA, a court may invalidate an arbitration agreement pursuant to "generally applicable contract defenses, such as fraud, duress, or unconscionability," *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740 (quoting *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)). The FAA preempts the application of state unconscionability law that "disfavors" arbitration and interferes with the FAA's objectives. *Id.* at 342, 131 S.Ct. 1740. Here, the application of California unconscionability law relies on generally applicable principles that neither disfavor arbitration nor interfere with the objectives of the FAA.

D. Unconscionability Conclusion

For the reasons articulated above, we hold that the delegation clause and the arbitration agreement as a whole are both unconscionable under California law, and that the application of California's unconscionability law is not preempted by the FAA.

VI. Alternate and Independent Ground

We also hold, based on an alternate and independent ground, that the application of California unconscionability law to the arbitration agreement at issue here is not preempted by the FAA.

We agree with our concurring colleague that the FAA simply does not apply to and protect the mass arbitration model set forth in Ticketmaster's Terms and New Era's Rules. Because the FAA does not apply, the rule of *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), governs the case before us.

In *Discover Bank*, the California Supreme Court held that class action waivers in consumer contracts of adhesion are unconscionable under California law. *Id.,* 30 Cal.Rptr.3d 76, 113 P.3d at 1110. The United States Supreme Court later held in *Concepcion* that the FAA preempts any application of the *Discover Bank* rule that poses an "obstacle" to objectives of the FAA. *Concepcion*, 563 U.S. at 352, 131 S.Ct. 1740. As applied to the Expedited/Mass Arbitration procedures set forth in Ticketmaster's Terms and New Era's Rules, the *Discover Bank* rule poses no such obstacle, because those procedures do not apply to the forms of arbitration covered by the FAA. We therefore hold under *Discover Bank* that the Terms' class action waiver is unconscionable and unenforceable.

It is clear that Congress did not have class-wide arbitration in mind when it passed the FAA. The Supreme Court has told us that "class arbitration was not . . . envisioned by Congress when it passed the FAA in 1925." *Concepcion*, 563 U.S. at 349, 131 S.Ct. 1740; *Viking River Cruises v. Moriana*, 596 U.S. 639, 656–57, 142 S.Ct. 1906, 213 L.Ed.2d 179 (2022); *Varela*, 587 U.S. at 184, 139 S.Ct. 1407 ("[I]t is important to recognize the 'fundamental' difference between class arbitration and the individualized form of arbitration envisioned by the FAA."). Class-wide arbitration did not exist in 1925, *Concepcion*, 563 U.S. at 349, 131 S.Ct. 1740 (citing *Discover Bank*, 30

Cal.Rptr.3d 76, 113 P.3d at 1110), and we should not read the FAA as protecting such arbitration. Rather, "FAA precedents treat *bilateral arbitration* as the prototype of the *individualized* and informal form of arbitration protected from undue state interference by the FAA." *Viking River Cruises*, 596 U.S. at 656–57, 142 S.Ct. 1906 (emphasis added); *Epic Systems*, 584 U.S. at 508, 138 S.Ct. 1612 (FAA privileges "traditionally individualized" arbitration).

The Supreme Court has consistently disparaged the use of aggregation in arbitration. *Varela*, 587 U.S. at 184, 139 S.Ct. 1407; *Concepcion*, 563 U.S. at 350, 131 S.Ct. 1740 ("Arbitration is poorly suited to the higher stakes of class litigation."); *id.* at 349, 131 S.Ct. 1740 ("[C]lass arbitration requires procedural formality."). A switch from bilateral to aggregative arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348–49, 131 S.Ct. 1740; *Epic Systems*, 584 U.S. at 509, 138 S.Ct. 1612. Even though some "parties may and sometimes do agree to aggregation" of arbitration claims, the Supreme Court has emphasized that such parties would not be agreeing to "arbitration as envisioned by the FAA." *Concepcion*, 563 U.S. at 351, 131 S.Ct. 1740.

Arbitration, as understood by Congress when it enacted the FAA, was designed to be a fair and efficient alternative to bilateral judicial proceedings. It may not be too much to say that this method of dispute resolution contemplated by New Era's Rules is "unworthy even of the name of arbitration." *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999). It is certainly beyond dispute that it is not

arbitration as envisioned by the FAA in 1925. *Concepcion*, 563 U.S. at 350, 131 S.Ct. 1740. Accordingly, we hold that the application of California law to Ticketmaster's Terms and New Era's Rules is not preempted by the FAA. *Discover Bank* therefore applies.

Discover Bank held that class waivers are unenforceable when contained in a "consumer contract of adhesion," when small damage disputes could predictably arise between the parties, and when the "party with the superior bargaining power" is alleged to have "carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank*, 30 Cal.Rptr.3d 76, 113 P.3d at 1110. As these criteria are easily met here, Ticketmaster's Terms and New Era's Rules are therefore independently unconscionable under *Discover Bank*.

Conclusion

We affirm the district court. We hold that the delegation clause of Defendants' arbitration agreement with Plaintiffs is unconscionable, that the arbitration agreement as a whole is unconscionable, and that the application of California's unconscionability law is not preempted by the FAA. We also hold, as an alternate and independent ground, that the FAA does not preempt California's *Discover Bank* rule as it applies to mass arbitration.

AFFIRMED.

VANDYKE, Circuit Judge, concurring in the judgment:

I agree with the majority that we should affirm the decision in this case. But I would resolve this case by

simply concluding that the Federal Arbitration Act ("FAA") just does not apply to the type of mass "arbitration" contemplated by Live Nation's agreements.

In *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), the California Supreme Court held that class action waivers in contracts of adhesion are unconscionable. While the Supreme Court held that this state rule is preempted by the FAA in the context of traditional, bilateral arbitration agreements, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), the Court's rationale in *Concepcion* does not support preemption for the very different sort of arbitration now before us. Nor did the district court abuse its discretion in declining to sever the contracts' mass arbitration requirement and replace it with one of Live Nation's backup schemes. Because I think this approach provides the most simple and direct way to resolve this case, I concur in the judgment.

I. The FAA Does Not Preempt California Law in This Case.

The FAA was enacted in 1925 "in response to widespread judicial hostility to arbitration agreements." *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740. Notably, Section 2 of the FAA contains a savings clause that "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* (cleaned up); *see also Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 657, 142 S.Ct. 1906, 213 L.Ed.2d 179 (2022)

("[Section] 2's saving clause does not preserve defenses that would allow a party to declare that a contract is unenforceable *just because it requires bilateral arbitration*." (cleaned up) (emphasis in original)).

The Supreme Court in *Concepcion* held that the FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 563 U.S. at 343, 131 S.Ct. 1740. The FAA's objective is to "ensure the enforcement of arbitration agreements," which Congress in 1925 understood to be bilateral in nature, not collective. *Id.* at 344, 131 S.Ct. 1740; *see also Viking River Cruises*, 596 U.S. at 656–57, 142 S.Ct. 1906 (explaining that there are "fundamental" differences between "the norm of bilateral arbitration" and class-based arbitration). It was enforcement of a *particular type* of arbitration—bilateral arbitration with its specific advantages and attributes—that Congress set out to protect when it passed the FAA roughly one hundred years ago. *Concepcion*, 563 U.S. at 348, 131 S.Ct. 1740; *see also Viking River Cruises*, 596 U.S. at 649, 142 S.Ct. 1906.

So a threshold issue in analyzing FAA obstacle preemption has to be whether the arbitration agreement under consideration is one that shares the attributes of bilateral arbitration as understood in 1925—the only form of arbitration conceived of by Congress at the time. *See Viking River Cruises*, 596 U.S. at 656, 142 S.Ct. 1906 ("Our FAA precedents treat bilateral arbitration as the prototype of the individualized and informal form of arbitration protected from undue state interference by the FAA."). Simply labeling something as "arbitration" does not automatically bring it within the ambit of the

FAA's protection. Imagine, for example, an arbitration clause that required the parties to resolve their disputes through a vigorous, winner-take-all game of ping-pong. Would the label "arbitration" be enough to bring that agreement under the FAA and protect such an "arbitration" agreement from state laws deeming it unconscionable? Of course not. The Supreme Court said as much in *Viking River Cruises* when it observed that the "right to enforce arbitration agreements" secured by the FAA is a protection only against state laws that attempt to "transform traditional individualized arbitration into . . . litigation . . . at odds with arbitration's informal nature." *Id.* at 651, 142 S.Ct. 1906 (cleaned up).

Basic logic and the Supreme Court's reasoning in *Concepcion* and *Viking River Cruises* equally support that there must be an outer boundary to the type of "arbitration" subject to FAA obstacle preemption. Inside that boundary are state laws that "interfere[ ] with fundamental attributes of arbitration," which are preempted because they "create[ ] a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344, 131 S.Ct. 1740. But outside that boundary are agreements that, even if labeled "arbitration" agreements, operate under procedures whose attributes fundamentally differ from the core attributes of bilateral arbitration envisioned by the FAA. *Viking River Cruises*, 596 U.S. at 658, 142 S.Ct. 1906 (noting that class and collective arbitration go beyond the "degree of deviation from bilateral norms" of "traditional arbitral practice"). State laws that interfere with such agreements—those that lack the fundamental attributes of bilateral arbitration—are not obstacles to accomplishing Congress's goals in the FAA and are therefore not preempted.

Understanding the limits of this boundary is key because the Supreme Court's ruling in *Concepcion*—which held that the FAA preempts California's rule in *Discover Bank* that class arbitration waivers can be unconscionable as a matter of law—relies entirely on obstacle preemption. 563 U.S. at 352, 131 S.Ct. 1740; *see also Discover Bank*, 30 Cal.Rptr.3d 76, 113 P.3d at 1109–10. But the scope of obstacle preemption under the FAA is limited to state laws that frustrate Congress's goal of protecting "arbitration's traditionally individualized form." *Viking River Cruises*, 596 U.S. at 655, 142 S.Ct. 1906. So applying the reasoning of *Concepcion* to this context leads to a different result than it did in *Concepcion*, where the Court expressly contemplated interference with "individual" arbitration. *See, e.g.*, 563 U.S. at 350, 131 S.Ct. 1740.

What New Era calls "mass arbitration" in this case is certainly outside the bounds of "the norm of bilateral arbitration as our precedents conceive of it." *Viking River Cruises*, 596 U.S. at 657–58, 142 S.Ct. 1906 (explaining that "[o]ur precedents use the phrase 'bilateral arbitration' in opposition to 'class or collective' arbitration"). The scheme that New Era has created, which among other arbitration novelties includes "bellwether cases" and "batch proceedings," is an entirely new form of dispute resolution *intentionally designed* to avoid individual, bilateral adjudication of claims—exactly the attributes of arbitration the Supreme Court in *Concepcion* recognized that the FAA protects. Supreme Court precedent thus leaves no doubt that New Era's system of collective arbitration is not what Congress set out to protect in the FAA. *Concepcion*, 563 U.S. at 349, 131 S.Ct. 1740 ("[C]lass arbitration was not even

envisioned by Congress when it passed the FAA in 1925."); *Viking River Cruises*, 596 U.S. at 655–58, 142 S.Ct. 1906. Because *Concepcion* stands for the principle that state law may not create an obstacle to the FAA's purpose of protecting specifically *bilateral* arbitration, its holding is simply inapplicable here. 563 U.S. at 352, 131 S.Ct. 1740.

And because New Era's mass arbitration fundamentally differs from bilateral arbitration, the FAA has no preemptive effect in this case. As a result, California's *Discover Bank* rule springs back to life in this context. The rule articulated by the California Supreme Court in that case provides that class action waivers found in consumer contracts are unconscionable as a matter of law, and therefore unenforceable, "when [1] the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when [2] it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank*, 30 Cal.Rptr.3d 76, 113 P.3d at 1110.

Here, there is no dispute that the contracts at issue are contracts of adhesion. And Plaintiffs allege that Defendants, the party with superior bargaining power, have carried out this scheme in order to cheat large numbers of consumers out of individually small sums of money. So the class action waivers in this case—which run to the delegation clause by preventing class-wide adjudication of threshold issues—are unconscionable and unenforceable under California law.

This is enough to defeat Defendants' motion to compel arbitration. And because appellate courts "may affirm on any basis finding support in the record," I would affirm on this ground without addressing the majority's alternative ground. *Hell's Angels Motorcycle Corp. v. McKinley*, 360 F.3d 930, 933 (9th Cir. 2004).

II. The District Court Did Not Abuse Its Discretion in Declining to Sever.

I also agree with my panel colleagues that the district court did not abuse its discretion in declining to sever the mass arbitration clause. *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 999 (9th Cir. 2021) (explaining that a district court's decision "not to sever unconscionable portions of an arbitration agreement" is reviewed for abuse of discretion).

Under California law, district courts enjoy broad leeway when remedying unconscionable contracts and "may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Cal. Civ. Code § 1670.5(a). "The overarching inquiry is whether the interests of justice would be furthered by severance." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, 696 (2000) (cleaned up); *see also Ramirez v. Charter Commc'ns, Inc.*, 16 Cal.5th 478, 322 Cal.Rptr.3d 825, 551 P.3d 520, 547 (2024) (holding that "[e]ven if a contract *can* be cured, the court should also ask whether the unconscionability *should* be cured through severance or restriction because the interests of justice would be furthered by such actions" (emphasis in original)). And severance does not serve

the interests of justice when an agreement is "permeated by unconscionability." *Lhotka v. Geographic Expeditions, Inc.*, 181 Cal.App.4th 816, 104 Cal. Rptr. 3d 844, 853 (2010); *Ramirez*, 322 Cal.Rptr.3d 825, 551 P.3d at 546 (explaining that a contract whose "central purpose . . . is tainted with illegality . . . cannot be cured" by severance and so, instead, "the court should refuse to enforce it").

Finding that "unconscionability permeates the arbitration clause" in this case, the district court "decline[d] to sever the offending provisions." California law gives district courts "discretion . . . to refuse to enforce an entire agreement if the agreement is 'permeated' by unconscionability," Cal. Civ. Code § 1670.5(a), and I agree with the majority that Defendants have not met their burden of showing that this was an abuse of the district court's discretion.

* * *

There is one more massive elephant in the room that cries out for acknowledgement. Live Nation argues that none of these issues should be decided by the courts, because the arbitration agreements in this case contain delegation clauses that require issues such as unconscionability and enforceability to be decided by the arbitrator, not a court. I agree with my colleagues that Live Nation cannot avoid the unconscionability issue in this case, however, because it is well-established that even where the parties' agreement delegates threshold issues to the arbitrator, it is still up to the courts to decide whether the delegation clause itself is unconscionable. *Lim*, 8 F.4th at 1000; *see also O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1092 (9th Cir. 2018). And here, whether you take the majority's route or mine, all the

Plaintiffs' arguments about unconscionability apply to the delegation clause in addition to the rest of the arbitration agreement. For example, the argument that *Concepcion*'s preemption rationale simply doesn't apply in the mass arbitration context applies equally to the delegation clause, because under New Era's batching and bellwether way of deciding cases, that issue once decided by the arbitrator in one of the initial arbitrations could be applied as "precedent" to other arbitrations in the same batch of related arbitrations.

But what if they didn't? What if Live Nation was right and only the arbitrator could address the threshold unconscionability and enforceability issues in this case? Pretend with me for a moment you are a freshly hired New Era arbitrator tasked with deciding the very first New Era "bellwether" case, which—because of the contracts' delegation clause—includes the novel questions of whether this whole mass arbitration approach is unconscionable, whether the FAA applies, whether *Discover Bank* applies, etc. Let's say that after much study he reached the same conclusions that I have: that *Concepcion*'s obstacle preemption analysis doesn't apply in the context of mass arbitration agreements, that *Discover Bank* therefore does apply, that the arbitration agreements aren't severable, and thus Live Nation's mass arbitration clauses are unenforceable.

That single arbitrator would face quite a practical dilemma. If the arbitrator issued that ruling, he wouldn't just be dismissing the case before him. He would literally be ruling against his employer's—New Era's—entire business model. He would be destroying New Era, and of course his own job along

with it. And after the dust settled from the nuke he just dropped on his own employer, he would know with absolute certainty that no other arbitration provider or business would ever touch him with a ten-foot pole.

I hope that if I was that person, I would still do the right thing and issue the correct decision. But I know I would think it was enormously unfair that I was put in a situation involving such a massive and obvious conflict of interest.

In addition to that certain conflict of interest, others too seem highly probable in this case. The district court observed below that Live Nation "provided nearly all of New Era's revenue during its first year" and that "there appears to be a remarkable degree of coordination between [Defendants' counsel] and New Era in terms of their interpretation and the evolution of New Era's Rules." Finding these facts to be "concerning," the district court noted that this "could certainly create an inference of bias." It seems to me that the circumstances in this case create more than merely an inference of bias—they create a strong and inescapable perception of bias.

"[A] dispute resolution procedure is not an arbitration unless there is a third party decision maker." *Cheng-Canindin v. Renaissance Hotel Assocs.*, 50 Cal.App.4th 676, 57 Cal. Rptr. 2d 867, 874 (1996). And a third-party decision maker "whose interests are so allied with those of the party" is, "for all practical purposes . . . subject to the same disabilities which prevent the party himself from serving." *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 28 Cal.3d 807, 171 Cal.Rptr. 604, 623 P.2d 165, 177 (1981). That seems to be the case here. Not only is the line between Defendants and New Era blurry, but

more than that, this agreement would require a New Era arbitrator to decide the question of whether their employer's invention—developed with the help of the party in front of them—is a failure. If the answer to that question is yes, goodbye New Era and the arbitrator's job as an arbitrator—with any arbitration provider, forever.

At oral argument, Live Nation's able counsel pointed to three California cases which stand for the proposition that "generally uncognizable is the belief that arbitrators might over time be biased toward the repeat players that bring them business." *Sandquist v. Lebo Auto., Inc.*, 1 Cal.5th 233, 205 Cal.Rptr.3d 359, 376 P.3d 506, 522 (2016); *see also Tiri v. Lucky Chances, Inc.*, 226 Cal.App.4th 231, 171 Cal. Rptr. 3rd 621, 635 (2014) (holding that conflict issues "are virtually *always* present with delegation clauses" (emphasis in original)); *Aanderud v. Superior Ct.*, 13 Cal.App.5th 880, 221 Cal. Rptr. 3d 225, 239 (2017) (explaining that the fact that threshold "determinations are left to the arbitrator does not make the delegation clause substantively unconscionable").

Respectfully, I don't think those cases are on all-fours with the exceptional pressure-cooker New Era's arbitrator would find himself in if he was forced to decide what we are deciding today. It certainly is true that courts "may not presume categorically that arbitrators are ill-equipped to disregard such institutional incentives and rule fairly and equitably." *Sandquist*, 205 Cal.Rptr.3d 359, 376 P.3d at 522. But no presumption is required to see a conflict of interest here—the conflict is manifest. Defendants were intimately involved in the creation of New Era's system for the admitted reason that they were "faced

with the emerging phenomenon of a single law firm filing thousands of virtually identical arbitration claims at once." The system developed by New Era, with the help of Defendants, purposefully modeled its rules "after the bellwether approach used in federal multi-district litigation" to "allow the arbitrator to apply certain determinations from the bellwethers as '[p]recedent' in the remaining cases."

The advantage this provides to Defendants is obvious, and it would be expecting a New Era arbitrator to exhibit a superhuman resistance to ordinary human incentives to issue a ruling that sinks New Era's entire operation and his own career. This conflict faced by New Era arbitrators is not simply a claimed "bias[ ] toward the repeat players that bring them business." *Id.* It's an obvious and understandable bias everyone has towards their own continued professional survival.

I don't think that obvious conflict of interest uniquely presented in this case can be ignored simply because in other cases courts have rejected arguments about very different types of *possible* biases by arbitrators. The conflict of interest that would result here if we were to accept Live Nation's urging to put all these threshold questions to the arbitrator would be both sui generis and inevitable. Thankfully our resolution of this case does not require us to figure out what, if anything, we would need to do about that. But I hesitate to think the right answer would be that we do nothing.

For all these reasons, I respectfully concur in the judgment.

[686 F. Supp. 3d 939]

UNITED STATES DISTRICT COURT,
C.D. California

Skot HECKMAN, et al.,

v.

LIVE NATION ENTERTAINMENT, INC., et al..

Case No. CV 22-0047-GW-GJSx

Filed August 10, 2023

PROCEEDINGS: IN CHAMBERS - FINAL RULING ON DEFENDANTS' MOTION TO COMPEL ARBITRATION [30]

GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Attached hereto is the Court's Final Ruling on Defendants' Motion to Compel Arbitration. The Court DENIES the Motion.

Final Ruling on Defendants' Motion to Compel Arbitration[1]

I. Introduction[2]

Plaintiffs Skot Heckman, Luis Ponce, Jeanene Popp, and Jacob Roberts ("Plaintiffs") brought this

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[1] Prior to the hearing on the present motion, a Tentative Ruling was provided to the parties but lodged under seal as it referenced materials that had been previously designated as "confidential" by the parties and filed under seal. Following the hearing, the parties have advised the Court that they do not request that any portion of the Tentative Ruling remain sealed.

[2] The following abbreviations are used for the filings: (1) Complaint ("Compl."), ECF No. 1; (2) Defendants' Motion to Compel Arbitration ("Motion" or "Mot."), ECF No. 30; (3)

putative class action against Defendants Live Nation Entertainment, Inc. ("Live Nation") and Ticketmaster LLC ("Ticketmaster") (collectively, "Defendants") alleging various anticompetitive practices in violation of the Sherman Act. *See generally* Compl. Plaintiffs claim that they suffered damages from paying "supracompetitive fees on primary and secondary ticket purchases from Ticketmaster's online platforms." Compl. ¶ 6. On March 8, 2022, Defendants moved to compel arbitration, arguing that this case is virtually identical to another case against Live Nation and Ticketmaster which this Court had previously sent to arbitration. *See Oberstein v. Live Nation Ent., Inc.*, No. 2:20-cv-03888-GW-(GJSx), 2021 WL 4772885 (C.D. Cal. Sept. 20, 2021), *aff'd*, 60 F.4th 505 (9th Cir. 2023). Among the apparent differences

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Declaration of Kimberly Tobias in Support of Motion ("Tobias Decl."), ECF No. 31; (4) Plaintiffs' Opposition to Motion ("Opp."), ECF No. 146; (5) Defendants' Reply in Support of Motion ("Reply"), ECF No. 153; (6) Tentative Ruling on Motion ("Tentative"), ECF No. 160; (7) Declaration of Collin Williams of Non-Party New Era ("Williams Decl."), ECF No. 163; (8) Defendants' Supplemental Brief in Support of Motion ("Def. Supp. Br."), ECF No. 166; (9) Plaintiffs' Supplemental Brief in Opposition to Motion ("Pl. Supp. Br."), ECF No. 168; (10) Plaintiffs' Supplemental Reply Brief in Opposition to Motion ("Pl. Supp. Reply"), ECF No. 172; (11) Defendants' Supplemental Reply Brief in Support of Motion ("Def. Supp. Reply"), ECF No. 173; (12) Plaintiffs' Supplemental Brief in Response to the Williams Declaration ("Pl. Resp. to Williams Decl."), ECF No. 177; (13) Supplemental Declaration of Collin Williams ("Williams Supp. Decl."), ECF No. 194; (14) Defendants' Second Supplemental Brief in Support of Motion ("Def. Sec. Supp. Br."), ECF No. 195; (15) Plaintiffs' Second Supplemental Brief in Opposition to Motion ("Pl. Sec. Supp. Br."), ECF No. 196; (16) Plaintiffs' Second Response to New Era ("Pl. Resp. to Williams Supp. Decl."), ECF No. 197.

between this case and the *Oberstein* case is that in July 2021, after the *Oberstein* complaint was filed, Defendants updated their terms of use ("TOU") to select a new arbitration provider with new arbitration procedures. Compl. ¶ 1; *see* TOU, ECF No. 31-30, at 10-13 of 15.[3] Whereas the TOU at issue in *Obsterstein* designated JAMS, the updated TOU selected New Era ADR ("New Era"). *See* Compl. ¶¶ 1-5. Unlike JAMS, New Era offers standardized procedures for administering mass arbitrations, which Defendants assert "facilitates the arbitration of mass individual consumer claims efficiently and fairly, and thereby *promotes* arbitration."[4] Mot. at 2. Plaintiffs, on the

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[3] For simplicity, citations to the TOU will be to Live Nation's TOU.

[4] Defendants seem to be asserting that promoting "arbitration" is – in and of itself – a good thing. But there are various types of arbitration some of which are not necessarily viewed with favor. For example, in *Lamps Plus, Inc. v. Varela*, the Supreme Court noted various differences between "the individualized form of arbitration envisioned by the [Federal Arbitration Act]" and class arbitration; and seemingly disparaged the latter in observing that:

> In individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." Class arbitration lacks those benefits. It "sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Indeed, we recognized just last Term that with class arbitration "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration

other hand, believe New Era's mass arbitration procedures require "consumers to engage in a novel and one-sided process that is tailored to disadvantage consumers." Compl. ¶ 5. According to Plaintiffs, Defendants' selection of New Era in the TOU "skews the odds so egregiously in Defendants' favor through its defense-biased provisions" that the arbitration agreement is rendered unconscionable. *Id.*

Before filing an opposition to Defendants' Motion, Plaintiffs sought discovery related to the validity, unconscionability, and severability of the dispute-resolution provisions in the TOU. *See* ECF No. 34 at 3. On June 9, 2022, the Court granted Plaintiffs' request and allowed the parties to conduct limited discovery as to those issues. *See* ECF No. 50. The parties completed such discovery on January 27, 2023. Plaintiffs filed their Opposition to Defendants' Motion on March 22, 2023, and Defendants filed a Reply on April 18, 2023. In advance of the May 1, 2023 hearing on the Motion, the Court issued a Tentative Ruling, which posed a number of questions for the parties to discuss at oral argument and reserved decision on the Motion pending additional argument. *See* ECF No. 160. Following oral argument, the Court requested and the parties submitted supplemental briefing. *See id.*; note 2, *supra.* The Court held a second hearing on Defendants' Motion on July 13, 2023. *See* ECF No.

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would wind up looking like the litigation it was meant to displace."

587 U.S. 176, 139 S. Ct. 1407, 1416, 203 L.Ed.2d 636 (2019) (citations omitted).

182. An additional round of supplemental briefing followed. *See* note 2, *supra.*

II. Background

This case is one of several consumer class actions alleging Ticketmaster and Live Nation engaged in anticompetitive conduct in the primary and secondary ticketing services market. One such case previously before this Court and asserting largely identical underlying allegations was *Oberstein*, filed on April 28, 2020. *See* Complaint, *Van Iderstine v. Live Nation Ent., Inc.*, No. 2:20-cv-03888-GW-(GJSx) (C.D. Cal. Apr. 28, 2020), ECF No. 1; First Amended Complaint, *Oberstein v. Live Nation Ent., Inc.*, No. 2:20-cv-03888-GW-(GJSx) (C.D. Cal. Jan. 1, 2021), ECF No. 81.[5] On September 20, 2021, this Court granted Ticketmaster and Live Nation's motion to compel arbitration in *Oberstein*, finding that: (1) Ticketmaster and Live Nation's websites provided sufficient constructive notice of the terms of use, (2) the authority to decide whether the arbitration agreement was enforceable had been delegated to the arbitrator, and (3) that delegation clause was not itself unconscionable. *See Oberstein*, 2021 WL 4772885, at *6-9. The Court's decision was affirmed on appeal. *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505 (9th Cir. 2023).

On July 2, 2021, while Ticketmaster and Live Nation's motion to compel arbitration in *Oberstein* was pending, Defendants updated their TOU to select New Era as the default arbitration provider. *See* Compl. ¶ 1; TOU at 10-13. New Era was founded in

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[5] Named plaintiff Olivia Van Iderstine was later voluntarily dismissed from the case.

2020 and launched its alternative dispute resolution ("ADR") services in April 2021. *See* Compl. ¶ 2; Opp. Ex. C at 10:16-18, 11:3-5. New Era first reached out to Defendants' counsel Latham & Watkins ("Latham") to pitch its services on May 4, 2021. Opp. Ex. C at 86:2-88:2. At that time, New Era had not yet conducted any arbitrations and had not finalized its Rules governing mass arbitration procedures. *Id.* at 109:1-110:10. The parties herein disagree about the nature of the initial conversations between New Era and Latham and the extent to which Defendants and Latham had input on, or helped shape, New Era's Rules. However, on June 21, 2021, New Era executed a subscription agreement with Live Nation as its first subscriber, and later that same day, New Era published its ADR Rules. *Id.* at 145:6-147:10.

Plaintiffs allege that New Era was created with a decidedly pro-business mission: to help " 'businesses settle legal disputes' by creating rules that 'make[ ] sense for businesses' and that also benefit 'law firms, who are able to provide an improved client experience' to businesses 'and handle a higher volume of cases' that are filed by consumers." Compl. ¶ 2. To that end, New Era offers businesses faced with large numbers of arbitration claims two primary advantages over traditional arbitration providers. First, in addition to a standard pricing option whereby the company pays $9,500 and the consumer pays $500 per arbitration, New Era offers a subscription option whereby the company pays an annual subscription fee and the claimant pays a $300 filing fee. *See* New Era Rules ("Rules"), ECF No 30-4, Rules 1(a)(ii), 1(e)(i), 6(a)(iii)(1)(c); *see also* Def. Sec. Supp. Br. at 4 ("[T]he primary innovation was around filing fees – i.e., creating a model that generated enough revenue to be

a viable business, without imposing multi-million-dollar upfront filing fees that forced parties to settle meritless claims."). Second, New Era includes procedures for administering mass individual consumer arbitrations presenting common issues of fact or law. *See* Rules 2(x), 6(b).

Plaintiffs principally take issue with this second aspect of New Era as an arbitral forum – the use of novel mass arbitration procedures to adjudicate consumer claims. As alleged in the Complaint:

> When one of many aggrieved consumers files a dispute against Defendants with New Era ADR, the consumer has no choice but to submit to batched arbitration proceedings. On the one hand, the New Era agreement requires a consumer to bring claims "ONLY IN AN INDIVIDUAL CAPACITY" and bars "ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING." On the other hand, once multiple consumers file cases against Defendants, New Era ADR will group their cases together for any reason it deems appropriate, including the consumers' counsel of choice. The batched cases will then be assigned to a single decisionmaker, chosen under unfair procedures that abridge consumers' rights to select neutral decisionmakers and that later-filing consumers will not be able to participate in at all. That decisionmaker will then preside over the selection and litigation of a few bellwether cases, during which all other consumers will be forced to wait with no progress on their cases, and after which the outcome of those bellwether

> cases will be forced on all consumers. The New Era agreement thus requires consumers to engage in a novel and one-sided process that is tailored to disadvantage consumers.

Compl. ¶ 4.[6]

Following Defendants' alteration to the TOU in July 2021, each of the named Plaintiffs purchased tickets on Defendants' sites between four and eight separate times. *See* Mot. at 6-7. To make those purchases, Plaintiffs were first required to create, and then sign into, their accounts, whereupon they were notified: "By continuing past this page, you agree to the **Terms of Use** and understand that information will be used as described in our **Privacy Policy**." *Id.* at 6. Upon clicking the bolded "**Terms of Use**" text, users were redirected to the TOU. *Id.* A screenshot of the sign-in page is shown below:

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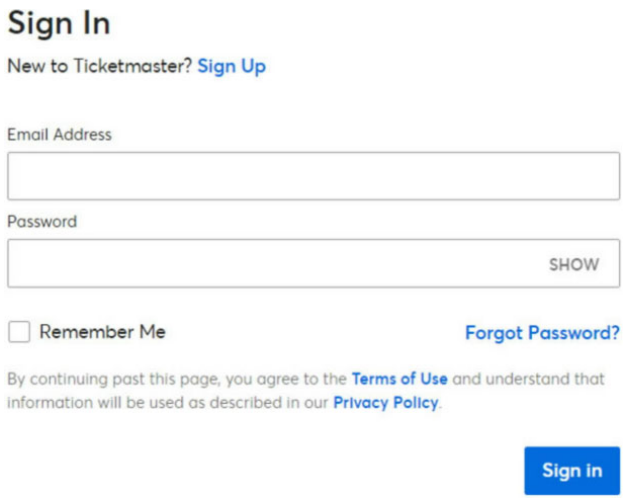
[6] By way of comparison, the arbitration provision in *Oberstein* case stated, *inter alia*:

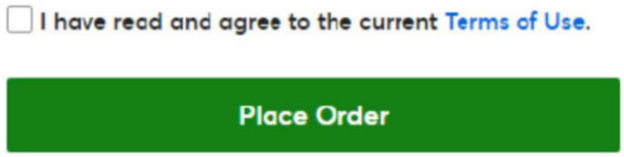
> We each agree that the arbitrator may not consolidate more than one person's claims and may not otherwise preside over any form of a representative or class proceeding, and that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action. YOU AGREE TO WAIVE ANY RIGHT TO A JURY TRIAL OR TO PARTICIPATE IN A CLASS ACTION LAWSUIT OR CLASSWIDE ARBITRATION.

Oberstein, No. 2:20-cv-03888-GW-(GJSx), ECF No. 25 at 6.



Id.

To complete a ticket purchase, users were also required to check a box acknowledging that they had read and accept the current TOU. *Id.* An example of such notice is shown below:



Id.

In addition, on virtually every page on Defendants' websites (including the home page), users were notified: "By continuing past this page, you agree to our **Terms of Use**" (or some similar variation thereof). *See id.* at 4 n.1; Tobias Decl. ¶¶ 14, 25.

III. Legal Standard

The Federal Arbitration Act ("FAA") reflects a "liberal federal policy favoring arbitration." *AT&T*

Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). A party aggrieved by the refusal of another party to arbitrate under a written arbitration agreement may petition the court for an order compelling arbitration as provided for in the parties' agreement. *See* 9 U.S.C. § 4. "By its terms, the [FAA] leaves no room for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). "The court's role under the [FAA] is therefore limited to determining: (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. If the response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms." *Daugherty v. Experian Info. Solutions, Inc.*, 847 F. Supp. 2d 1189, 1193 (N.D. Cal. 2012) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)). "While the Court may not review the merits of the underlying case '[i]n deciding a motion to compel arbitration, [it] may consider the pleadings, documents of uncontested validity, and affidavits submitted by either party.' " *Macias v. Excel Bldg. Servs. LLC*, 767 F. Supp. 2d 1002, 1007 (N.D. Cal. 2011) (quoting *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 540 (E.D. Pa. 2006)). "In determining whether a valid arbitration agreement exists, federal courts apply ordinary state-law principles that govern the formation of contracts." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175

(9th Cir. 2014) (quotations omitted). Both parties have briefed the issues under California contract law.

The FAA permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740. As to unconscionability under California law, the California Supreme Court has discussed the doctrine in the following terms:

> One common formulation of unconscionability is that it refers to an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. As that formulation implicitly recognizes, the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.
>
> The prevailing view is that procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree. Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves. In other words,

> the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. Courts may find a contract as a whole or any clause of the contract to be unconscionable.

Sanchez v. Valencia Holding Co., LLC, 61 Cal. 4th 899, 910, 190 Cal.Rptr.3d 812, 353 P.3d 741 (2015) (citations omitted) (cleaned up). Furthermore, "[a]n evaluation of unconscionability is highly dependent on context . . . . The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." *Id.* at 911-12, 190 Cal.Rptr.3d 812, 353 P.3d 741 (citations omitted).

IV. Discussion

Plaintiffs do not appear to contest that they repeatedly agreed to Defendants' updated TOU prior to purchasing tickets on Defendants' website. Nor do Plaintiffs seem to take issue with this and other courts' findings that Defendants' websites provided users sufficient notice of the TOU for purposes of constructive assent. *See, e.g., Oberstein*, 2021 WL 4772885; *Lee v. Ticketmaster LLC*, 817 Fed. App'x 393, 394 (9th Cir. 2020) (affirming finding that "Ticketmaster's website provided sufficient notice for constructive assent, and therefore, there was a binding arbitration agreement between [plaintiff] and Ticketmaster").

Instead, the gravamen of Plaintiffs' argument is that Defendants' selection of New Era as the arbitration provider along with its concomitant procedures renders the arbitration and delegation

clauses within the TOU unconscionable. Plaintiffs maintain that Defendants, faced with a mounting number of consumers pursuing individual arbitrations against them in connection with ongoing antitrust litigation, abruptly switched from JAMS (which did not provide for a grouping of individual consumer claims) to a provider Defendants knew would be beholden to their interests, and that the creation of New Era's "batched/bellwether" case resolution set of rules is manifestly unfair to Plaintiffs and other actual or potential claimants.

A. Delegation Clause

As a threshold issue, the Court must first determine whether the TOU to which Plaintiffs agreed delegates the authority to decide issues of enforceability, including unconscionability, to the arbitrator rather than the Court. "A court is normally tasked with two gateway issues when deciding whether to compel arbitration under the FAA: '(1) whether a valid agreement to arbitrate exists, and if it does, (2) whether the agreement encompasses the dispute at issue.' " *Morgan v. Glob. Payments Check Servs., Inc.*, No. 2:17-CV-01771-JAM-CMK, 2018 WL 934579, at *2 (E.D. Cal. Feb. 15, 2018) (quoting *Chiron*, 207 F.3d at 1130). "But the parties can agree to expressly delegate these gateway issues to an arbitrator, in which case an arbitrator, rather than a court, must decide the issues." *Id.* A court must determine whether the underlying agreement "clearly and unmistakably" delegated the questions of arbitrability to the arbitrator. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (internal quotation marks and citations omitted). The Supreme Court has since reiterated these points. *See*

Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 139 S. Ct. 524, 529, 202 L.Ed.2d 480 (2019) (explaining that the "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."). The Supreme Court emphasized that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract . . . even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *See id.*

Here, Defendants' TOU contains a delegation clause, which provides:

> The arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to the extent permitted by law to resolve all disputes arising out of or relating to the interpretation, applicability, enforceability, or formation of this Agreement, including, but not limited to any claim that all or any part of this Agreement is void or voidable.

TOU at 13.

For the reasons stated in the Court's Tentative, this clause clearly and unmistakably delegates issues of enforceability to the arbitrator, and thus "the Court's unconscionability inquiry is limited to the delegation clause instead of the arbitration clause as a whole." Tentative at 6 (quoting *Oberstein*, 2021 WL 4772885, at *8). Plaintiffs' unconscionability arguments (particularly as articulated in their supplemental briefings) are directed at the delegation

clause, as is required by *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). Having determined that the delegation clause assigns issues of arbitrability to the arbitrator, the Court next turns to whether the delegation clause itself is unconscionable.

B. Procedural Unconscionability

As previously noted, to prove unconscionability, Plaintiffs must show that the delegation clause was both procedurally and substantively unconscionable. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000).

The procedural component of unconscionability "focuses on the factors of oppression and surprise." *Patterson v. ITT Consumer Fin. Corp.*, 14 Cal. App. 4th 1659, 1664, 18 Cal.Rptr.2d 563 (1993) (citations omitted). "Oppression results where there is no real negotiation of contract terms because of unequal bargaining power." *Id.* " 'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *Id.*

For the reasons discussed in the Court's Tentative and on the record during oral argument, and as further elaborated upon below, the Court would find that the arbitration agreement (and more specifically, the delegation clause contained therein) is procedurally unconscionable to an extreme degree.

As a preliminary matter, the Ninth Circuit has held that the elements of oppression and surprise are both "satisfied by a finding that the arbitration provision was presented on a take-it-or-leave-it basis and that it was oppressive due to 'an inequality of bargaining power that result[ed] in no real negotiation and an absence of meaningful choice.' " *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1281 (9th Cir. 2006) (quoting *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853, 113 Cal.Rptr.2d 376 (2001)) (alteration in original). The Court finds both elements are present here. The agreement is certainly contained within a contract of adhesion presented to ticket purchasers on a take-it-or-leave-it basis, as there was no opportunity for consumers to negotiate individual terms. As to unequal bargaining power, it is hard to imagine a relationship with a greater power imbalance than that between Defendants and its consumers, given Defendants' market dominance in the ticket services industries. *See* Compl. ¶ 71. Because Defendants are often in effect the only ticketing game in town, would-be concert goers are forced to accept Defendants' TOU in full, or else forego the opportunity to attend events altogether. *See Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100, 118 Cal.Rptr.2d 862 (2002) ("The availability of similar goods or services elsewhere may be relevant to whether the contract is one of adhesion . . . .").[7] The Court would find the elements

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[7] That attending such events is arguably a nonessential recreational activity does not alter this conclusion. *See* Tentative at 7 n.6; *Lhotka v. Geographic Expeditions, Inc.*, 181 Cal. App. 4th 816, 822, 104 Cal.Rptr.3d 844 (2010).

of procedural unconscionability are satisfied on these grounds alone.

Here, however, the manner in which Defendants imposed the changes to their TOU evinces an extreme amount of procedural unconscionability far above and beyond a run-of-the-mill contract-of-adhesion case. Specifically, the TOU were amended: (1) to bring about a significant change in the parties' agreement (from individual, bilateral arbitration to mass arbitration); (2) unilaterally; (3) in the midst of ongoing litigation; (4) to be applied retroactively to already accrued claims; (5) without giving any notice to existing customers about this major change; and (6) while burying the true nature of this change in New Era's difficult-to-parse Rules.

Defendants dispute either the validity or legal import of each of these facts. To begin, they argue that they were not required to provide customers specific notice of the changes to the TOU. In support of that argument, they rely on *Weber v. Amazon.com, Inc.*, No. 2:17-cv-08868-GW-E, 2018 WL 6016975, at *9 (C.D. Cal. June 4, 2018), and *McKee v. Audible, Inc.*, No. 2:17-cv-01941-GW-E, 2017 WL 4685039, at *11 n.7 (C.D. Cal. July 17, 2017), in which this Court found arbitration agreements enforceable even absent specific notice of amended terms. Those cases, however, are distinguishable for two reasons. First, the Court's discussion of the sufficiency of the notice arose in the context of determining whether the plaintiffs had manifested their assent to enter into an agreement in the first instance – that is, those cases dealt with contract formation. *See, e.g., Weber v. Amazon.com, Inc.*, 2018 WL 6016975, at *7 ("In the context of an electronic consumer transaction, the occurrence of *mutual assent* ordinarily turns on

whether the consumer had reasonable notice of a merchant's terms of service agreement." (citing *Nguyen*, 763 F.3d at 1173) (emphasis added)). Here, by contrast, the issue is unconscionability. *Cf. id.* at *14 n.23 ("Plaintiffs did not meaningfully make arguments related to the enforceability of Amazon's COUs in terms of unconscionability or otherwise"). Plaintiffs do not contest that they manifested an agreement to be bound by the TOU, nor do they claim that specific notice is required in every circumstance for the formation or modification of a contract. Rather, their argument is that Defendants' imposition of such a significant change in the TOU without giving any notice to customers is one reason, among others, that the agreement is procedurally unconscionable. The Court would agree with that argument. The fact that Defendants' customers received no notice of the significant change to the TOU creates a situation of unfair surprise. And, because it would seem trivially easy to provide customers with such notice, Defendants' failure to do so suggests a degree of intentionality and/or oppression.[8]

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[8] Defendants refer to the fact that, like in *Weber* and *McKee*, the TOU here provides a "Last Updated" date at the top of the page. *See* TOU at 1. However, even if a consumer were to discover that the terms had been recently updated, she would have no way of knowing *which* particular provision or provisions had been changed. To discover that fact, she would need to do a line-by-line comparison of the prior multi-page TOU, which she very likely would not have a copy of (indeed, Defendants appeared to confirm at the May 1, 2023 hearing that prior versions of the TOU are not available on Defendants' websites and would be available, if at all, through third-party sites). Defendants cite *Shen v. United Parcel Service*, No. 2:21-CV-08446-MCS-E, 2022 WL 17886012, at *4 (C.D. Cal. Nov. 21,

Second, the question in *Weber* and *McKee* was whether users could be held to terms to which they affirmatively agreed when making specific *purchases* – purchases which formed the basis for their claims.[9] The plaintiffs argued that they could not, because they did not receive specific notice that the terms had changed from when they first began using defendants' websites. In that context, the Court declined to find

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2022), for the proposition that companies are not required to "publish a redline version of the terms any time an amendment is made." But like *McKee* and *Weber*, that case found only that "California law does not impose such a requirement for *contractual assent*." *Id.* (emphasis added). And where, as here, a company claims continued assent to updated terms merely by continuing to use the company's site or other passive means, courts have been more stringent in the type of notice required to infer assent. *See Nguyen*, 763 F.3d at 1179 ("While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract, the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers." (citation omitted)); *Douglas v. U.S. Dist. Ct. for Cent. Dist. of California*, 495 F.3d 1062, 1066 (9th Cir. 2007) ("Even if Douglas had visited the website, he would have had no reason to look at the contract posted there. Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side."); *Rodman v. Safeway Inc.*, No. 11-CV-03003-JST, 2015 WL 604985, at *10 (N.D. Cal. Feb. 12, 2015) ("[C]ustomers' assent to the revised Terms cannot be inferred from their continued use of Safeway.com when they were never given notice that the Special Terms had been altered."), *aff'd*, 694 F. App'x 612 (9th Cir. 2017).

[9] The same was true in *Lee v. Ticketmaster*, 2019 WL 9096442 (N.D. Cal. 2019), *aff'd*, 817 F. App'x 393 (9th Cir. 2020). The district court's opinion in that case was premised on the conclusion that the plaintiff "assented to terms that included an arbitration clause *when purchasing tickets*" and did not consider whether his "use of other pages on Ticketmaster's website or other resale websites also establish an agreement to arbitrate." *Id.* at *1 & n.1 (emphasis added).

a failure of assent. But here, the amended TOU does much more than bind users at the point of purchase as to future claims arising out of those purchases. Rather, the TOU states that the amended arbitration agreement applies to "ANY DISPUTE, CLAIM OR CONTROVERSY . . . IRRESEPECTIVE OF WHEN THAT DISPUTE, CLAIM, OR CONTROVERSY AROSE." TOU at 10. Furthermore, these amended terms become "effective immediately when we post a revised version of the Terms on the Site" and that by merely "continuing to use this Site after that date, you agree to the changes." TOU at 1. As a result, a customer who purchased a ticket prior to the changes to the TOU (thereby agreeing to arbitrate before JAMS) could then be required to bring any dispute regarding that *same* purchase before New Era merely because the customer opened Defendants' website[10] at some later date (regardless of whether they had any intention of transacting business on that occasion). Without a doubt, that constitutes unfair surprise. *Cf. Nguyen*, 763 F.3d at 1173 (customer could not be bound to terms by "merely using Barnes & Noble's website," where terms stated: "By visiting any area in the Barnes & Noble.com Site . . . a User is deemed to have accepted the Terms of Use."); *Douglas v. U.S. Dist. Ct. for Cent. Dist. of California*, 495 F.3d 1062, 1066 (9th Cir. 2007) ("Even if Douglas's continued use of Talk America's service could be considered assent, such assent can only be inferred

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[10] Indeed, according to Defendants, "virtually every Live Nation and Ticketmaster website page that users navigate" (including the homepage) contains a statement purporting to bind users to the latest version of the TOU merely by browsing the site. Mot. at 4 n.1; *see* Tobias Decl. ¶¶ 14, 25.

after he received proper notice of the proposed changes.").

Defendants respond that "[w]hether a consumer who agreed to arbitrate at JAMS could somehow be bound to arbitrate at New Era simply because she browsed Defendants' websites after the Terms were updated is a hypothetical with no application to this case." Def. Sec. Supp. Br. at 2. Defendants are incorrect. While it is true that the four named Plaintiffs agreed to the updated TOU by checking a box when purchasing tickets, Defendants' reliance on that fact alone again confuses assent with unconscionability. "In assessing unconscionability, the Court must examine the validity of a contractual provision as of the time of the contract is made – it is a prospective analysis which does not require proof that a particular plaintiff has already been adversely affected." *MacClelland v. Cellco P'ship*, 609 F. Supp. 3d 1024, 1040-41 (N.D. Cal. 2022) (citations omitted) (rejecting virtually identical argument that "the unconscionability analysis must be limited to the twenty-seven Plaintiffs in this case without regard to the other 2,685 customers"). Accordingly, just because *these* Plaintiffs agreed to the updated TOU when making purchases does not immunize the TOU as to all possible plaintiffs who did not.[11] Accordingly, unlike in *Weber, McKee*, and *Lee*, the "hypothetical" about the TOU being applied retroactively is properly a question for the Court's consideration.

Defendants further protest that "online contracts often include a unilateral modification provision –

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[11] Nor can Defendants simply attempt to walk away from any unfair aspects of the TOU by disclaiming them once they are challenged in Court. *See infra* Section IV.D.

and courts routinely enforce them." Def. Supp. Reply at 3. However, the cases Defendants cite for that proposition found only that a unilateral modification provision does not necessarily render a contract illusory *on its face* "because there are other limitations to [the company's] ability to abuse this power." *McKee*, 2017 WL 4685039, at *13; *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1066 (S.D. Cal. 2015) ("The restriction on Amazon's discretion imposed by the duty of good faith and fair dealing saves the Agreement from being illusory."), *aff'd sub nom. Wiseley v. Amazon.com, Inc.*, 709 F. App'x 862 (9th Cir. 2017). But "[e]ven the cases upholding unilateral modification provisions recognize that any authority to modify the contract is constrained by the covenant of good faith and fair dealing." *In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767, 793 (N.D. Cal. 2019); *see also Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 796, 79 Cal.Rptr.2d 273 (1998) ("If the [defendant's] performance under the change of terms provision was not consonant with the duty of good faith and fair dealing, then whether the ADR clause, considered in isolation, satisfies the implied covenant makes no difference."). Here, Plaintiffs do not allege that the mere *prospect* of an unfair unilateral modification renders the TOU facially invalid, notwithstanding the protections imposed by the duty of good faith and fair dealing. Rather, Plaintiffs argue that Defendants *in fact* violated that duty by adding new, unreasonable terms to be applied retroactively to already accrued claims. Thus, the situation here mirrors the one the California Court of Appeal found problematic in *Peleg v. Neiman Marcus Group, Inc.*, 204 Cal. App. 4th

1425, 1465, 140 Cal.Rptr.3d 38, (2012). As summarized in a subsequent decision:

> [T]he *Peleg* court observed [that] had the agreement to arbitrate simply authorized the department store to make unilateral modifications, it would not be illusory under California law because the implied covenant of good faith and fair dealing would preclude any change that undermined the employee's rights. What made the agreement problematic, in the court's view, was that it expressly applied to unfiled claims, including those that had accrued, thus potentially permitting the employer to modify the agreement retroactively to frustrate the employee's rights in arbitration. Because the agreement specifically allowed retroactive modifications, the implied covenant could not be used to vary those express contract terms and limit the employee to prospective amendments only. Without the benefit of the implied covenant to rein in and restrict the employer's otherwise unilateral right to modify the agreement to include unfiled claims, the court held the agreement to arbitrate was illusory and invalid under California law.

Serpa v. California Sur. Investigations, Inc., 215 Cal. App. 4th 695, 707, 155 Cal.Rptr.3d 506 (2013) (citations omitted).

Here too, Defendants in their TOU reserve the right to "make changes to the Terms at any time," which will become "effective immediately" and will apply to any dispute irrespective of when it arose. TOU at 1, 10. As a result, the TOU expressly

contemplates that unilateral changes made by Defendants will be applied to already accrued claims – and indeed that is precisely what Plaintiffs allege happened, fundamentally altering the nature of the bargain in the process. The implicit protections of the covenant of good faith and fair dealing will not save a unilateral contract modification is such situations.

As a final point on procedural unconscionability, the Court notes that even if ticket purchasers were to review the revised TOU, it is doubtful that they would understand that they were agreeing to resolve their claims in a novel mass arbitration procedure. The revised TOU makes no mention of mass arbitration whatsoever. To the contrary, the TOU states, quite confusingly, that all claims will be resolved by "individual arbitration," and not "in any purported class or representative proceeding." TOU at 10. Thus, to discover what they were actually agreeing to, users would need to parse through New Era's separately posted Rules and comprehend their implications (no small task, as evidenced by the parties' briefing on the instant motion and New Era's repeated attempts to clarify and amend the Rules in response to this litigation). That the "supposedly agreed-upon terms of the bargain are hidden" in this way is yet another reason the TOU is procedurally unconscionable. *Patterson*, 14 Cal. App. 4th at 1664, 18 Cal.Rptr.2d 563. That is particularly true where, as here, the hidden terms effect a fundamental change to the bilateral nature of the individual arbitration process to which users initially agreed. *Cf. Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 684, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a

contractual basis for concluding that the party agreed to do so.").

The cumulative result of the above facts is significant. To avoid mass arbitration before New Era on their already accrued claims, ticket purchasers would need to: (1) do a line-by-line comparison of the TOU each time they opened Defendants' sites[12] (regardless of whether they had any intention of transacting business on that occasion, and notwithstanding that they very likely would not have the prior version of the TOU to compare); (2) discover the switch in arbitration providers and read New Era's separate Rules; (3) analyze and comprehend those dense Rules to discover the existence and implications of the mass arbitration procedure (which the parties and the Court have all struggled to do), despite the TOU's assurances that all claims would be resolved by "individual arbitration;" and then (4) decide not only to refrain from purchasing tickets from Defendants, the largest ticket services providers in the country, but also to refrain from browsing Defendants' websites altogether. Obviously, to expect so much out of consumers would be untenable. For these reasons, the Court would conclude that the agreement is extremely procedurally unconscionable.

C. Substantive Unconscionability

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 125, 251

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[12] Indeed, according to Defendants, the named Plaintiffs have signed into their accounts "dozens, if not hundreds of times." Mot. at 11. The number of times they simply browsed Defendants' websites is presumably even larger.

Cal.Rptr.3d 714, 447 P.3d 680 (2019) (quoting *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217 (2012)). As stated by the California Supreme Court in *OTO*:

> This analysis ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as "overly harsh," "unduly oppressive," "so one-sided as to shock the conscience," or "unfairly one-sided." All of these formulations point to the central idea that the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain, but with terms that are unreasonably favorable to the more powerful party.

Id. at 129-30, 251 Cal.Rptr.3d 714, 447 P.3d 680 (cleaned up) (citations omitted). Furthermore, "an examination of the case law does not indicate that 'shock the conscience' is a different standard in practice than other formulations or that it is the one true, authoritative standard for substantive unconscionability, exclusive of all others." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1159, 163 Cal.Rptr.3d 269, 311 P.3d 184 (2013).

"As with any contract, the unconscionability inquiry requires a court to examine the totality of the agreement's substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided." *Id.* at 1146, 163 Cal.Rptr.3d 269, 311 P.3d 184. Because the Court has found that the TOU exhibits an extremely high degree of procedural unconscionability, "even a relatively low degree of

substantive unconscionability may suffice to render the agreement unenforceable." *Id.* at 130, 251 Cal.Rptr.3d 714, 447 P.3d 680 (citations omitted); *see also id.* at 125-26, 251 Cal.Rptr.3d 714, 447 P.3d 680 ("[T]he more deceptive or coercive the bargaining tactics employed, the less substantive unfairness is required." (citations omitted)).

Plaintiffs argue the TOU is substantively unconscionable because: (1) New Era is biased in favor of Defendants and Latham, (2) the mass arbitration protocol and various other procedures violate claimants' due process rights, (3) the procedure for selecting the arbitrator violates California law, (4) the appeal provisions are unfair, and (5) the class action waiver violates California law. The Court will address each contention in turn.

i. <u>New Era's Alleged Bias</u>

First, Plaintiffs argue that New Era is biased in favor of Defendants and Latham. *See* Opp. at 9. As evidence of such bias, Plaintiffs point to New Era's early outreach to Latham and the fact that Live Nation was New Era's "anchor client" and only source of revenue initially. *Id.* Plaintiffs further assert that "New Era actively seeks business from Latham, uses Latham as a 'Reference' for other law firms, and has strong incentives to appease them." *Id.* Defendants contest these claims as "pure speculation," and argue that pre-arbitration discovery uncovered no evidence of actual bias. Reply at 12. Specifically, Defendants assert that the evidence shows they and Latham engaged only in arm's length discussions about the potential selection of New Era, that they had no hand in drafting New Era's Rules, and that Defendants'

business now makes up only a small percentage of New Era's overall revenues. *See* Reply at 3-4.

Although Plaintiffs' allegations are troubling, the Court is not entirely persuaded that the evidence of bias is all Plaintiffs make it out to be. Plaintiffs cite several emails and other documents purporting to demonstrate Latham's early involvement with, support for, and influence over, New Era. Upon review, however, those documents do not seem to indicate much more than that Latham was willing to serve as a reference for New Era, that Latham believed some of its clients would be interested in New Era's ADR services, and that New Era praised Latham and considered it an "evangelist" for the company. But as Defendants point out, *Plaintiffs'* counsel herein were themselves listed alongside Latham and other law firms as one of New Era's "evangelists." To be sure, the evidence that Defendants provided nearly all of New Era's revenue during its first year of operations is concerning and could certainly create an inference of bias. On the other hand, Defendants cite evidence that they are far from New Era's only client and now make up a small percentage of New Era's revenue. *See* Reply at 3-4. In addition, while Plaintiffs allege Latham was involved in shaping New Era's Rules, they have not made any concrete showing to that effect.[13] In sum,

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[13] In connection with New Era's latest changes to the Rules, Plaintiffs again charge Latham with improperly communicating and coordinating with New Era "in crafting the rules *and defending and modifying them in this Court*." Pl. Resp. to Williams Supp. Decl. at 1. It would seem beyond dispute that there have been some joint defense efforts between Latham and New Era in connection with this Motion. *See id.* Ex. A (acknowledging that New Era has sought to defend the Rules "in

while the Court cannot rule out the possibility of impropriety or undue influence, neither can it conclude based on the existing record that New Era is "so identified with [Defendants] as to be in fact, even though not in name, [Defendants]," or that New Era lacks even "minimum levels of integrity." *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 825, 827, 171 Cal.Rptr. 604, 623 P.2d 165 (1981).

In any event, whether the delegation clause is substantively unconscionable ultimately turns on "the fairness of [the] agreement's actual terms and . . . whether they are overly harsh or one-sided." *OTO*, 8 Cal. 5th at 125, 251 Cal.Rptr.3d 714, 447 P.3d 680 (quoting *Pinnacle Museum*, 55 Cal. 4th at 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217). Thus, even if Latham's "involvement in the development of [New Era's] Protocol may raise some concern, the ultimate question is whether the Protocol is fair and impartial – *i.e.*, one that is not predisposed more favorably to [Latham], its clients (including [Defendants]), or defendants generally compared to other generally accepted conventional arbitration rules." *McGrath v. DoorDash, Inc.*, No. 19-CV-05279-EMC, 2020 WL 6526129, at *10 (N.D. Cal. Nov. 5, 2020). The Court therefore turns to the specific Rules governing the mass arbitration protocol.

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submissions with the Court, and counsel for Live Nation and New Era have engaged in discussions regarding the same"). Indeed, there appears to be a remarkable degree of coordination between Latham and New Era in terms of their interpretation and the evolution of New Era's Rules. Nevertheless, it is not readily apparent to the Court that Latham has in fact helped *craft* or *modify* the Rules (as opposed to relying on them after the fact).

ii. Mass Arbitration Protocol

a. Application of Precedent

Plaintiffs claim that New Era's mass arbitration procedure operates similar to a Fed. R. Civ. P. 23(b)(3) representative class action but does not comply with the due process requirements of class actions – namely, to provide non-represented parties an opportunity to be heard, an opportunity to remove themselves, and adequate representation by the represented party. *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Concepcion*, 563 U.S. at 349, 131 S.Ct. 1740 (noting that these requirements would also apply to class arbitrations). Defendants, on the other hand, assert that unlike a class action, absentee claimants would not be bound by the results of earlier arbitration proceedings. Instead, they liken New Era's mass arbitration procedure to a multidistrict litigation ("MDL"), in which a determination is made in a bellwether case as to a common issue and then extended to other cases within the MDL unless a party provides a case-specific reason to depart from the ruling.

The Court begins with an overview of New Era's Rules governing mass arbitration.[14] Those Rules

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[14] As previously noted, New Era changed its Rules specifically in response to the Court's concerns in this litigation. *See* Williams Supp. Decl. However, "[u]nder California law, unconscionability of a contract or a contract clause is determined based on the law and facts at the time of the agreement." *Yerkovich v. MCA, Inc.*, 11 F. Supp. 2d 1167, 1173 (C.D. Cal. 1997) (citations omitted), *aff'd*, 211 F.3d 1276 (9th Cir. 2000); *see also* Cal. Civ. Code § 1670.5. The Court will therefore analyze the Rules in their prior iteration.

apply if a neutral determines there are more than five cases presenting the same or similar evidence, witnesses, or issues of law and fact. Rules 2(x), 6(b)(ii)(1), 6(b)(iii)(3)(a). Although New Era may initially group together cases for administrative purposes, the ultimate determination as to whether those cases involve common issues is made by the neutral. Rules 2(x)(ii), 6(b)(ii)(2). Once that determination is made, three bellwethers are selected – one by each side and one according to an unspecified process determined by the neutral. Rule 6(b)(iii)(3). After the neutral renders a decision in the three bellwethers, the parties must conduct settlement discussions. Rule 6(b)(4). If the parties reach an agreement, individual claimants or respondents may opt their particular case out of that settlement agreement. Rule 6(b)(iii)(4). If no agreement is reached, "each party shall provide the neutral with the case(s) that such party believes involve individualized issues of law and/or fact that should not be subject to Precedent" from the bellwether cases. Rule 6(b)(iii)(4)(d). As to the remaining cases, determinations made from the bellwether cases "will act as Precedent on subsequent cases with Common Issues of Law and Fact as applied to those Common Issues of Law and Fact, solely as determined by New Era ADR affiliated neutral(s)." Rule 6(b)(iii)(5)(a). Precedent "shall be applied" in the same manner in later filed cases as well. 6(b)(iii)(5)(b). The neutral creates a process for resolving the individualized issues in the remaining cases. Rule 6(b)(iii)(6). "Precedent will still apply to all Common Issues of Law and Fact in the Remaining Cases." Rule 6(b)(iii)(6)(b). "Only if a party can demonstrate that there are no Common Issues of Law and Fact will a

case be removed from the Mass Arbitration." Rule 6(b)(iii)(6)(c).

Plaintiffs primarily take issue with the use of decisions from the bellwethers as Precedent. They read the Rules as *requiring* the neutral to apply Precedent from the bellwethers to all cases in the mass arbitration, regardless of when the case was filed, such that all claimants will be bound by those decisions. *See* Rule 6(b)(iii)(5)(a) (determinations from the bellwethers "*will* act as Precedent on subsequent cases" (emphasis added)); Rule 6(b)(iii)(5)(b) (Precedent "*shall* be applied" in later filed cases (emphasis added)). Under Plaintiffs' reading of the Rules, a claimant who brings a claim after the bellwethers have been resolved would effectively have had her case decided, in secret, before she even filed her case, and without having been represented in, notified of, or given an opportunity to opt out of, the earlier proceeding. Plaintiffs distinguish New Era's mass arbitration procedure from that of an MDL on this basis, citing *Home Depot USA, Inc. v. Lafarge North America, Inc.*, 59 F.4th 55 (3d Cir. 2023), in which the Third Circuit held that it was impermissible to apply issue preclusion and the law of the case doctrine to individual cases within an MDL.

Defendants predictably take a different view. They point to the general definition of the term Precedent, which they claim makes clear that its application is both discretionary and subject to other applicable rights, such as the right to a fair opportunity to be heard. The definition of Precedent is contained in Rule 2(y), which provides:

> When significant factual findings and legal determinations have been made in one or more proceedings on the platform ("Lead Decisions"), New Era ADR affiliated neutrals may apply these determinations in the same manner and with the same force and effect to the Common Issues of Law and Fact contained in other proceedings that involve Common Issues of Law and Fact with those cases from which the Lead Decisions originated, subject to any rights contained herein. Such determinations made from the Lead Decisions are known as "Precedent(s)."

Based on this language, Defendants argue that the application of Precedent is, by definition, discretionary. The problem with that assertion, however, is that the Rule simply defines the term Precedent to mean "determinations made from the Lead Decisions," or, "significant factual findings and legal determinations . . . made in one or more proceedings on the platform." *Id.* The portion of the Rule 2(y) dealing with application of Precedent states only that neutrals, *in general*, "may apply" Precedent to Common Issues of Law and Fact in cases before New Era. *Id.* The Rule does not speak to *how* Precedent is to be applied in the specific context of New Era's mass arbitration procedures. To answer that question, the Court turns to the specific Rules governing mass arbitration.

Plaintiffs point to several provisions in the mass arbitration Rules that they claim operate to mandate the application of Precedent to all future claimants. First, Rule 6(b)(iii)(5)(a) states that determinations from bellwether cases "will act as Precedent." Plaintiffs prefer to read that language to mean that

such determinations "will *be applied* as Precedent." However, it is not clear whether that is what to "*act* as Precedent" means. Based on the definition in Rule 2(y), to "act as Precedent," could mean to "act as" a "determination[ ] made from [a] Lead Decision[ ]," which a neutral "may apply." Rule 2(y). *How* exactly the neutral is to determine whether to apply Precedent, though, is left unsaid. Rule 6(b)(iii)(5)(a) states only that the bellwether decisions will act as Precedent "solely as determined by" the neutral.

Plaintiffs also take issue with the next subsection of the Rules, which states that in later-filed cases, Precedent "shall be applied in the manner identified in the immediately preceding paragraph." Rule 6(b)(iii)(5)(b). Plaintiffs quote the clause "shall be applied" (which, standing alone, would suggest that Precedent is applied automatically), but ignore the modifying clause "in the manner identified in the immediately preceding paragraph." But as just discussed, "the manner identified in the immediately preceding paragraph" – *i.e.*, Rule 6(b)(iii)(5)(a) – leaves unclear how Precedent is to be applied by the neutral.

Lastly, Plaintiffs point to Rule 6(b)(iii)(6). That Rule states that *after* Precedent has been applied in the cases presenting common issues, the neutral will create a process for resolving cases presenting individualized issues, but that in those cases, "Precedent will still apply to all Common Issues of Law and Fact." *See* Rule 6(b)(iii)(6)(a)-(b). Sequentially, Rule 6(b)(iii)(6) follows Rule 6(b)(iii)(5) and thus comes into play only after "Application of Precedent(s)" has occurred. *See* Rule 6(b)(iii)(5)-(6). Accordingly, that "Precedent will *still* apply" could simply mean that any determination by the neutral

regarding the application of Precedent remains unchanged as to the remaining cases. In short, examination of the Rules governing mass arbitration does not necessarily prove, as Plaintiffs insist, that Precedent is to be applied in all instances by the neutral without discretion.

Even so, the application of Precedent in mass arbitrations still raises a host of issues. First, as the foregoing discussion illustrates, the Rules contain a substantial amount of ambiguity as how Precedent is to be applied (and, as Plaintiffs point out, both Defendants and New Era have contradicted their prior representations about what the Rules actually mean, further indicating a lack of clarity by the very drafters and proponents of the Rules).[15] Even

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[15] For instance, Defendants' supplemental brief states that New Era's mass arbitration procedures "are only triggered when there are 'similar cases filed by the same law firm or groups of law firms,' " which "limits, upfront, which claims can be grouped together into mass arbitration." Def. Supp. Br. at 2-3 (quoting Rule 2(x)(ii)(1)); *see also id.* at 3 ("At each stage, the claimants in any given mass arbitration are represented by the same firm or group of firms acting in coordination."). That requirement did not exist anywhere in the Rules at the time Defendants made those representations, and Defendants' earlier filings made no mention of it. *See, e.g.*, Mot. at 9 ("The rules and procedures for mass arbitrations apply where the presiding neutral determines that more than five arbitrations have been filed that present common issues."); Rule 2(x)(ii)(1) ("*Solely for administrative purposes*, New Era ADR may group similar cases filed by the same law firm or group of law firms and have them proceed through the Mass Arbitration process unless and until the presiding neutral makes a determination otherwise." (emphasis added)). New Era later amended its Rules to add the threshold requirement that mass arbitration applies only where five or more cases are "brought by the same law firm or group of law firms acting in coordination." *See* Williams Supp. Decl. Ex. B.

assuming, as the Court has, that the Rules allow for discretion on the part of the neutral, the Rules provide no guidance as to *how* the neutral is to exercise that discretion. Indeed, the Rules grant the neutral "sole discretion" in determining both whether to group together similar cases in a mass arbitration, Rules 2(x)(ii), 6(b)(iii)(3)(a), and whether and how to apply Precedent to those cases, *see* Rule 6(b)(iii)(5)(a). Such unfettered discretion invites the potential for unfairness (particularly where New Era's arbitrator selection provisions contravene the protections provided under California law, *see infra* Section IV.C.iii). This unchecked power on the part of the neutral, combined with the ambiguity contained in the Rules, is uniquely problematic when considering that Precedent could be applied to thousands of claims at once. The interpretation of whether and how to apply Precedent could be the difference between a fair arbitration process where each claimant is provided a sufficient opportunity to be heard, and a mechanical process for summarily disposing of an entire class of claimants based on an earlier proceeding to which they were not a party.

Defendants protest that the Rules provide other provisions requiring the neutral to act in a manner that will "ensure fundamental fairness and equity." Rule 6(b)(iii)(6)(a); *see* Def. Supp. Br. at 4. As an initial matter, none of those provisions speak to the application of Precedent in mass arbitrations. *See* Rules 2(p) (arbitrator has discretion to allow additional evidence "as necessary to ensure a fundamentally fair process"), 6(a)(vii)(4) (same), 6(b)(iii)(3)(d) (arbitrator has discretion to increase the number of bellwethers "but only if it is necessary to allow for a fundamentally fair process"), 6(b)(iii)(6)(a)

(arbitrator will create a process for resolving *individualized* issues "to ensure fundamental fairness and equity"). In addition, the California Court of Appeal has found arbitration procedures (specifically discovery procedures) substantively unconscionable notwithstanding similar catchall language. *See Baxter v. Genworth N. Am. Corp.*, 16 Cal. App. 5th 713, 727, 224 Cal.Rptr.3d 556 (2017) (discovery limitations unfair notwithstanding that arbitrator could grant additional discovery "for good and sufficient cause shown" in order "to ensure that a party has a fair opportunity to present a case"); *see also infra* Section IV.C.ii.b.

As an additional fallback, Defendants rely on the fact that the Rules allow for parties to "present evidence and arguments demonstrating that a case or cases do not involve Common Issues of Law and Fact." Rule 2(x)(iii). But whether that carve out provides an adequate safety valve is also unclear. As Plaintiffs point out, the structure of the Rules – and indeed, New Era's entire business proposition – presupposes that the mass arbitration procedure is a means for quickly and finally disposing of a large number of claims as efficiently as possible. *See* Opp. Ex. F at 11 (touting New Era's services "as critical prophylactic measure for client's mass arbitration risk"). Allowing each individual claimant a real opportunity to argue "any reason to depart from precedent in that case," as Defendants claim is the case, would seem to negate that basic premise. Def. Supp. Br. at 4.

The potential due process concerns associated with adjudicating thousands of claims on the basis of vague "Precedent" at the sole discretion of the neutral are notable given the lack of other critical procedural safeguards present in MDLs and class actions. For

instance, the Rules do not provide notice to interest parties (the arbitrations are private) or an opportunity for them to be heard. There is no process for appointing leadership or impartial making determinations as to adequacy of counsel.[16] And critically, there is no opportunity for claimants to opt out, as is required for class actions maintained under Fed. R. Civ. P. 23(b)(3).[17] In their Motion, Defendants analogize to *McGrath*, 2020 WL 6526129, at *9-11, in which Judge Chen of the Northern District found that a different mass arbitration protocol involving the use of randomly selected test cases was fair and impartial. However, "[m]ost important" to the court's determination in that case was the fact that "a claimant can choose to opt out of the arbitration process and go back to court." *Id.* No such option exists here. For these reasons, the Court finds that

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[16] Defendants assert that "leadership conflicts are unlikely" because "cases can only be part of a mass arbitration if the individual claimants are represented by the same firm or group of firms acting in coordination." Def. Supp. Br. But as previously noted the same-law-firms requirement was not added until the newest version of the Rules. Moreover, even if a subsequent claimant is represented by the same law firm that represented the bellwether claimant, that would not solve the due process issue. *See Taylor v. Sturgell*, 553 U.S. 880, 889, 904-05, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008) (rejecting "virtual representation theory" and holding that subsequent litigant could not be bound to judgment in prior case brought by same lawyer).

[17] Fed. R. Civ. P. 23(b)(3) applies to class actions seeking damages. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). By contrast, in cases where arbitration claimants would be seeking injunctive relief (the equivalent of a Fed. R. Civ. P. 23(b)(2) class), the TOU is problematic in a different respect: the non-mutual appeal provision. *See infra* Section IV.C.iv.

the mass arbitration protocol creates a process that poses a serious risk of being fundamentally unfair to claimants, and therefore evinces elements of substantive unconscionability.

b. Other Procedural Limitations

Plaintiffs also challenge New Era's discovery, page, and record limitations. Under the Rules, complaints cannot exceed 10 pages, presentations of evidence are limited to 10 total references, and argument is limited to 15,000 characters[18] (or approximately 5 pages). *See* Rules 6(a)(ii)(1)(b), 6(a)(vii), 6(a)(x). The Court's Tentative found that these limitations would not, standing alone, rise to the level of unconscionability. *See* Tentative at 14. Nevertheless, when coupled with the due process concerns identified above, they present yet another hurdle for claimants to overcome and further exacerbate the level of unfairness to claimants.

More problematic is the fact that the Rules governing expedited arbitrations (including mass arbitrations) provide for no formal process of discovery as a right. *See* Rule 2(*o*)(i). To upgrade to a "standard arbitration" with a formal process, claimants would need to pay a fee *and* obtain the consent of Defendants. *See* Rule 2(*o*)(ii). The Rules governing mass arbitration provide only that "Documents Are Exchanged" by the parties, *see* Rule 6(a)(viii), but the documents exchanged are the 10 total files each side chooses in support of its *own*

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[18] At his deposition, New Era's corporate representative stated that this figure (*i.e.* 15,000 characters) was "extraordinarily small" and suggested it could have been a misprint, before acknowledging its accuracy. Opp. Ex. C at 123:19-125:18, 359:12-360:25.

argument, *see* Rule 6(a)(vii). Thus, this initial document exchange is not even equivalent to the initial disclosures mandated under Fed. R. Civ. P. 26(a), and it is not clear whether parties are *required* to submit any such documents.

Defendants argue that the Rules contemplate informal discovery at the discretion of the arbitrator. For example, "if a party believes an opposing party has relevant or necessary evidence that they are not disclosing, they can make a request to the neutral that such evidence be provided or disclosed," and the neutral will determine whether "good cause for the production exists." Rule 2(q)(i). Additionally, in mass arbitrations, "[t]he neutral has discretion to allow evidence in excess of the stated limits as necessary to ensure a fundamentally fair process." Rule 6(a)(vii)(4). However, as previously noted, the California Court of Appeal found very similar provisions unconscionable in *Baxter*, 16 Cal. App. 5th at 727, 224 Cal.Rptr.3d 556. True, the procedures at issue in that case allowed for additional discovery only "for good *and sufficient* cause," *id.* (emphasis added), and furthermore, in *Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 183, 116 Cal.Rptr.2d 671 (2002), the court found a "good cause" standard to be sufficient. But in *Mercuro*, the discovery provisions allowed up to "30 discovery requests of any kind." *Id.*; *see also Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 716, 13 Cal.Rptr.3d 88 (2004) ("compelling need" standard unconscionable where procedure allowed for a default of two deposition statements and testifying experts). Here, by contrast, New Era's Rules provide for *no* discovery as a right (beyond the initial document exchange, if any). The Court therefore agrees with the *Baxter* court's conclusion that while courts "must

assume an arbitrator will act in a reasonable manner, a reasonable arbitrator would feel constrained under [New Era's Rules] to expand discovery to the extent necessary to vindicate [claimants'] statutory rights." *Baxter*, 16 Cal. App. 5th at 730, 224 Cal.Rptr.3d 556.[19]

Accordingly, the discovery limitations and other procedural limitations further support a finding of substantive unconscionability.

iii. Selection of the Arbitrator

Next, Plaintiffs claim that New Era's mass arbitration protocol violates the California Arbitration Act's ("CAA") provisions regarding the selection of an arbitrator, which provides parties a right to disqualify any arbitrator based on a mandated disclosure statement. *See* Cal. Civ. Proc. Code §§ 1281.9, 1281.91(b)(1). Plaintiffs point to three features of New Era's Rules that they claim violate California law: (1) New Era has the power to override a claimant's decision to disqualify an arbitrator; (2) each side, rather than each individual party, has a right to disqualify an arbitrator; and (3) a single arbitrator presides over several cases at one time. Defendants do not dispute that New Era's Rules

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[19] Indeed, the statutory rights at issue here arise under the Sherman Act. Antitrust lawsuits brought under the Sherman Act are notoriously complex and fact-intensive, and proving a violation generally requires extensive discovery and investigation into internal practices, pricing data, and the like which is in the exclusive possession of the defendant. Thus, in a case such as this one, the discovery limitations provided by the Rules (that is, essentially no discovery) are wholly inadequate for claimants to even begin to prove their case. Those same limitations might also impede claimants from making a threshold showing of "good cause" to obtain any discovery at all.

violate these state law requirements but claim that the CAA does not apply to the TOU, and in any event is preempted by the FAA.

While Defendants are correct that, as a general matter, parties to an arbitration agreement are at liberty to select the procedural provisions governing arbitration proceedings, parties in California may not waive a right conferred by a statute "where the public benefit of the statute is one of its primary purposes." *Azteca Constr., Inc. v. ADR Consulting, Inc.*, 121 Cal. App. 4th 1156, 1167, 18 Cal.Rptr.3d 142 (2004) (cleaned up), *as modified* (Sept. 9, 2004); *see* Cal. Civil Code § 3513 ("Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."). In considering the California's arbitrator disqualification laws, the Court of Appeal in *Azteca* found that the "provisions for arbitrator disqualification established by the California Legislature may not be waived or superseded by a private contract." *Id.* at 1160, 18 Cal.Rptr.3d 142.

Nevertheless, Defendants argue that those provisions are preempted by the FAA. In support of that argument, they rely exclusively on *Modiano v. BMW of North America LLC*, in which the court found that, assuming a conflict existed between California law and the terms of the parties' agreement, "it would be preempted by the FAA." No. 21-CV-00040-DMS-MDD, 2021 WL 5750460, at *2 (S.D. Cal. June 29, 2021). Plaintiffs, on the other hand, cite several cases holding that the California arbitrator disqualification provisions are not preempted. *See* Pl. Supp. Br. at 13; *see e.g., Kalasho v. BMW of N. Am., LLC*, 520 F. Supp. 3d 1288, 1295 (S.D. Cal. 2021) ("[T]he CAA provisions

at issue are not preempted by the FAA because the two statutes do not conflict."); *Nguyen v. BMW of N. Am.*, No. 20-cv-2432, 2022 WL 102203, at *6 (S.D. Cal. Jan. 11, 2022) (following *Kalasho* and finding "the CAA is not preempted by the FAA with respect to the arbitration agreement at issue").

Defendants have not pointed to any conflict between California's arbitrator disclosure and disqualification rules that would indicate the existence of a conflict with the FAA in this case. Accordingly, the Court would agree with Plaintiffs (and with what appears to be the weight on authority on the issue) and find the CAA is not preempted as to those provision and this agreement. That the TOU purports to waive a nonwaivable right under California law (along with the other problems noted above) support finding the delegation clause substantively unconscionable.

iv. Appeal Provisions

Plaintiffs further challenge what they characterize as a "non-mutual right of appeal" under the TOU. Opp. at 18. The TOU provides: "[I]n the event that the arbitrator awards injunctive relief against either you or us, the party against whom injunctive relief was awarded may . . . appeal that decision to JAMS." TOU at 13. Plaintiffs argue that because it is claimants who will be seeking injunctive relief, the exclusive right to appeal only *grants* of injunctive relief favors Defendants. Relying on *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1070, 130 Cal.Rptr.2d 892, 63 P.3d 979 (2003), Plaintiffs contend that the right of appeal would be valuable to a defendant when injunctive relief against it is granted, but only valuable to a claimant when

injunctive relief is denied. Defendants, in turn, cite *Sanchez v. Valencia Holding Co., LLC* for the proposition that given the "potentially far-reaching nature of an injunctive relief remedy," the review of a grant of injunctive relief furnishes a corporate defendant a " 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need." 61 Cal. 4th 899, 917, 190 Cal.Rptr.3d 812, 353 P.3d 741 (2015).

The Court would agree with Plaintiffs that the right to appeal a grant, but not a denial, of injunctive relief is unfair to claimants in this case. It would seem to the Court that, for all intents and purposes, claimants would be the only parties pursuing any real form of injunctive relief (certainly in the context of a mass arbitration).[20] Thus, while the TOU's appeal provision nominally applies to Plaintiffs and Defendants in equal measure, only Defendants will benefit in practice. The same was true in *Sanchez*, but *Sanchez* involved traditional, bilateral arbitration. While the suit was brought as a putative class action, the case was before the court on a motion to compel arbitration; thus, the issue before the court was whether to send Sanchez's *individual* claim to arbitration. The fate of the rest of the putative class

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[20] Defendants' contention that they might seek injunctive relief against ticket resellers is unavailing. The TOU expressly allows Defendants to file claims involving unauthorized use of Defendants' websites, including for purposes of resale, in federal court. *See* TOU at 3-5, 10; *see also, e.g., Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1116-17 (C.D. Cal. 2007) (enjoining defendants from "[p]urchasing or facilitating the purchase of tickets from Ticketmaster's website for the commercial purpose of reselling them").

of claimants was not in jeopardy. If Sanchez was denied injunctive relief during arbitration, another plaintiff could try again. In that context, the California Supreme Court found that as compared to the interests of a single plaintiff, it was not unconscionable to afford the business an extra "margin of safety" against a far-reaching injunction. Here, by contrast, a denial of injunctive relief for a bellwether plaintiff could effectively foreclose the ability of the *entire class* of claimants to obtain injunctive relief. As Plaintiffs put it, "the risks of injunctive relief here are equally high-stakes for both sides, not asymmetric for Defendants." Pl. Supp. Br. at 8. The Court does not see why the interests of the business should be afforded any special protection in such a case.

That a class of individuals could be prevented from pursuing injunctive relief without the possibility of appeal is particularly significant in an antitrust case, where injunctive relief is a critical remedy for vindication of the public good. Indeed, *Sanchez* (which involved claims of unfair competition) recognized this fact when it noted: "Of course, apart from the parties' particular interests, the public has a strong interest in ensuring that fraudulent business practices are enjoined." *Id.* The Court, however, did not fully address that issue, as it was not argued on appeal. Nor, as just noted, was the Court presented with factual circumstances which would have required it to consider the possibility that *no claimant* – *i.e.*, no member of the public – could appeal the denial of injunctive relief or prevail on a subsequent claim seeking that relief. The appeal provision at issue here presents such a possibility.

This Court further notes that the specific procedures governing the appeal contained in the TOU highlights the inherent unfairness of Defendants' one-sided appeal provision. The TOU provides that the appeal will be taken before a three-arbitrator JAMS panel consisting of "either (a) retired state or federal judges or (b) licensed attorneys with at least 20 years of active litigation experience and substantial expertise in the substantive laws applicable to the subject matter of the dispute." TOU at 13. Moreover, the "panel will conduct a de novo review of the arbitrator's decision." *Id.* In other words, the TOU ensures that any adverse decision against Defendants that would require them to alter their business practices would be rigorously reviewed by a panel of experienced arbitrators at a trusted arbitration outfit (notably, not New Era). Claimants, on the other hand, have no recourse at all. Thus, Defendants have much more than a "margin of safety"; they have effectively stacked the deck so they can arbitrate thousands of claims in a single go, and if they lose, simply go back to JAMS to take an appeal.

For these reasons, the Court would find the appeal provisions contained in the TOU adds another element of substantive unconscionability.

v. <u>Class Action Waiver</u>

Lastly, Plaintiffs assert that the class action waiver contained in the TOU is substantively unconscionable under California law, based on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005). The *Discover Bank* rule provides that waivers of the right to a class action are unconscionable "when the waiver is found in a

consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Id.* at 162–63, 30 Cal.Rptr.3d 76, 113 P.3d 1100. But as Plaintiffs acknowledge, the United States Supreme Court overruled *Discover Bank* in *Concepcion*, 563 U.S. 333, 131 S.Ct. 1740. Plaintiffs nonetheless contend that the *Concepcion* holding does not apply here because its reasoning was premised on the notion that the *Discover Bank* rule interfered with the FAA's purpose to facilitate *bilateral* arbitrations, not mass arbitrations. However, there is no clear indication that once the Supreme Court considers the creation and use of mass arbitrations, it will reconsider its ruling that the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures. Accordingly, the Court does not find the existence of a class action waiver to be a basis for invalidating the agreement.

vi. Summary

In sum, the Court finds that the TOU and New Era's Rules contain several elements supporting a finding of substantive unconscionability, specifically: (1) the mass arbitration protocol including the application of precedent from the bellwether decisions to other claimants plus the lack of corresponding procedural safeguards; (2) the lack of a right to discovery and other procedural limitations; (3) the arbitrator selection provisions; and (4) the limited right of appeal. Each of these elements is present

with respect to the delegation clause specifically, as each applies to threshold issues of arbitrability.[21] Any one of these elements, standing alone, might not suffice to invalidate the agreement. However, when viewed together and alongside the extremely high degree of procedural unconscionability present here (as the law requires, *see Sonic-Calabasas*, 57 Cal. 4th at 1146, 163 Cal.Rptr.3d 269, 311 P.3d 184), the Court finds the agreement unconscionable.

D. Severability

Having found both procedural and substantive unconscionability present, the Court now turns to whether the unconscionable portions of the agreement are severable. "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Cal. Civ. Code § 1670.5(a). In determining whether severance is

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[21] The Rules governing the application of precedent in mass arbitrations apply to threshold issues of arbitrability; for example, the neutral's determination as to unconscionability in a bellwether could apply to all future claims which are grouped together in a mass arbitration. Similarly, California law governing arbitrator disqualification would apply equally to threshold issues like unconscionability as they would to the underlying merits of the claim, as a single arbitrator would decide both issues. Finally, any injunctive relief awarded on threshold issues of arbitrability would be subject to the appeal provisions (although it is not entirely clear how equitable relief such as contract rescission would be treated for purposes of appeal under the TOU).

appropriate, courts examine "(1) whether the substantively unconscionable provision relates to the arbitration agreement's chief objective; (2) whether the arbitration agreement contained multiple substantively unconscionable provisions such that it indicates a systematic effort to impose arbitration not simply as an alternative to litigation, but as an inferior forum; and (3) a lack of mutuality that permeated the entire agreement." *MacClelland*, 609 F. Supp. 3d at 1044 (citing *Armendariz*, 24 Cal. 4th at 124-25, 99 Cal.Rptr.2d 745, 6 P.3d 669). "The overarching inquiry is whether 'the interests of justice . . f. would be furthered' by severance." *Armendariz*, 24 Cal. 4th at 124, 99 Cal.Rptr.2d 745, 6 P.3d 669 (quoting *Beynon v. Garden Grove Med. Grp.*, 100 Cal. App. 3d 698, 713, 161 Cal.Rptr. 146 (1980)).

Here, the TOU contains a clause stating that in the event New Era cannot conduct the arbitration for any reason, "the arbitration will be conducted by FairClaims pursuant to its FastTrack Rules & Procedures," and, failing that, an alternative, mutually selected arbitration provider. TOU at 12. However, the existence of a severability clause is not dispositive; rather, the ultimate question is whether the agreement is permeated by unconscionability. *See MacClelland*, 609 F. Supp. 3d at 1045 ("The existence of the severability clauses does not change the fact that where an agreement is permeated by unconscionability, a court will not sever the unlawful provisions." (citations omitted)).

As was the case in *Armendariz*, there are multiple unlawful provisions here. "Such multiple defects indicate a systematic effort to impose arbitration on [a ticket purchaser] not simply as an alternative to litigation, but as an inferior forum." *Armendariz*, 24

Cal. 4th at 124, 99 Cal.Rptr.2d 745, 6 P.3d 669. Specifically, New Era's mass arbitration Rules and the arbitration agreement's appeal provisions provide Defendants, the party with substantially superior bargaining power, an unfair advantage in contesting the claims against it. Moreover, the way in which Defendants effected the changes to the TOU (*e.g.*, unilaterally, and in response to the looming prospect of defending against large numbers of arbitration claims) further indicates a "systematic effort to impose arbitration on a customer as an inferior forum" to avoid having to arbitrate consumer claims individually. *MacClelland*, 609 F. Supp. 3d at 1046. It would appear to the Court that these efforts were by design, and that the effects of these unconscionable provisions were "entirely foreseeable and intended." *Id.* The Court would thus find that unconscionability permeates the arbitration clause and decline to sever the offending provisions.

The Court also notes that the fact the arbitration agreement contains a clause designating FairClaims as a backup arbitration provider (and failing that, another backup provider) does not save the agreement. Because the parties have not briefed the issue, the Court is unable to conclude that requiring consumers to arbitrate pursuant to FairClaims' "FastTrack Rules & Procedures" – an apparently online-only process administered by another relatively new arbitration provider – would alleviate the Court's concerns with respect to the procedural and substantively unconscionable elements of the agreement. Moreover, "[i]f the Court were to sever the numerous unconscionable provisions in a case such as this, companies could be incentivized to retain unenforceable provisions designed to chill customers'

vindication of their rights, then simply propose to sever these provisions in the rare event that they are challenged successfully in court." *Id.* Nor, contrary to Defendants' suggestion, should claimants have to rely on the FAA's post-award review process for vacating an adverse award. That process "is 'both limited and highly deferential' and an arbitration award may be vacated only if it is 'completely irrational' or 'constitutes manifest disregard of the law.' " *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1193 (9th Cir. 2004) (quoting *Coutee v. Barington Cap. Grp., L.P.*, 336 F.3d 1128, 1132 (9th Cir. 2003)); *see also Coutee*, 336 F.3d at 1133 ("Manifest disregard of the facts is not an independent ground for vacatur in this circuit."). As Plaintiffs put it, such a limited review process "is no substitute for fair procedures up front – otherwise, unconscionability challenges would always fail." Pl. Supp. Reply at 7.

V. Conclusion

Based on the foregoing discussion, the Court **DENIES** the motion to compel arbitration.

FILED
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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SKOT HECKMAN; et al., Plaintiffs-Appellees, v. LIVE NATION ENTERTAINMENT, INC.; TICKETMASTER, LLC, Defendants-Appellants.	No. 23-55770 D.C. No. 2:22-cv-00047-GW-GJS Central District of California, Los Angeles ORDER

Before: W. FLETCHER, CHRISTEN, and VANDYKE, Circuit Judges.

Appellants filed a petition for panel rehearing and/or rehearing en banc on November 12, 2024 (Dkt. Entry 79). The panel has unanimously voted to deny the petition for panel rehearing. Judges Christen and VanDyke have voted to deny the petition for rehearing en banc, and Judge W. Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and/or rehearing en banc is **DENIED**.

9 U.S.C. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

9 U.S.C. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party

alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 5

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 10(a)

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

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CALIFORNIA COURT OF APPEAL DECISIONS APPLYING CALIFORNIA'S SEVERABILITY DOCTRINE (MAY 5, 2015 TO MAY 5, 2025)

ARBITRATION CASES

Case	Severance	Applied interests of justice
Advanced Air Mgmt., Inc. v. Gulfstream Aerospace Corp., No. B265723, 2017 WL 3887428 (Cal. Ct. App. Sept. 6, 2017)	Yes	No
Ahlmann v. Forwardline Fin., LLC, No. B304367, 2023 WL 4858552 (Cal. Ct. App. July 31, 2023)	Yes	No
Ainsworth v. Boys & Girls Clubs of Sonoma Valley, No. A165472, 2023 WL 5441408 (Cal. Ct. App. Aug. 24, 2023)	Yes	Yes
Alatorre v. Alcal Specialty Contracting, Inc., No. B297476, 2020 WL 1482131 (Cal. Ct. App. Mar. 27, 2020)	Yes	No
Alberto v. Cambrian Homecare, 91 Cal. App. 5th 482 (Ct. App. 2023)	No	Yes

Case	Severance	Applied interests of justice
Ali v. Daylight Transp., LLC, 59 Cal. App. 5th 462 (Ct. App. 2020)	No	Yes
Altman v. SolarCity Corp., No. D067582, 2016 WL 2892733 (Cal. Ct. App. May 13, 2016)	No	No
Anderson v. Thrive Soc. Equity Manager VII, LLC, No. B329181, 2024 WL 4282162 (Cal. Ct. App. Sept. 24, 2024)	No	No
Arbitech, LLC v. Hackney, No. G063744, 2017 WL 4296101 (Cal. Ct. App. Sept. 28, 2017)	No	No
Arnold v. Antelope Manufactured Home Cmty., No. C097244, 2024 WL 1081934 (Cal. Ct. App. Mar. 13, 2024)	No	Yes
Bacall v. Shumway, 61 Cal. App. 5th 950 (Ct. App. 2021)	Yes	No
Bakersfield Coll. v. Cal. Cmty. Coll. Athletic Ass'n, 41 Cal. App. 5th 753 (Ct. App. 2019)	No	Yes

Case	Severance	Applied interests of justice
Baltazar v. Ace Parking Mgmt., Inc., No. D081483, 2023 WL 7034203 (Cal. Ct. App. Oct. 26, 2023)	Yes	No
Barraza v. Tesla, Inc., No. A165347, 2023 WL 2887547 (Cal. Ct. App. Apr. 11, 2023)	No	Yes
Barris v. Pletcher, No. B259129, 2015 WL 5883897 (Cal. Ct. App. Oct. 8, 2015)	No	No
Baxter v. Genworth N. Am. Corp., 16 Cal. App. 5th 713 (Cal. Ct. App. 2017)	No	Yes
Beco v. Fast Auto Loans, Inc., 86 Cal. App. 5th 292 (Cal. Ct. App. 2022)	No	Yes
Bonzell v. Ret. Cap. Strategies, Inc., No. H052392, 2024 WL 4903598 (Cal. Ct. App. Nov. 25, 2024)	No	No
Brawerman v. Loeb & Loeb LLP, 81 Cal. App. 5th 1106 (Ct. App. 2022)	Yes	No

Case	Severance	Applied interests of justice
Brooks v. Emer, No. B334409, 2025 WL 812149 (Cal. Ct. App. Mar. 14, 2025)	Yes	Yes
Carbajal v. CWPSC, Inc., 245 Cal. App. 4th 227 (Ct. App. 2016)	No	Yes
Carlson v. Home Team Pest Def., Inc., 239 Cal. App. 4th 619 (Ct. App. 2015)	No	Yes
Carter v. Disc. Courier Servs., Inc., No. D073105, 2019 WL 908773 (Cal. Ct. App. Feb. 25, 2019)	No	No
Carver v. JFK Mem'l Hosp., Inc., No. E071782, 2020 WL 6269268 (Cal. Ct. App. Oct. 26, 2020)	No	Yes
Castro v. SBM Site Servs., LLC, No. A150032, 2018 WL 1193544 (Cal. Ct. App. Mar. 8, 2018)	Yes	No

Case	Severance	Applied interests of justice
Cisneros Alvarez v. Altamed Health Servs. Corp., 60 Cal. App. 5th 572 (Ct. App. 2021), *as modified* (Mar. 4, 2021)	Yes	No
Conyer v. Hula Media Servs., LLC, 268 Cal. Rptr. 3d 346 (Ct. App. 2020)	Yes	No
Cook v. Univ. of S. Cal., 102 Cal. App. 5th 312 (Ct. App. 2024)	No	Yes
Craighead v. Midway Rent a Car, Inc., No. B275191, 2018 WL 387849 (Cal. Ct. App. Jan. 12, 2018)	No	Yes
Cusimano v. Brilliant Earth, LLC, No. B330401, 2025 WL 585136 (Cal. Ct. App. Feb. 24, 2025)	No	No
Daniel v. Blue Bridge Hosp. Mgmt., LLC, No. D081413, 2024 WL 2312553 (Cal. Ct. App. May 22), *reh'g denied* (June 11, 2024)	Yes	No

Case	Severance	Applied interests of justice
D'Avella v. Overhill Farms, Inc., No. B303644, 2021 WL 4958910 (Cal. Ct. App. Oct. 26, 2021)	Yes	Yes
Davis v. Kozak, 53 Cal. App. 5th 897 (Ct. App. 2020)	No	Yes
De Leon v. Pinnacle Prop. Mgmt. Servs., LLC, 72 Cal. App. 5th 476 (Ct. App. 2021)	No	Yes
DeMarinis v. Heritage Bank of Com., 98 Cal. App. 5th 776 (Ct. App. 2023)	No	No
Dennison v. Rosland Capital LLC, 47 Cal. App. 5th 204 (Ct. App. 2020)	No	Yes
Diaz v. Hutchinson Aerospace & Indus., Inc., No. B271563, 2017 WL 4856858 (Cal. Ct. App. Oct. 27, 2017)	No	Yes
Dopp v. Now Optics, LLC, No. D081665, 2024 WL 2265759 (Cal. Ct. App. May 20, 2024)	No	Yes

Case	Severance	Applied interests of justice
Dorff v. Robert Half Int'l Inc., No. B293325, 2019 WL 5558068 (Cal. Ct. App. Oct. 29, 2019)	No	No
Dougherty v. Roseville Heritage Partners, 47 Cal. App. 5th 93 (Ct. App. 2020)	No	Yes
Elite Logistics Corp. v. Wan Hai Lines, Ltd., No. B252543, 2015 WL 3522606 (Cal. Ct. App. June 4, 2015)	No	Yes
Enyong v. Westlake Servs., LLC, No. B275952, 2017 WL 1438473 (Cal. Ct. App. Apr. 24, 2017)	Yes	Yes
Farrar v. Direct Com., Inc., 9 Cal. App. 5th 1257 (Ct. App. 2017)	Yes	Yes
Fisher v. MoneyGram Int'l, Inc., 66 Cal. App. 5th 1084 (Cal. Ct. App. 2021)	No	Yes

Case	Severance	Applied interests of justice
Fong & Chan Architects v. Washington Hosp. Healthcare Sys., No. A147767, 2017 WL 1164915 (Cal. Ct. App. Mar. 29, 2017)	Yes	No
Fredeen v. Cal. Cemetery & Funeral Servs., LLC, No. B326031, 2024 WL 2930024 (Cal. Ct. App. June 11, 2024)	No	Yes
Freeman v. Hanmi Bank, No. B259370, 2016 WL 748541 (Cal. Ct. App. Feb. 25, 2016)	Yes	No
Fuentes v. Empire Nissan, Inc., 90 Cal. App. 5th 919 (Ct. App. 2023)	Yes	No
Gentry v. Robert Half Int'l, Inc., No. A147553, 2018 WL 3853775 (Cal. Ct. App. Aug. 14, 2018)	No	No
Gentry v. Robert Half Int'l, Inc., No. A166610, 2023 WL 6430122 (Cal. Ct. App. Oct. 3), *reh'g denied* (Oct. 19, 2023)	No	No

Case	Severance	Applied interests of justice
Gostev v. Skillz Platform, Inc., 88 Cal. App. 5th 1035 (Ct. App. 2023)	No	Yes
Gregg v. Uber Techs., Inc., 89 Cal. App. 5th 786 (Ct. App. 2023), *review dismissed, cause remanded sub nom. Gregg v. Uber Techs.*, 534 P.3d 925 (Cal. 2023), *cert. denied*, 144 S. Ct. 2656 (2024).	Yes	No
Guerra v. Long Beach Care Ctr., Inc., No. B257157, 2015 WL 6672220 (Cal. Ct. App. Nov. 2, 2015)	Yes	No
Guerrero v. TruConnect Commc'ns, Inc., No. B324938, 2024 WL 2044023 (Cal. Ct. App. May 8, 2024)	No	Yes
Guzman v. Front Porch Communities & Servs., No. B314877, 2023 WL 3265696 (Cal. Ct. App. May 5, 2023)	Yes	No

Case	Severance	Applied interests of justice
Haluska v. Costar Realty Info., Inc., No. D083499, 2024 WL 5164907 (Cal. Ct. App. Dec. 19, 2024)	Yes	No
Hasty v. Am. Auto. Ass'n, 98 Cal. App. 5th 1041 (Ct. App. 2023)	No	Yes
Haydon v. Elegance at Dublin, 97 Cal. App. 5th 1280 (Ct. App. 2023)	No	Yes
Held v. Norton, No. B268595, 2017 WL 3405304 (Cal. Ct. App. Aug. 9, 2017)	Yes	No
Herlitz v. Cap. Senior Living, Inc., No. C097245, 2023 WL 367782 (Cal. Ct. App. Jan. 24, 2023)	No	Yes
Heywood v. Casa Cabinets, Inc., No. E066122, 2017 WL 6523859 (Dec. 21, 2017)	No	Yes

Case	Severance	Applied interests of justice
Hovanesyan v. Glendale Internal Med. & Cardiology Med. Grp., Inc., No. B277855, 2017 WL 2391688 (Cal. Ct. App. June 2, 2017)	No	Yes
Hutcheson v. UBS Fin. Servs., Inc., No. A166376, 2023 WL 7143186 (Cal. Ct. App. Oct. 31, 2023), *as modified on denial of reh'g* (Nov. 17, 2023)	No	Yes
Impact Wind LLC v. Eolus N. Am., No. F082855, 2021 WL 5409448 (Cal. Ct. App. Nov. 19, 2021)	No	Yes
Imperial v. FibroGen, Inc., No. A153535, 2019 WL 910656 (Cal. Ct. App. Feb. 25, 2019)	No	Yes
Jack v. Ring LLC, 91 Cal. App. 5th 1186 (Ct. App.), *review denied* (Sept. 13, 2023)	No	No
Jenkins v. Dermatology Mgmt., LLC, 107 Cal. App. 5th 633 (Ct. App. 2024)	No	Yes

Case	Severance	Applied interests of justice
Johnson v. Stoneridge Creek Pleasanton CCRC LLC, No. A165800, 2023 WL 7125117 (Cal. Ct. App. Oct. 30, 2023)	No	Yes
Johnston v. Sensei AG Holdings, Inc., No. B334773, 2025 WL 703258 (Cal. Ct. App. Mar. 5, 2025)	Yes	Yes
Juarez v. Wash Depot Holdings, Inc., 24 Cal. App. 5th 1197 (Ct. App. 2018)	No	No
Kec v. Superior Ct. of Orange Cnty., 51 Cal. App. 5th 972 (Ct. App. 2020)	No	No
Kling v. Horn, No. B305967, 2021 WL 5897922 (Cal. Ct. App. Dec. 14, 2021)	Yes	Yes
La Count v. Patina Rest. Grp., LLC, No. B256470, 2015 WL 3814298 (Cal. Ct. App. June 18, 2015)	No	Yes
Lange v. Monster Energy Co., 46 Cal. App. 5th 436 (Ct. App. 2020)	No	Yes

Case	Severance	Applied interests of justice
Lile v. Mr. Wheels, Inc., No. B303239, 2021 WL 2431223 (Cal. Ct. App. June 15, 2021)	No	No
Lopez v. Bartlett Care Center, LLC, 39 Cal. App. 5th 311 (Ct. App. 2019)	No	No
Low Desert Empire Pizza, Inc. v. Applied Underwriters, Inc., No. E067081, 2018 WL 5095209 (Cal. Ct. App. Oct. 19, 2018)	No	No
Luxor Cabs, Inc. v. Applied Underwriters Captive Risk Assurance Co., 242 Cal. Rptr. 3d 87 (Ct. App. 2018)	Yes	No
Magno v. Coll. Network, Inc., 1 Cal. App. 5th 277 (Ct. App. 2016)	No	Yes
McQueen v. Ervin Cohen & Jessup LLP, No. B301637, 2021 WL 632680 (Cal. Ct. App. Feb. 18, 2021)	Yes	No

Case	Severance	Applied interests of justice
Meda v. Autozoners, LLC, No. B327923, 2024 WL 1169126 (Cal. Ct. App. Mar. 19, 2024)	No	No
Mena v. Muscolino Inventory Servs., Inc., No. B321559, 2023 WL 7852745 (Cal. Ct. App. Nov. 16, 2023)	No	No
Mendez v. WTMG, Inc., No. C095759, 2023 WL 1459930 (Cal. Ct. Feb. 3, 2023) *as modified on denial of reh'g* (Feb. 23, 2023)	No	Yes
Miller v. MBK Senior Living, LLC, No. G059947, 2021 WL 2024238 (Cal. Ct. App. May 21, 2021)	No	No
Mills v. Facility Sols. Grp., Inc., 84 Cal. App. 5th 1035 (Ct. App. 2022)	No	Yes
Mirzoyan v. W. Coast Wound & Skin Care Inc., No. B310901, 2022 WL 2314478 (Cal. Ct. App. June 28, 2022)	Yes	No

Case	Severance	Applied interests of justice
Monroy v. Donsuemor, Inc., No. A167487, 2024 WL 1068436 (Cal. Ct. App. Mar. 12, 2024)	No	Yes
Montgomery v. Solomon Edwards Grp. LLC, Nos. B260421, B259810, 2015 WL 5839047 (Cal. Ct. App. Oct. 7, 2015)	Yes	Yes
Moriana v. Viking River Cruises, Inc., No. B297327, 2023 WL 3266802 (Cal. Ct. App. May 4, 2023)	Yes	No
Murrey v. Superior Ct. of Orange Cnty., 87 Cal. App. 5th 1223 (Ct. App. 2023)	No	Yes
Nelson v. Dual Diagnosis Treatment Ctr., Inc., 77 Cal. App. 5th 643, 666 (Ct. App. 2022)	No	Yes
Nguyen v. Applied Med. Res. Corp., 4 Cal. App. 5th 232 (Ct. App. 2016)	Yes	No

Case	Severance	Applied interests of justice
Nix v. Cabco Yellow, Inc., No. G056110, 2019 WL 3714528 (Cal. Ct. App. Aug. 7, 2019)	No	No
Nunez v. Cycad Mgmt. LLC, 77 Cal. App. 5th 276 (Ct. App. 2022)	No	Yes
O'Connor v. Pletcher, No. B259610, 2015 WL 6121983 (Cal. Ct. App. Oct. 16, 2015)	No	No
Ojeda v. Vahi, Inc., No. B313717, 2022 WL 3367500 (Cal. Ct. App. Aug. 16, 2022)	No	Yes
Ortiz v. Roberts Tool Co., No. 280442, 2018 WL 328167 (Cal. Ct. App. Jan. 9, 2018)	No	No
Patterson v. AVX Design & Integration, No. B313948, 2023 WL 312212 (Cal. Ct. App. Jan. 19, 2023)	No	Yes
Penilla v. Westmont Corp., 3 Cal. App. 5th 205 (Ct. App. 2016)	No	No

Case	Severance	Applied interests of justice
Perez v. IT Works Mktg., Inc., No. A168331, 2024 WL 3963524 (Cal. Ct. App. Aug. 28, 2024)	No	Yes
Pichardo v. Am. Fin. Network, No. G054755, 2019 WL 153704 (Cal. Ct. App. Jan. 8, 2019)	Yes	Yes
Pike v. True Bullion, LLC, No. B324634, 2024 WL 1903203 (Cal. Ct. App. May 1, 2024)	No	No
Pinela v. Neiman Marcus Grp., Inc., 238 Cal. App. 4th 227 (Ct. App. 2015)	No	Yes
Platt, LLC v. OptumRx, Inc., No. A163061, 2023 WL 2507259 (Cal. Ct. App. Mar. 15, 2023)	No	Yes
Rainier v. Paradise Chevrolet Cadillac, Nos. E079647, E080308, 2024 WL 2873688 (Cal. Ct. Ap. June 7, 2024)	No	Yes
Ramirez v. Charter Commc'ns, Inc., 108 Cal. App. 5th 1297 (Ct. App. 2025)	No	Yes

Case	Severance	Applied interests of justice
Ramirez v. Charter Commc'ns, Inc., 75 Cal. App. 5th 365, 386 (Ct. App. 2022), *rev'd and remanded*, 16 Cal. 5th 478 (Cal. 2024)	No	No
Ramos v. Monschein Indus., Inc., No. F083299, 2022 WL 17752221 (Cal. Ct. App. Dec. 19, 2022)	No	Yes
Ramos v. Superior Ct. of S.F. Cnty., 28 Cal. App. 5th 1042 (Ct. App. 2018), *as modified* (Nov. 28, 2018)	No	No
Randall v. Veros Credit, LLC, No. G056463, 2019 WL 4445048 (Cal. Ct. App. Sept. 17, 2019)	No	Yes
Rice v. Gulfstream Aerospace Corp., No. B316079, 2023 WL 3314990 (Cal. Ct. App. May 9, 2023)	No	Yes
Royee v. Casino 580, LLC, No. A144464, 2016 WL 775523 (Cal. Ct. App. Feb. 29, 2016)	Yes	Yes

Case	Severance	Applied interests of justice
Salgado v. Carrows Rests., Inc., No. B304799, 2021 WL 2199436 (Cal. Ct. App. June 1, 2021)	No	Yes
Sanchez v. JFK Mem'l Hosp., Inc., No. E072560, 2021 WL 5578378 (Cal. Ct. App. Nov. 30, 2021)	Yes	Yes
Sanchez v. MC Painting, No. D078817, 2024 WL 830290 (Cal. Ct. App. Feb. 28, 2024)	Yes	No
Schultz v. City of Hope Nat'l Med. Ctr., No. B287185, 2019 WL 1922952 (Cal. Ct. App. Apr. 30, 2019)	Yes	No
Securitas Sec. Servs. USA, Inc. v. Superior Ct. of San Diego Cnty., 234 Cal. App. 4th 1109 (Ct. App. 2015)	No	No
Sellers v. World Fin. Grp., Inc., No. D078934, 2022 WL 2254998 (Cal. Ct. App. June 23, 2022)	No	Yes

Case	Severance	Applied interests of justice
Smigelski v. PennyMac Fin. Servs., Inc., No. C081958, 2018 WL 6629406 (Cal. Ct. App. Dec. 19, 2018)	No	No
Smith v. Folsom Inv'rs, L.P., No. C097549, 2023 WL 8794888 (Cal. Ct. App. Dec. 20, 2023)	No	Yes
Subcontracting Concepts (CT), LLC v. De Melo, 34 Cal. App. 5th 201 (Ct. App. 2019)	No	Yes
Tielemans v. Aegion Energy Servs., Inc., No. H049635, 2023 WL 3731442 (Cal. Ct. App. May 31, 2023)	Yes	Yes
Tome v. Parsons Env't & Infrastructure Grp. Inc., No. B316661, 2023 WL 6614713 (Cal. Ct. App. Oct. 11, 2023)	Yes	No
Torres v. VanLaw Food Prods., Inc., No. G058320, 2020 WL 3393760 (Cal. Ct. App. June 19, 2020)	No	Yes

Case	Severance	Applied interests of justice
Tran v. Integra LifeSciences Corp., No. G051620, 2016 WL 4398065 (Cal. Ct. App. Aug. 18, 2016)	No	Yes
Valadez v. In-N-Out Burgers, No. B318125, 2024 WL 830499 (Cal. Ct. App. Feb. 28, 2019), *review denied* (May 15, 2024)	Yes	No
Valdez v. Superior Ct. of San Bernardino Cnty., No. E070656, 2019 WL 1236932 (Cal. Ct. App. Mar. 18, 2019), *as modified* (Apr. 4, 2019)	No	No
Velasco v. Volt Mgmt. Corp., No. B293190, 2020 WL 2190961 (Cal. Ct. App. May 6, 2020)	No	No
Vera v. US Bankcard Servs., Inc., No. B283187, 2018 WL 618586 (Cal. Ct. App. Jan. 30, 2018)	No	No
Wan v. SolarCity Corp., No. H042103, 2017 WL 25497 (Cal. Ct. App. Jan. 3, 2017)	No	No

Case	Severance	Applied interests of justice
Westmoreland v. Kindercare Educ. LLC, 90 Cal. App. 5th 967 (Ct. App. 2023)	No	No
Woodie v. AER Elecs., Inc., No. A159317, 2021 WL 194146 (Cal. Ct. App. Jan. 20, 2021)	No	No
Yeganeh v. Amerisave Mortg. Corp., No. G062668, 2024 WL 4532654 (Cal. Ct. App. Oct. 21, 2024)	No	No
Yeotis v. Warner Pac. Ins. Servs. Inc., No. B245770, 2016 WL 298260 (Jan. 25, 2016)	Yes	Yes
Zephyr Equities & Dev., LLC v. Brookfield Natomas, LLC, No. G050001, 2015 WL 6948632 (Cal. Ct. App. Nov. 10, 2015)	Yes	Yes

NON-ARBITRATION CASES

Case	Severance	Applied interests of justice
A-Mark Found. v. Advanced Media Networks, LLC, No. B295234, 2021 WL 6048846 (Cal. Ct. App. Dec. 21, 2021), *as modified* (Dec. 28, 2021)	No	No
Axline v. Reimund, No. C087826, 2021 WL 2617781 (Cal. Ct. App. June 25, 2021)	No	No
Blasco v. Dadvar, No. G053780, 2018 WL 2016080 (Cal. Ct. App. May 1, 2018)	Yes	No
Boustead Sec., LLC v. Sunstock, Inc., No. G060952, 2023 WL 4613862 (Cal. Ct. App. July 19, 2023)	Yes	No
Broadband ITV, Inc. v. OpenTV, Inc., No. A160815, 2022 WL 202437 (Cal. Ct. App. Jan. 24, 2022), *as modified on denial of reh'g* (Feb. 14, 2022)	No	No

Case	Severance	Applied interests of justice
City of Fontana v. Bosler, Nos. C083058, C083081, 2019 WL 2762927 (Cal. Ct. App. July 2, 2019)	Yes	Yes
County of Ventura v. City of Moorpark, 24 Cal. App. 5th 377 (Ct. App. 2018)	Yes	Yes
Discovery Builders, Inc. v. City of Oakland, 92 Cal. App. 5th 799 (Ct. App. 2023)	Yes	Yes
Frazer, LLP v. Rendon, No. G061846, 2023 WL 5602370 (Cal. Ct. App. Aug. 30, 2023), *review denied* (Nov. 29, 2023)	No	No
Hardy v. Forest River, Inc., 108 Cal. App. 5th 450 (Ct. App. 2025)	No	Yes
Hecny Brokerage Servs., Inc. v. Sopko, Nos. A149111, A151574, 2020 WL 593390 (Cal. Ct. App. Feb. 4, 2020)	No	No

Case	Severance	Applied interests of justice
Jui-Chien Lin v. Chiu, No. B285053, 2019 WL 1069595 (Cal. Ct. App. Mar. 7, 2019)	Yes	Yes
Klein v. Safyari, Nos. B280661, B282572, 2020 WL 5867595 (Cal. Ct. App. Oct. 2, 2020)	Yes	No
Koenig v. Warner Unified Sch. Dist., 41 Cal. App. 5th 43 (Ct. App. 2019)	Yes	Yes
L.A. Cnty. Metro. Transp. Auth. v. S. Cal. Gas Co., No. B288686, 2021 WL 3579191 (Cal. Ct. App. Aug. 13, 2021), *as modified on denial of reh'g* (Sept. 10, 2021)	Yes	No
Lathrop v. Thor Motor Coach, Inc., 105 Cal. App. 5th 808 (Ct. App. 2024)	No	Yes
McKenzie v. Ford Motor Co., 238 Cal. App. 4th 695 (Ct. App. 2015)	Yes	No

Case	Severance	Applied interests of justice
Mitracos v. City of Tracy, No. C093383, 2022 WL 1536636 (Cal. Ct. App. May 16, 2022)	No	No
Pardoe v. Salazar, No. B336831, 2025 WL 212813 (Cal. Ct. App. Jan. 16, 2025)	No	No
Pun & McGeady, LLP v. Marcum, LLP, No. G055480, 2019 WL 2284727 (Cal. Ct. App. May 29, 2019)	Yes	Yes
Richmond v. Mikkelson, No. D076375, 2021 WL 2274888 (Cal. Ct. App. June 4, 2021)	No	No
Rogers v. Auto. Club of S. Cal., No. B256085, 2016 WL 1253528 (Cal. Ct. App. Mar. 30, 2016)	No	No
Russell City Energy Co., LLC v. City of Hayward, 14 Cal. App. 5th 54 (Ct. App. 2017)	Yes	No
Smykla v. Mark, No. A164211, 2023 WL 6937366 (Cal. Ct. App. Oct. 20, 2023)	No	No

Case	Severance	Applied interests of justice
Tufeld Corp. v. Beverly Hills Gateway, L.P., 86 Cal. App. 5th 12 (Ct. App. 2022)	Yes	No
Twentieth Century Fox Film Corp. v. Netflix, Inc., No. B304022, 2021 WL 5711822 (Cal. Ct. App. Dec. 2, 2021)	Yes	Yes
Whitlach v. Premier Valley, Inc., 86 Cal. App. 5th 673 (Ct. App. 2022)	Yes	No