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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES - SOUTH DISTRICT

Total Transportation Services, Inc.,

Petitioner,

v.

Jose Armenta, Enrique Canisalez, Jose Garcia, Oscar Gonzales, Carlos Martinez, Hugo Menendez, Jose Palma, Alejandro Paz, Oscar Reyes, Jose Rosales, Walter Trujillo, Ruben Valencia, Jose Zetino, Manuel de Jesus Garay, and Julie A. Su, in her official capacity as the Labor Commissioner of the State of California,

Respondents.

Case No.: NS028839

OPPOSITION TO PETITIONER'S MOTION TO COMPEL ARBITRATION AND VACATE ADMINISTRATIVE PROCEEDINGS OF RESPONDENTS JOSE GARCIA, HUGO MENENDEZ, JOSE PALMA, JOSE ROSALES, AND RUBEN VALENCIA

[Filed concurrently with Declarations of Kevin Kish, Jose Garcia, Hugo Menendez, Jose Palma, Jose Rosales, Ruben Valencia, Request for Judicial Notice, and [Proposed] Order Denying Petitioner's Petition to Compel Arbitration]

Complaint filed: May 7, 2014
Hearing: December 4, 2014, 8:30 am
Department: S27
Judge: Hon. Ross M. Klein

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I. INTRODUCTION

Plaintiff Total Transportation Services, Inc. (TTSI) has no right to compel arbitration of the claims Respondents brought before the California Division of Labor Standards Enforcement (DLSE) alleging violations of the California Labor Code. It is true that TTSI required Respondents, who are Spanish-speaking truck drivers with limited English proficiency, to sign stacks of untranslated English-language documents in order to begin or continue driving for TTSI. One of those documents is a "Purchase Assistance Agreement" that includes a purported arbitration agreement. But TTSI cannot rely on the Federal Arbitration Act (FAA) to enforce the agreements because the FAA does not apply to transportation workers who, like Respondents, work in interstate or foreign commerce. TTSI's arguments based on the FAA (or FAA preemption) must fail.[1]

In any event, there is no arbitration agreement applicable to Respondents' claims in the first place. The agreements appear in a document that (1) is not supported by consideration; (2) does not purport to cover Respondents' Labor Code claims; and (3) has expired by its own terms. Even if there were applicable agreements to arbitrate, TTSI cannot enforce them. The agreements are both procedurally and substantively unconscionable. They wholly fail to duplicate the efficiencies and protections of the DLSE process or otherwise "provide for accessible, affordable resolution of wage disputes," as the law requires. *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal. 4th 1109, 1150 (*Sonic II*). Instead, TTSI's arbitration clauses would force Respondents into a forum where they face fees and costs-allocating risks that they cannot possibly sustain. Further, TTSI has waived its right to arbitrate these claims by its repeated attempts to litigate in court the same issues at stake in the proceedings before the DLSE and by delaying in bringing this petition to compel arbitration.

Finally, even if there were enforceable and applicable agreements to arbitrate, there is no legal authority—and TTSI cites none—for vacating the decisions of the DLSE. The decisions

[1] Unless otherwise indicated, "Respondents" refers to the five individual respondents who filed this opposition.

were properly issued after hearings (known as "Berman" hearings) that, precisely because of TTSI's delay, did not interfere with this Court's decision on TTSI's petition to compel arbitration. TTSI has timely appealed the DLSE decisions in *de novo* proceedings pursuant to Labor Code § 98.2. The only possible purpose for TTSI's request that this Court vacate the decisions is to deny Respondents the statutory benefits of the administrative process. Critically, those benefits include the requirement that the DLSE itself represent claimants who are "financially unable to afford counsel" in an employer's *de novo* appeal (whether the appeal proceeds in court or in arbitration). Cal. Labor Code § 98.4.

In short, TTSI's actions and arguments in this case are inconsistent with those of a party truly wishing to arbitrate claims because of the supposed efficiency of the arbitral forum. Instead, they are consistent with those of a company seeking to thwart its drivers' ability to vindicate their statutory rights in any forum. The Court should deny TTSI's motion and dismiss its petition.

II. STATEMENT OF FACTS

The purported arbitration agreements applicable to Respondents are contained in Exhibits 17, 19, 20, 23, and 25 to TTSI's initial petition to compel arbitration.

Respondent Jose Garcia is a native Spanish speaker from Mexico who attended school until the equivalent of the 6th grade and cannot read English. (Garcia Decl. ¶¶ 2-3.) In 2009, he signed a pre-printed English-language document presented to him by TTSI employees who did not provide a translation or otherwise explain the terms of the agreement. He was not provided the opportunity to negotiate terms and was required to sign the document on the spot. (*Id.* ¶¶ 5-7.) He did not know and was not told that the agreement contained an arbitration clause or what arbitration meant. (*Id.* ¶ 8.) He cannot afford the cost of arbitration. (*Id.* ¶ 9.)

Respondent Hugo Menendez is a native Spanish speaker who completed high school in Guatemala and cannot read English. (Menendez Decl. ¶¶ 2-3.) In 2009 and 2011, he signed English-language agreements with TTSI. TTSI employees did not translate or otherwise explain the agreements, other than to show him where to sign. In 2011, he asked to take the document home before signing and was told TTSI wouldn't allow it. (*Id.* ¶¶ 5-8.) He did not know and was not told that the agreement contained an arbitration clause. (*Id.* ¶ 9.) He cannot afford the cost of

arbitration. (*Id.* ¶ 10.)

Respondent Jose Palma is a native Spanish speaker who completed high school in El Salvador and has limited reading proficiency in English. He cannot read legal or technical documents in English. (Palma Decl. ¶¶ 2-3.) In 2009 he signed English-language documents presented to him by a TTSI employee who did not translate or otherwise explain the terms of the agreement. (*Id.* ¶¶ 5-7.) He did not know and was not told that the agreement contained an arbitration clause. (*Id.* ¶ 8.) He cannot afford the cost of arbitration. (*Id.* ¶ 9.)

Respondent Jose Rosales is a native Spanish speaker who completed the equivalent of the 11th grade in Mexico. He cannot read complicated or technical English documents. (Rosales Decl. ¶¶ 2-3.) In 2009, he signed English language documents presented to him by a TTSI employee who did not fully explain the terms of the agreement. He was instructed to sign on the spot in order to work. (*Id.* ¶¶ 5-7.) He did not know and was not told that the agreement contained an arbitration clause or what that meant. (*Id.* ¶ 8.) He cannot afford the cost of arbitration. (*Id.* ¶ 9.)

Respondent Ruben Valencia is a native Spanish speaker who completed the equivalent of the 8th grade in El Salvador. He cannot read technical or complicated English documents. (Valencia Decl. ¶¶ 2-3.) In 2009, he signed English language documents presented to him by a TTSI employee who explained only that the documents would allow him to change the truck he had been driving for the company. (*Id.* ¶¶ 5-7.) He did not know and was not told that the agreement contained an arbitration clause or what that meant. (*Id.* ¶ 8.) He cannot afford the cost of arbitration. (*Id.* ¶ 9.)

In May 2013, the first group of the fourteen Respondents filed claims with the DLSE alleging that TTSI had misclassified them as independent contractors, illegally withheld pay, and illegally deducted certain expenses from their paychecks. (Pet. Exhs. 5, 6, 10, 12.) The five Respondents represented here filed their claims in July 2013. (Pet. Exhs. 4, 7, 8, 11, 13.)

In December 2013 and January 2014, TTSI filed declaratory judgment actions against four of the fourteen Respondents seeking declarations that those Respondents were properly classified as independent contractors and that TTSI owed them nothing under the Labor Code. TTSI did not invoke its alleged right to arbitration at that time. (*See* Labor Comm'r Opposition to TTSI's Ex

Parte Application to Stay, Early Decl., Exhs. A-D.)

TTSI did not seek to arbitrate Respondents' claims until it filed this Petition to Compel Arbitration on May 7, 2014, one year after the first claim was filed with the DLSE and merely twelve days before Respondents' hearings before the DLSE were scheduled to begin. After sitting on its purported right for nearly a year, TTSI attempted to stay the DLSE proceedings *ex parte* in this Court and via writ of mandate and writ of *supersedeas* in the Court of Appeals. (TTSI *Ex Parte* Application to Stay; Cal. Ct. App. (Second Dist.) Dkt. Nos. B256271, B256415.) TTSI's appeal of the denial of its *ex parte* motion for a stay remains pending. (Cal. Ct. App. (Second Dist.) Dkt. No. B256415.)

The DLSE heard Respondents' claims in May and June of 2014. (Garcia Decl. ¶ 23; Menendez Decl. ¶ 22; Palma Decl. ¶ 23; Rosales Decl. ¶ 19; Valencia Decl. ¶ 25.) In August 2014, The DLSE issued awards in favor of all the Respondents, finding that each was misclassified and that TTSI had illegally withheld wages. (Garcia Decl. ¶ 24; Menendez Decl. ¶ 23; Palma Decl. ¶ 24; Rosales Decl. ¶ 20; Valencia Decl. ¶ 26.) TTSI has appealed those awards to the superior court. (Dean Decl. in support of TTSI's motion and petition, ¶ 6.)

III. ARGUMENT

A. TRANSPORTATION WORKERS LIKE RESPONDENTS ARE EXEMPT FROM THE FAA.

TTSI's entire petition is premised on its assertion that the FAA requires its purported arbitration agreements to be enforced (and that the FAA preempts any state law to the contrary). But TTSI ignores § 1 of the FAA, which expressly exempts the contracts of transportation workers working in foreign or interstate commerce from the FAA's coverage. 9 U.S.C. § 1 (excluding "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the reach of the FAA); *see Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 109, 112 (section 1 applies to "transportation workers").

There can be no doubt that Respondents are transportation workers engaged in foreign or interstate commerce. TTSI is a registered interstate motor carrier, and Respondents transport cargo that has arrived from foreign nations to the warehouses or distribution centers of TTSI's clients.

(TTSI's Response to Request for Admission (RFA) 3, Kish Decl. Exh. 1); LaRosa Decl. in Support of TTSI's motion and petition ¶ 2.) *See Harden v. Roadway Package Sys., Inc.* (9th Cir. 2001) 249 F.3d 1137, 1140 (truck drivers are transportation workers within the meaning of § 1 and the FAA is inapplicable to them). This is so whether or not Respondents themselves cross state or international borders while driving. Courts have consistently held that workers are "engaged in foreign or interstate commerce" if their *intra*state transportation of the cargo is one leg of an *inter*state or foreign journey for that cargo. *See Phila. & Reading Ry. Co. v. Hancock* (1920) 253 U.S. 284, 286 (railroad worker "engaged in" foreign or interstate commerce when transported coal within single state and coal destined for another state); *Bell v. H.F. Cox, Inc.* (2012) 209 Cal. App. 4th 62, 77-78 (intrastate movement of goods is part of interstate commerce when it is one leg of interstate journey of those goods); *Circuit City*, 532 U.S. at 117 (section 1 applies to those whose work is part of the "flow of interstate commerce").

Nor does TTSI's designation of Respondents as independent contractors alter this conclusion. The majority of courts to consider the question have held that the "contract of employment" language of § 1 is broad enough to encompass both employees and independent contractors. *Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.* (D. Utah 2004) 325 F. Supp. 2d 1252, 1257-58 (collecting cases and following majority view). In the past year, at least two other departments of the Los Angeles County Superior Court have reached the same conclusion in cases involving port truck drivers, and there is no reason to depart from their reasoning in this case. (Kish Decl. Exh. 4, Notice of Ruling (July 8, 2014) *Pacific 9 Transp. Inc. v. Labor Comm'r of the State of Cal.*, LASC Case No. BC544496; Exh. 5, Order on Motion to Compel Arbitration (June 23, 2014) *Green Fleet Sys., LLC v. Labor Comm'r of the State of Cal.*, LASC Case No. BS148377.)

Even if the exemption under § 1 were limited to employees, TTSI's boiler plate language defining them as independent contractors cannot overcome the evidence that Respondents were in fact employees, as the DLSE has already found. *See S.G Borello & Sons, Inc. v. Dep't of Indus. Relations* (1989) 48 Cal. 3d 341. Respondents performed duties at the core of TTSI's service—the transportation of consumer goods from the ports to its customers' warehouses—under the close

supervision and control of TTSI and under indefinite, long-term conditions of employment. TTSI controlled the hours and shifts Respondents worked (Garcia Decl. ¶¶ 15-17; Menendez Decl. ¶ 17; Palma Decl. ¶ 16; Rosales Decl. ¶ 15; Valencia Decl. ¶ 17); actively tracked and monitored every detail of their work down to the times they took their breaks and how fast they drove and braked the trucks (Garcia Decl. ¶ 14; Menendez Decl. ¶¶ 14-15; Palma Decl. ¶¶ 13-14; Rosales Decl. ¶¶ 12-13; Valencia Decl. ¶¶ 13-15); controlled the appearance, use, and insurance of the trucks (Garcia Decl. ¶¶ 12-13; Menendez Decl. ¶ 13; Palma Decl. ¶ 12; Valencia Decl. ¶¶ 12, 16); unilaterally set the rates of pay (Palma Decl. ¶ 18); and terminated some of the drivers without cause in apparent retaliation for refusing to withdraw their DLSE claims (Menendez Decl. ¶ 24; Rosales Decl. ¶ 21; Valencia Decl. ¶ 27). All of these indicia of control make clear that Respondents were employees, rather than independent contractors, applying the relevant factors set out in *Borello*, 48 Cal. 3d at 351. *See also Alexander v. FedEx Ground Package Sys., Inc.* (9th Cir. 2014) 765 F.3d 981, 989, 997 (holding that FedEx drivers were misclassified as independent contractors under California factors); *Ruiz v. Affinity Logistics Corp.* (9th Cir. 2014) 754 F.3d 1093 (same, in the context of home delivery drivers).

Because the FAA does not apply, TTSI can only rely on the California Arbitration Act to enforce its purported agreements. As discussed in detail below, in the absence of federal preemption, the CAA is limited by state law prohibiting the waiver of Berman rights by mandatory arbitration, including Labor Code § 229 and *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal. 4th 659 (*Sonic I*).

B. TTSI'S PURPORTED ARBITRATION AGREEMENTS DO NOT GOVERN RESPONDENTS' LABOR CODE CLAIMS.

Under both federal and state law, arbitration agreements are limited to their terms, and no party can be forced to arbitrate what they have not agreed to arbitrate. *See, e.g., Tracer Res. Corp. v. Nat'l Envtl. Serv.* (9th Cir. 1994) 42 F.3d 1292, 1294; *Lopez v. Charles Schwab & Co.* (2004) 118 Cal. App. 4th 1224, 1229. Here, there is no valid agreement to arbitrate anything at all. The alleged agreements, located in Addendum 2 of the PAAs (Pet. Exhs. 17, 19, 20, 23, 25), are premised on Respondents having entered into a separate truck lease agreement with a lease and

finance company:

> **Whereas**, CONTRACTOR and to be determined Equipment Lease & Finance company (***"Lease & Finance Company"***) have entered into that certain Open-End Commercial/Business Use Master Vehicle Lease Agreement dated as of the date hereof (the ***"Lease"***), pursuant to which CONTRACTOR is leasing the vehicle described in Schedule A attached hereto (the ***"Vehicle"***).
> * * *
> **Now Therefore**, in consideration of inducing CONTRACTOR to execute the Lease, the parties agree as follows:

(*Id.* (emphasis in original).) Addendum 1 includes this introductory language and then describes various terms relating to the drivers' responsibilities for the vehicle, including lease payments; how "green surcharge fees" will be handled; the driver's duty to obtain specific GPS and phone devices; the consequences if the driver terminates the relationship with TTSI; TTSI's vehicle purchase right; the length of "this agreement" (defined as the PAA); and maintenance and parking requirements. (*Id.*) Addendum 2 consists solely of the above introductory language and the arbitration clause. (*Id.*)

The catch is that Respondents *never executed* any leases with any lease and finance company. (Kish Decl. Exh. 2, TTSI's Response to Special Interrogatories 1 and 2; Kish Decl. Exh. 3, TTSI's Response to Demands for Production (DFP) 1 and 2; Garcia Decl. ¶ 11; Menendez Decl. ¶ 2; Palma Decl. ¶ 11; Rosales Decl. ¶ 11; Valencia Decl. ¶ 11). The consideration for the agreements to arbitrate does not exist, and, as a result, there is simply no contract to arbitrate between TTSI and Respondents. *See* Cal. Civ. Code § 1550 ("It is essential to the existence of a contract that there should be: . . . 4. A sufficient cause or consideration."); *US Ecology, Inc. v. State of California* (2001) 92 Cal. App. 4th 113, 129-30 (agreement not enforceable without consideration). TTSI's protestations that all the documents should be considered together cannot overcome the fact that the arbitration clause expressly states that the agreements are undertaken "in consideration of" an action (the executing of a lease with a lease and finance company) Respondents have never taken.

Moreover, even if they ever came into force, the purported arbitration agreements do not govern Respondents' Labor Code claims. Addendum 2 defines "this agreement" to mean the PAA and then states that "Any dispute between the parties concerning their respective rights and

obligations under *this agreement* shall be resolved by arbitration." (Pet. Exhs. 17, 19, 20, 23, 25 (emphasis added).) It does not purport to govern disputes concerning the Labor Code, or anything else outside of the PAA. Respondents claim that TTSI misclassified them as independent contractors and therefore denied them statutory Labor Code rights. Statutory wage claims arise out of the statute, not the contract, and therefore they are not covered by the contract's limited arbitration clause. *See Barrentine v. Arkansas-Best Freight Sys., Inc.* (1981) 450 U.S. 728, 736-37 (explaining that substantive statutory labor rights arise from the statute, not the contract to work, and holding that a Fair Labor Standards Act claim is not subject to arbitration clause in collective bargaining agreement).

Indeed, this was the precise holding by the court of appeals in a very similar case. *Elijahjuan v. Superior Court* (2012) 210 Cal. App. 4th 15, involved truck drivers claiming that they were misclassified as independent contractors. The drivers alleged that they were employees and that the trucking company had violated various Labor Code provisions. *Id.* at 18. The appellate court held that the arbitration clause in the drivers' independent contractor agreements did *not* encompass the drivers' claims because whether the drivers were misclassified—the core issue to be decided in the drivers' underlying case—depended on the drivers' actual work, not what the contract stated. *Id.* at 21-23. And the court further held that whether the trucking company was ultimately liable would depend on its statutory obligations and the facts, not anything the independent contractor agreements said or did not say. *Id.* at 23. (*See also* Kish Decl. Exh. 4, *Pacific 9*, at 3 (following *Elijahjuan* in the context of port truck drivers who brought Labor Code claims before the DLSE based on misclassification); Kish Decl. Exh. 5, *Green Fleet*, at 3-4 (same).)

Elijahjuan is not an outlier. A majority of courts to address the question have held that where an independent contractor agreement's forum or arbitration clause does not state that it covers statutory wage claims, the agreement does not control claims that the workers are misclassified. *See Hoover v. Am. Life Ins. Co.* (2012) 206 Cal. App. 4th 1193, 1208; *Narayan v. EGL, Inc.* (9th Cir. 2010) 616 F.3d 895, 897; *Cotter v. Lyft, Inc.* (N.D. Cal. Aug. 7, 2014) 2014 WL 3884416, at *4 & *4 n.3; *Ronlake v. US-Reports, Inc.* (E.D. Cal. Feb 6, 2012) 2012 WL

393614, at *4; *Quinonez v. Empire Today, LLC* (N.D. Cal. Nov. 4, 2010) 2010 WL 4569873, at *2-*3.[2]

Even if TTSI's legal reasoning were correct (in the face of overwhelming contrary authority), it cannot overcome a very basic hurdle in the form of straightforward contract interpretation. These particular arbitration agreements expressly apply, by their own terms, only to the portion of the relationship between TTSI and Respondents discussed in the PAAs. Addendum 2 defines "this agreement" to mean the PAAs, and the arbitration clause only covers "dispute[s] between the parties concerning their respective rights and obligations under *this agreement*," not the independent contractor or any other agreement. (Pet. Exhs. 17, 19, 20, 23, 25 (emphasis added).) This explicit limitation also distinguishes this case from *Brookwood v. Bank of America* (1996) 45 Cal. App. 4th 1667, 1672, in which the arbitration clause in one of the agreements expressly applied to "any dispute, claim or controversy that may arise between me and my firm." Here, the PAAs do not deal with rate of pay, meal periods, rest periods, waiting time penalties, fuel charges, insurance, or other items that Respondents claim were illegally not paid to them or illegally deducted from their pay.

Finally, even if the arbitration agreements created a binding obligation between the parties as to some claims, the time in which that obligation was in force either never existed or has passed. Some iterations of Addendum 1 provide that "This agreement shall be in effect for the term of the Lease." (Pet. Exhs. 17, 20, 23.) Because Respondents never signed lease agreements as contemplated by the PAAs, the term of the PAAs—the only part of the TTSI documents containing an arbitration clause—never began to run and is not in effect. Other iterations of Addendum 1 specify that "This agreement shall be in effect for 119 days from the date of agreement execution. CONTRACTOR/CARRIER shall have the option to renew agreement at the end of this term." (Pet. Exhs. 19, 25.) All of Respondents' 119-day terms expired well prior to the

[2] Against this breadth of authority, TTSI relies on a single decision that runs contrary to the majority of courts' reasoning: *Galen v. Redfin Corp.* (2014) 227 Cal. App. 4th 1525. On November 12, 2014, the California Supreme Court granted a petition for review of the case. As a result, the parties and the Court may not rely on it, Cal. Rules of Court 8.1105(e)(1) and 8.1115, and Respondents cite it here only to inform the Court of the grant of review.

filing of their complaints with the DLSE, and none of the PAAs were ever renewed. (Kish Decl. Exh. 3, TTSI's Response to DFP 7.) Those agreements, by their own terms, ceased to have any force long ago.

C. TTSI'S PURPORTED ARBITRATION CLAUSE IS UNENFORCEABLE.

1. California Labor Code § 229 Prohibits Arbitration of Respondents' Claims in the Absence of FAA Preemption.

As explained above, the FAA does not apply to TTSI's purported arbitration agreements because Respondents are transportation workers in interstate commerce and their contracts are exempt from the FAA under 9 U.S.C. § 1. Therefore, California law governing the enforceability of arbitration agreements applies and cannot be preempted by the FAA. California Labor Code § 229 provides that "[a]ctions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate." Cal. Labor Code § 229. "This article" includes Labor Code §§ 200-244. At a minimum, Respondents' claims to recover illegal deductions from their wages based on misclassification (Labor Code § 226.8(a)(2)), and Respondents' claims that they are owed wages meal and rest break premiums (Labor Code § 226.7(c)) cannot be arbitrated under § 229.

2. TTSI's Purported Arbitration Agreement Is Procedurally and Substantively Unconscionable.

TTSI's arbitration agreement is also unenforceable because it is an unconscionable one-sided contract of adhesion. The doctrine of unconscionability has 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." *Sonic II*, 57 Cal. 4th at 1133. Courts view these elements as being on a "sliding scale": the more egregious the procedural unconscionability, the less substantively oppressive the terms must be for an agreement to be unenforceable, and vice versa. *Armendariz v. Found. Health Psychare Servs., Inc.* (2000) 24 Cal. 4th 83, 114. Because unconscionability doctrine does not facially discriminate against arbitration, it is not preempted by the FAA and remains a valid defense to a petition to compel arbitration whether or not the FAA applies. *Sonic II*, 57 Cal. 4th at 1149.

a. The Arbitration Clause is Procedurally Unconscionable.

Factors supporting procedural unconscionability include "[o]ppression aris[ing] from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice" and "surprise involv[ing] the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." *Stirlen v. Supercuts, Inc.* (1997) 51 Cal. App. 4th 1519, 1532.

Here, the elements of oppression and surprise are stark. The contracts are contracts of adhesion "imposed and drafted by the party of superior bargaining strength" and presented to the Respondents on a take-it-or-leave-it basis. *Armendariz*, 24 Cal. 4th at 113. The arbitration agreements appear at the end of a lengthy stack of documents with dense legal language. None of the Respondents understood the terms of the agreements, and they all signed because TTSI employees told them they had to do so on the spot to start or continue working. (Garcia Decl. ¶¶ 5-6; Menendez Decl. ¶¶ 5-7; Palma Decl. ¶¶ 5-7; Rosales Decl. ¶¶ 5-7; Valencia Decl. ¶¶ 5-7.) Contrary to the declaration of TTSI employee Brenda Gutierrez (Gutierrez Decl. ¶ 4), TTSI did not translate or explain the agreements in Spanish, either orally or in written form. (Garcia Decl. ¶¶ 5-6; Menendez Decl. ¶¶ 5-7; Palma Decl. ¶¶ 5-7; Rosales Decl. ¶¶ 5-7; Valencia Decl. ¶¶ 5-7.) The Respondents were not given the opportunity to take the contracts home to review them (or have them translated). (*Id.*) TTSI never explained the concept of arbitration orally or in writing. (*Id.*) None of the Respondents knew that the agreements contained purported arbitration provisions or what such provisions meant. Respondents learned about the arbitration provisions for the first time either during the DLSE proceedings or from their lawyers in this action. (Garcia Decl. ¶¶ 8-9; Menendez Decl. ¶¶ 8-10; Palma Decl. ¶¶ 8-9; Rosales Decl. ¶¶ 8-9; Valencia Decl. ¶¶ 8-9.)

Though the purported agreements provide that arbitration will be conducted pursuant to the American Arbitration Association (AAA) commercial rules, TTSI admits that is has never given Respondents copies of the rules. (Kish Decl. Exh. 1, RFA 6; Garcia Decl. ¶ 10; Menendez Decl. ¶ 11; Palma Decl. ¶ 10; Rosales Decl. ¶ 10; Valencia Decl. ¶ 10.) *See Zullo v. Superior Court* (2011) 197 Cal. App. 4th 477, 485-86 (collecting cases holding that failure to attach applicable

arbitration rules adds to procedural unconscionability). These facts amply support a finding of procedural unconscionability. *See, e.g.*, *Samaniego v. Empire Today, LLC* (2012) 205 Cal. App. 4th 1138 (procedural unconscionability demonstrated by inconspicuous arbitration clause in a dense English-language agreement presented to workers who could barely read English and who were not provided arbitration rules); *Carmona v. Lincoln Millennium Car Wash* (2014) 226 Cal. App. 4th 74 (finding procedural unconscionability where company presented Spanish-speaking workers with English-language agreements, did not allow negotiation or time for review, and did not provide arbitration rules).

b. TTSI's Arbitration Clause Is Substantively Unconscionable.

Courts find substantive unconscionability where there are "overly harsh or one-sided results" or terms that reallocate "the risks of the bargain in an objectively unreasonable or unexpected manner." *Stirlen*, 51 Cal. App. 4th at 1532. "In light of [a] high degree of procedural unconscionability, even a low degree of substantive unconscionability could render the arbitration agreement unconscionable." *Carmona*, 226 Cal. App. 4th at 85.

Here, where the FAA does not preempt state law, contracts that require a worker to waive his or her right to a Berman hearing before the DLSE are categorically unconscionable. *Sonic I*, 51 Cal. 4th at 687. Even if the FAA applies and preempts that bright-line rule, TTSI's arbitration clause is still substantively unconscionable under the California Supreme Court's decision in *Sonic II*. As that court explained in detail, any purported waiver of the right to a Berman hearing is still a factor demonstrating substantive unconscionability when the arbitration agreement does not provide a forum with similar protections for employees. *Sonic II*, 57 Cal. 4th at 1149. Berman hearings are designed for an employee to navigate without an attorney, take place at no cost to the employee, and include free translation services. *See Sonic I*, 51 Cal. 4th at 673-74 (describing the Berman hearing process). In light of the advantages of Berman hearings, *Sonic II* held that arbitration is only permitted where it "provide[s] for accessible, affordable resolution of wage disputes" in the way that Berman hearings do. *Sonic II*, 57 Cal. 4th at 1150.

There is no question that TTSI's arbitration clause fails under this standard. To begin, the clause states that disputes are subject to the AAA commercial rules, and those rules create a

process that is anything but accessible and affordable for Respondents. The AAA rules require that parties initiating arbitration proceedings pay an initial filing fee ranging from $750 to several thousand dollars, depending on the size of the claim (Kish Decl. Exh. 6-7, AAA Commercial Rule R-4(b), AAA Standard Fee Schedule); parties must pay the arbitrator and his or her expenses (Kish Decl. Exh. 7, AAA Commercial Rules R-54, R-55); parties needing translation must pay for interpreters (Kish Decl. Exh. 7, AA Commercial Rule R-29); and the filing party must pay another administrative fee of up to several thousand dollars at the conclusion of the arbitration proceedings (Kish Decl. Exh. 6, AAA Standard Fee Schedule). The thousands of dollars Respondents would have to pay to arbitrate their claims is a far cry from the cost-free Berman hearing process.

Even putting to the side any comparison to Berman proceedings, arbitration clauses in adhesive contracts are unconscionable as a general matter if they require, as these do, individuals to pay more than they can afford to adjudicate their claims, *Gutierrez v. Autowest, Inc.* (2003) 114 Cal. App. 4th 77, 89-90, or, in the employment context, if they must pay more than they would to bring the same claims in court, *Armendariz*, 24 Cal. 4th at 110-11.

TTSI's arbitration clause also includes a loser-pays provision, which provides that the prevailing party "shall" recover its costs of arbitration and attorneys' fees. This means that in addition to the significant fees Respondents would have to advance to bring the arbitration proceeding, if they were to lose, they would also owe TTSI thousands more. Automatic loser-pays provisions are substantively unsconscionable where they place a worker at greater risk than if he brought his claims in court. *See Trivedi v. Curexo Tech. Corp.* (2010) 189 Cal. App. 4th 387, 394-95. Further, the loser-pays provision stands in stark contrast to the rules governing superior-court appeals of DLSE awards, where there is a one-way fee shifting provision: if the employee recovers any amount greater than zero on an appeal taken by the employer, the employer pays his costs and fees, but not the other way around. Labor Code § 98.2(c); *Sonic I*, 51 Cal. 4th at 673.

In short, because TTSI's arbitration clause imposes oppressive expenses on limited-means Respondents, it is unconscionable and unenforceable regardless of whether the FAA applies. And because unlawfulness permeates the brief arbitration clause, severing the unconscionable parts would not be possible or appropriate. *See Armendariz*, 24 Cal. 4th at 124-25.

D. TTSI HAS WAIVED ITS RIGHT TO DEMAND ARBITRATION.

Regardless of whether there is an applicable and enforceable arbitration agreement between Respondents and TTSI, TTSI has waived its right to seek arbitration by delaying its petition to compel arbitration and invoking the court system to determine Respondents' claims. In determining whether a party has waived its right to arbitration, courts consider the following factors:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.

St. Agnes Med. Ctr. v. Pacificare of Cal. (2003) 31 Cal. 4th 1187, 1196.

TTSI's actions weigh in favor of waiver under every one of these factors. At the latest, TTSI learned of Respondents' claims in February 2014 (although they learned of the claims of other respondents in this action months earlier). (*See* Labor Comm'r Opposition to TTSI's Ex Parte Application to Stay, Ramos Decl. ¶¶ 11-15). TTSI waited for months after learning about Respondents' claims before seeking arbitration a mere twelve days before Respondents' hearings before the DLSE. When TTSI learned of the claims, it filed four declaratory actions against other respondents in this action asking four different *courts* to rule on the very same misclassification issue that Respondents brought before the DLSE. (Kish Decl. Exh. 2, TTSI's Response to Special Interrogatory 3.) Filing lawsuits that seek to resolve the same issue TTSI now seeks to arbitrate are actions inconsistent with a party seeking to invoke arbitration and are, for practical purposes, counterclaims. Courts in this state and across the country have held that filing a lawsuit is the paradigm of behavior that waives the right to arbitrate because it is fundamentally inconsistent with the exercise of that right. *See, e.g.*, *Christensen v. Dewor Devs.* (1983) 33 Cal. 3d 778, 783-84; *Lewallen v. Green Tree Servicing* (8th Cir. 2007) 487 F.3d 1085, 1090; *In re Tyco Int'l Ltd. Sec. Litig.* (1st Cir. 2005) 422 F.3d 41, 46-47. At the very least, the four declaratory judgment

actions demonstrate that TTSI was well aware of Respondents' claims against it and chose a path—delaying its motion to compel while it invoked the court system to vindicate its rights—inconsistent with preserving its right to arbitrate.

Finally, the delay in seeking arbitration has prejudiced Respondents. At this point, Respondents have gone through the entire administrative process, received favorable decisions, and will defend those awards in superior court on terms more beneficial to them then had they not first engaged in the administrative process. For example, they may be represented by the Labor Commissioner in the appeal (Labor Code § 98.4); they have the benefit of one-way fee shifting (Labor Code § 98.2(c)); and, if they prevail, they may collect from the bonds TTSI was required to post as a condition of appeal (Labor Code § 98.2(b)). The only possible purpose for TTSI's request that this Court vacate the DLSE decisions is to deny Respondents the statutory benefits of the administrative process.

IV. CONCLUSION

For these reasons, there is no applicable, enforceable agreement to arbitrate the claims Respondents brought before the DLSE, and TTSI's motion to compel arbitration should be denied and its petition dismissed. If, however, this court finds that Respondents' claims are subject to arbitration, then the proper remedy is to send the pending appeals to arbitration on terms comparable to those Respondents enjoy in court, not to vacate the DLSE decisions.[3]

Respectfully Submitted,

Date: November 17, 2014

BET TZEDEK

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[3] Though undersigned counsel do not represent Respondents Oscar Reyes and Walter Trujillo, we note that their failure to timely respond to the petition does not render arbitration automatic. Failure to respond may result in an admission of the *factual* allegations, but there is no basis for deeming the *legal* allegations admitted. *See Taheri Law Grp., A.P.C. v. Sorokurs* (2009) 176 Cal. App. 4th 956, 963-64 (deeming factual allegations admitted and analyzing legal issues on the merits).