No. 24-5810

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BO AVERY, JILL UNVERFERTH, KRISTY CAMILLERI, and PHOEBE ROGERS,

Plaintiffs-Appellees,

v.

TEKSYSTEMS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
Case No. 3:22-cv-072733-JSC
The Honorable Jacqueline Scott Corley

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its broad discretion to manage class action proceedings under Fed. R. Civ. P. 23(d) by invalidating arbitration agreements that TEKsystems obtained through misleading and coercive communications to members of the class?

2. Should the district court's denial of the motion to compel arbitration be affirmed because no arbitration agreements were formed?

3. Did TEKsystems waive its right to arbitrate by waiting until years into the litigation and after the class had been certified to compel arbitration?

INTRODUCTION

More than a year and a half into this wage and hour class action, Defendant-Appellant TEKsystems ("TEK") decided it needed a back-up plan. So, over the winter holidays, it rolled out an arbitration policy for its workers—including class members—that required individual arbitration and prohibited class actions. It gave employees a choice: submit to individual arbitration or lose your job. But, perhaps recognizing that it could not legally force class members in this action to give up their claims as a condition of employment, it sent them an email offering the option to opt out of arbitration as to this class action. The email gave class members just three weeks (again, over the holidays) to sign an opt-out notice. If they failed to sign within that time, they automatically waived their right to participate in this class action. In

other words, TEK turned the Rule 23 opt-out class action mechanism on its head: class members had to act to *stay in* the class, rather than acting to opt out.

Instead of allowing the class members who did manage to see the email to make an informed decision about whether to opt out, TEK went out of its way to lie in its communications to them about class-action litigation. It characterized class actions in court as slow and expensive and class action attorneys as greedy, while touting arbitration as quick and cost efficient, ensuring that few, if any, employees would be tempted to opt out. And it provided only limited and misleading information about this case and the benefits class members would be giving up by not opting out of arbitration.

After extracting arbitration agreements from its workers, TEK did not move to enforce them right away. Instead, it waited to move to compel arbitration until after the district court certified the class and Plaintiffs moved for summary judgment—that is, until one of the most consequential elements of the litigation had been decided against it and after briefing on the merits of a dispositive issue had started. If TEK could not defeat class certification in court, it would take a second bite at that apple by moving to compel individual arbitration.

The district court appropriately had no patience for TEK's antics. Using its discretionary authority to manage communications with class members, it held that, because TEK had misled and coerced class members into agreeing to arbitrate, the

arbitration agreements were a nullity. But even if they were not, the district court alternatively held that TEK had waived any right to arbitrate by waiting to impose arbitration agreements until nearly two years into the litigation and then waiting to move to enforce those agreements until after it lost class certification. Either way, the district court correctly concluded that TEK cannot be permitted to avoid class liability in court by misleading its employees into agreeing to individual arbitration mid-litigation and then waiting until the court proceedings were not going its way before moving to compel arbitration.

STATEMENT OF THE CASE

I. TEK Engaged in Years of Litigation and Discovery Before Imposing Arbitration.

Plaintiffs work as Recruiters for TEK, a professional staffing agency that serves clients in the business and technology fields. 3-ER-358. Due to TEK's productivity requirements, Recruiters routinely work more than 12 hours per day and more than 50 hours per week, and they regularly work through lunch periods, in evenings, and on weekends. 3-ER-359-60, 362. Plaintiffs allege that TEK misclassified its Recruiters as "exempt" from state and federal employment laws and thus failed to pay them overtime and failed to provide meal and rest breaks as required by California law. 3-ER-366-72; *see also* SER 3-25 (granting summary judgment to plaintiff's on TEK's exemption defense).

In January 2022, Plaintiffs filed a class action complaint in California Superior Court against TEK, which TEK then removed to federal court. 3-ER-335-74. TEK moved to either dismiss Plaintiffs' claims in their entirety on the merits, stay the action pending a ruling in *Thomas v. TEKsystems, Inc.*, Case No. 2:21-cv-00460-WSS (W.D. Pa.), or transfer the case to Pennsylvania. 3-ER-385; ECF No. 21. TEK did not reference arbitration in its motion to dismiss. *Id.* The district court denied TEK's motion in August 2022. 3-ER-386; ECF No. 31. The parties then engaged in extensive discovery for over a year, including eight depositions, multiple rounds of written discovery, and the exchange of over 465,000 documents. SER 27 ¶ 4. Class counsel expended over 2,800 hours reviewing documents, preparing responsive discovery, taking and defending depositions, researching legal issues, and briefing motions. *Id.* ¶ 5.

In "mid-2023," while discovery was ongoing, TEK began planning to impose a policy on its current employees, including members of the putative class, that would eliminate their ability to participate in this class action and force them to arbitrate their claims individually. SER 53 ¶ 10; *see also* SER 27 ¶ 8; SER 30 (privilege log listing communications regarding arbitration rollout beginning August 23, 2023). And in September 2023, TEK's CEO approved the plan to adopt the mandatory arbitration policy. 1-ER-4; SER 53 ¶ 10. TEK did not inform the district court or Plaintiffs of its plans to impose arbitration, nor did it raise arbitration during discovery.

Plaintiffs filed their Motion for Class Certification on October 6, 2023. 3-ER-390-91; ECF No. 63. TEK opposed Plaintiffs' motion on November 17, 2023, without mentioning its in-progress plans to impose arbitration agreements on class members and without raising arbitration as a defense. 3-ER-391; SER 133-79.

II. TEK Extracted Arbitration Agreements Through Misleading and Coercive Communications with the Class.

On December 19, 2023, just five days after class certification briefing closed, TEK's counsel informed class counsel for the first time that it had adopted an arbitration policy that would automatically apply to all Recruiters, except for those members of the putative class who chose to affirmatively opt out. SER 40-41. TEK did not initially produce its communications with class members, instead representing that the email to class members "includes information about how [putative class members] may contact [class counsel]." SER 40-41. Only after class counsel requested that copies be immediately produced did TEK produce exemplars of the communications and agreements. SER 36-40.

TEK sent two communications to potential class members regarding its arbitration policy: one DocuSign email to all employees, including class members, containing the arbitration agreement and one DocuSign email to only class members containing notice of this case and a separate agreement class members could sign to opt out of the arbitration agreement for the limited purpose of continuing to participate in this class action. 1-ER-4; 2-ER-262-75. Because the class certification

motion had not yet been decided, the second email was the first communication about this class action most class members received.

A. TEK's First *Ex Parte* Communication with Potential Class Members

The first email announced that "TEK is instituting a mutual arbitration agreement for internal employees in the U.S." 1-ER-5; 2-ER-262. It started by touting the benefits of arbitration, which it characterized as "being more efficient and cost effective for both employees and the company." 1-ER-5; 2-ER-262. Then, it disparaged litigation in court, class actions, and class action attorneys, stating: "In our experience, litigation in court—particularly class and collective actions—are wasteful, inefficient means for resolving disputes, and tend to enrich only the attorneys rather than individuals who may have legitimate claims." 1-ER-5; 2-ER-263. It promised that arbitration would involve only a "small 'filing fee'" and that arbitration would be "similar to court." 1-ER-5; 2-ER-263.

The email also stated, "All new and current employees will be subject to this Agreement as a condition of working for the Company. If you choose to continue working here after December 31, 2023 you'll be deemed to have accepted the Agreement, and we are asking for your signature to reflect that." 1-ER-5; 2-ER-263. It directed employees to "review, acknowledge and electronically 'sign' the agreement by clicking 'I agree.'" *Id*.

At the bottom of the email, there was a link to a set of "FAQs." 1-ER-5; 2-ER-263. The FAQ document reiterated that "[t]he Agreement is effective as of January 1, 2024 for all U.S. employees." 2-ER-270. It again touted arbitration as "less costly for both parties than litigation," answering the question "will this make it more expensive for me?" with an unequivocal "No." 2-ER-272. And it again criticized class actions in court as a "wasteful, inefficient means for resolving disputes" that "tends to enrich only attorneys rather than [] individuals." 2-ER-270. In the answer to the question "Does this require us to waive class claims?" TEK asserted that it was requiring workers to waive class claims because "the Company cares about resolving your claim specifically and thoroughly," while "[a] class claim requires the Company to ignore individual employee issues and concerns." 2-ER-272. It again suggested that participating in a class action would be costly and only benefit lawyers: "attorneys, not employees, are often the biggest winners in class actions, often charging exorbitant fees to both the class and the employer involved, reducing the money actually received by class members." *Id.*

B. TEK's Arbitration Agreement

If employees clicked on "Review Document" in the first email, they were taken to the Arbitration Agreement. 2-ER-266. On the first page, the Agreement says in all capital letters: "YOU WILL BE DEEMED AS HAVING ACCEPTED THIS AGREEMENT IF YOU REMAIN EMPLOYED BY TEKSYSTEMS ON OR

AFTER JANUARY 1, 2024." *Id.* It requires submission of virtually all claims an employee may have to arbitration and bans participation in a "class action, collective action, or representative action [] either in court or arbitration." *Id.* It also states that the "Agreement supersedes any prior agreement between the parties regarding the subject matter of dispute resolution." 2-ER-267. Neither the Arbitration Agreement nor the email that linked to it included any information about opting out of arbitration, nor do they mention this lawsuit. *Id.*

C. TEK's Second *Ex Parte* Communication with Class Members

Sometime after they received the email with the Arbitration Agreement, class members received a separate email with the subject "Mutual Arbitration Agreement and Current Class Action Suit." 2-ER-274. This email stated that "the company is adopting a policy of requiring mutual arbitration that will go into effect on January 1, 2024," but it did not provide a copy of the arbitration agreement. *Id.* It then explained that "[a] lawsuit has been filed which, if certified, would include you as a class member." *Id.* The email included a link to "a copy of Avery et al. v. TEKsystems, Inc," which led to the complaint, but it did not provide additional information about the claims or the status of the action. *Id.* It informed class members that they could "opt out of the arbitration agreement for the limited purpose of keeping your ability to participate in that lawsuit" if they returned the "attached agreement" within

three weeks over the holidays, by January 9, 2024. *Id.* At the bottom, the email warned recipients: "Do Not Share This Email." 2-ER-275.

The Notice of the Right to Opt-Out of Mutual Arbitration Agreement for Limited Purposes (which was not attached as stated in the email but could be accessed by clicking the DocuSign link) provided that the Arbitration Agreement "may" affect Recruiters' rights in this lawsuit. 2-ER-200. It did not explain anything about the lawsuit other than that it alleged that TEK "misclassified Recruiters as exempt from the overtime requirements under California law" and that it sought "overtime pay and various penalties." *Id.* It also stated, "unless you separate from your employment with TEKsystems before January 1, 2024, or take action as described below before January 9, 2024," TEK would "take the position in *Avery* that, if a class is certified, you could not be a part of it and that you can bring claims only in individual arbitration." *Id.* It explained that class members "may opt out of the Mutual Arbitration Agreement for the limited purpose of remaining in the *Avery* putative class by signing below and returning this form no later than January 9, 2024." *Id.* It said, "You are of course free to consult with your attorney," but did not indicate that class members could consult class counsel or provide information about class counsel. *Id.*

Ultimately, most class members did not opt out of the Arbitration Agreement. 1-ER-4; 1-ER-10.

D. Plaintiffs' Emergency Motion for Protective Order

After receiving copies of these communications, Plaintiffs filed an Emergency Motion for a Protective Order, requesting that the district court invalidate the arbitration agreements and restrict TEK's communications with class members about this case. 3-ER-392. During the January 4, 2024, hearing on the motion, the court indicated that the timing of the agreements, coming after class certification was fully briefed, weighed against their enforcement but noted that no effort to enforce the agreements had been made. 2-ER-220-21. In response, defense counsel said, "the issue of whether arbitration can be compelled isn't even ripe. The agreement's not even in effect yet. And so if we decide to make that argument down the road, it will only be because we think we have a good faith basis to assert it, and we'll make our case to the judge then." 2-ER-221. TEK did not ask the district court to delay ruling on the class certification motion so it could move to compel arbitration. *Id.* The district court pointed out that it was "too late" to move to compel arbitration given the completion of class certification briefing, and defense counsel agreed, saying "I understand." *Id.* The court concluded that it did not need to decide the enforceability of the arbitration agreements because TEK had not sought to enforce them, but it ruled that, going forward, TEK must notify Plaintiffs of any communications with the class. 2-ER-219-20; 2-ER-226.

III. TEK Continued to Litigate After it Imposed Arbitration.

TEK did not promptly move to enforce the arbitration agreements after the January 4 hearing, or the January 9, 2024, deadline for class members to opt out of arbitration. Instead, it soldiered on with the litigation. On February 1, 2024, the district court held a class certification hearing, at which TEK did not raise arbitration whatsoever. 3-ER-393; SER 102-32. On February 13, 2024, the court granted Plaintiffs' motion for class certification. 3-ER-393; SER 76-101.

Once the class was certified, the parties engaged in briefing on the contents of the class notice. In its filing, TEK noted in a footnote that it had "not yet filed a motion to compel arbitration because, until the notice period has closed, it does not know who is in the class." 2-ER-208. On March 14, 2024, the district court held a case management conference at which it repeatedly emphasized that any motion to compel arbitration should be briefed as soon as possible, and that TEK should not wait to file the motion until after the class notice period closed. 3-ER-394; SER 67-68. The conference ended with the court telling TEK to start drafting its motion to compel so it could file it soon. SER 71-72.

On April 9, 2024, the district court approved the class notice, and Plaintiffs issued the approved notice to the 542 class members on April 16. 3-ER-396; SER 27 ¶ 7. After notice went out, the district court held another case management conference and issued a briefing schedule for Plaintiffs' motion for summary judgment. 3-

ER-396; ECF No. 99. Pursuant to that schedule, on May 14, 2024, Plaintiffs filed their motion for partial summary judgment on behalf of the class. 3-ER-396; ECF No. 100. Defendants' opposition was due on June 28. 3-ER-396.

Instead, on June 10, 2024—five days before the class opt-out period closed on June 15, 2024—TEK moved to compel arbitration. 2-ER-139-64; SER 27 ¶ 7. It did so after more than two years of litigation and discovery, after it lost on class certification, and after briefing on Plaintiffs' summary judgment motion began. And it did so despite the district court instructing it to file a motion to compel arbitration as soon as possible in March 2024. Plaintiffs opposed. 2-ER-110-38.

IV. The District Court Denied TEK's Motion to Compel Arbitration.

The district court denied TEK's motion to compel on August 21, 2024. It explained that its "discretionary authority" under Federal Rule of Civil Procedure 23(d) gives it "the power to regulate the notice and opt-out processes and to impose limitations when a party engages in behavior that threatens the fairness of the litigation." 1-ER-11 (quoting *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 756 (9th Cir. 2010), *judgment vacated on other grounds*, 565 U.S. 801 (2011)). And it found that the content of TEK's "disparaging comments" about class actions and class action attorneys were misleading and coercive, and that the timing and content "appear designed to prevent putative class members from opting into the lawsuit and opting

out of the arbitration agreement (for the purpose of participating in the *Avery* class action)." 1-ER-13.

Alternatively, the district court found that TEK waived its right to compel arbitration. 1-ER-15-17. It noted that during class certification briefing TEK "never raised arbitration as an issue, even though, according to its own testimony, its CEO got the go ahead to impose mandatory arbitration on all internal TEK employees, including the (then) putative class members, in September 2023—before Plaintiffs filed their class certification motion." 1-ER-15. And it pointed out that, even if it had been proper for TEK to wait until after the agreement went into effect to raise arbitration, it failed to do so at the class certification hearing on February 1, 2024. *Id.* "Instead, it waited until after the Court certified the class, after the Court approved class notice, after the Court set a briefing schedule on Plaintiffs' partial summary judgment motion, and after Plaintiffs filed their summary judgment motion, to finally move to compel arbitration." *Id.* The district court concluded that "[s]uch wait and see conduct is inconsistent with the right to arbitrate." *Id.* It then emphasized that TEK's approach was particularly egregious because "TEK knew of its right to impose a mandatory arbitration agreement even before it removed the action to this Court. But it waited until the December 2023 holiday season—18 months into this litigation—to impose arbitration." 1-ER-16.

The district court granted Plaintiffs' motion for partial summary judgment on September 23, 2024, holding that TEK's defense that Plaintiffs are exempt from California's overtime and break requirements failed as a matter of law. 3-ER-401; SER 3-25.

TEK appealed the denial of its motion to compel arbitration. 3-ER 375-78.

SUMMARY OF ARGUMENT

The district court was right to deny TEK's belated, post-class certification motion to compel arbitration. First, the district court had broad discretionary authority under Federal Rule of Civil Procedure 23(d) to issue orders to manage notice and opt-out process and protect the class, including by invalidating agreements that were procured through misleading or coercive conduct. That discretion does not conflict with the Federal Arbitration Act (FAA) because Rule 23(d) applies generally to any type of contract and does not impermissibly single out arbitration agreements. The court did not abuse its discretion by invalidating TEK's arbitration agreements here because the record supported its findings that TEK's communications with the class were misleading and coercive. Contrary to TEK's argument, the question whether the arbitration agreements can be invalidated under Rule 23(d) could not be—and was not—delegated to an arbitrator. To start, an arbitrator would not have the power to issue orders to manage class action proceedings in district court. Moreover, any

delegation clause would be invalid as the product of the same process that rendered the entire arbitration agreements unenforceable.

Second, this Court can affirm on the alternative ground that no arbitration agreements were formed. Class members lacked notice of the rights in this class action that they were giving up because they were provided misleading information about the nature of this action and class actions generally. And they lacked notice of the conduct that would constitute assent to the arbitration agreement because the two communications they received from TEK about arbitration provided conflicting information about what conduct would accept the agreement.

Third, the district court correctly held that, by intentionally waiting to move to compel arbitration until after it lost at class certification, TEK waived its right to do so. Despite having the right to impose arbitration on its workers before this litigation began, and despite planning to implement an arbitration policy before Plaintiffs moved for class certification, TEK waited to see how the court would rule on class certification before moving to compel arbitration. It failed to raise arbitration at any point during years of litigation, including at the class certification hearing that was held after the arbitration agreements went into effect. It was only after the district court ruled against it on class certification that TEK sought another bite at the apple by raising arbitration. And even then, TEK dragged its feet and did not move to compel arbitration until just a few days before the class notice period had ended

and Plaintiffs had moved for partial summary judgment. That was too late. And, under binding Ninth Circuit precedent, the district court properly decided the waiver question rather than delegating it to an arbitrator.

For those reasons, this Court should affirm the district court's denial of TEK's motion to compel arbitration.

STANDARD OF REVIEW

"District courts have 'broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.'" *Dominguez v. Better Mortg. Corp.*, 88 F.4th 782, 791 (9th Cir. 2023) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981)). In reviewing the exercise of that authority, this Court's "task is to determine whether the district court clearly erred in concluding that [the defendant] had in fact engaged in coercive conduct," *Wang*, 623 F.3d at 756, and whether the district court "abused its discretion" by taking corrective action based on those findings, *id.*; *see Dominguez*, 88 F.4th at 791.

When reviewing a district court's conclusion that a party waived its right to compel arbitration by litigation conduct, this Court's review is *de novo* if the facts are undisputed. *See Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023). But waiver is a "generally fact-intensive question." *Al-Nahhas v. 777 Partners LLC*, -- F.4th --, 2025 WL 546908, at *3 (7th Cir. Feb. 19, 2025). And this Court reviews a district court's factual findings underlying an order denying a motion to

compel arbitration for clear error. *Stover v. Experian Holdings, Inc.*, 978 F.3d 1082, 1085 (9th Cir. 2020) (citation omitted). Thus, the question whether defendants "waive[d] their right to compel arbitration" may "present[] the type of mixed question that merits deference to the district court, not de novo review." *Al-Nahhas*, 2025 WL 546908, at *3. As the Seventh Circuit has explained, deference to a district court's waiver holding is especially warranted because "waiver of the right to arbitration depends on the facts of each particular case" and "the district judge was much more familiar with the proceedings in [her] court than [the court of appeals] can be, so [she] is in a much better position to assess whether what [the defendant] did in that court was inconsistent with its right to arbitration." *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 588 (7th Cir. 1992). "Given these factors, it makes little sense for three appellate judges to redo the district judge's work." *Id.*

ARGUMENT

I. The District Court Did Not Abuse Its Broad Discretion to Regulate Communications with Class Members.

A. The district court's discretionary powers under Rule 23(d) include invalidating waivers signed by class members as a result of a defendant's misleading and coercive communications.

District courts have broad discretionary powers to manage class actions under Rule 23(d), and that power includes invalidating waivers, like TEK's arbitration agreement here, resulting from inappropriate communications with class members.

As the Supreme Court has explained, "[c]lass actions serve an important function in our system of civil justice," but they also present "opportunities for abuse as well as problems for courts and counsel in the management of cases." *Gulf Oil*, 452 U.S. at 99-100. For example, "[u]napproved communications to class members that misrepresent the status or effect of the pending action [] have an obvious potential for confusion and/or adversely affecting the administration of justice." *Id.* at 100 n.12 (quoting *Waldo v. Lakeshore Estates, Inc.*, 433 F. Supp. 782, 790 (E.D. La. 1977)) (first alteration in original). "Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Id.* at 100; *see also Dominguez*, 88 F.4th at 791 (explaining that "district courts have the duty and the power to oversee communications from both defendants and class counsel with potential class members" (citing *Gulf Oil*, 452 U.S. at 101)); *In re Victor Techs. Sec. Litig.*, 792 F.2d 862, 864 (9th Cir. 1986) ("Obviously district courts must have broad discretion, resting on the specific facts of each case, in framing procedures for class actions under Fed. R. Civ. P. 23.").

That authority includes invalidating arbitration agreements or other waivers agreed to by class members based on misleading or coercive communications by defendants. *See Jimenez v. Menzies Aviation Inc.*, 2015 WL 4914727, at *6 (N.D. Cal. Aug. 17, 2015) ("Courts routinely exercise their discretion to invalidate or

refuse to enforce arbitration agreements implemented while a putative class action is pending if the agreement might interfere with members' rights." (listing cases)). That is because "Rule 23(d) gives district courts the power to regulate the notice and opt-out processes and to impose limitations when a party engages in behavior that threatens the fairness of the litigation." *Wang*, 623 F.3d at 756. For example, in exercising authority to require "giving appropriate notice" to class members under Rule 23(d)(1)(B), district courts can regulate defendants' communications "to protect class members and fairly conduct the action," ensuring that they are not provided with *inappropriate* notice. *Id.* And Rule 23(d)(1)(E) gives the court authority to issue orders to "deal with similar procedural matters" to those enumerated in the rest of the rule. Moreover, outside of Rule 23, district courts have broad authority to manage their dockets by issuing pre-trial orders. *See generally* Fed. R. Civ. P. 16. Taken together, those provisions give district courts broad discretion to take corrective action where, as here, a defendant preempts the notice and opt-out process by making class members sign agreements to *opt in* to the class action before notice has even been sent.

This Court's decision in *Wang* confirms that courts have authority to invalidate agreements entered by class members as the result of conduct by the defendant that interferes with the fairness of the notice and opt-out process. There, this Court held that the district court did not abuse its discretion in invalidating all opt-out forms

submitted by class members after finding that the opt-out period "was rife with instances of coercive conduct by the defendant employer." 623 F.3d at 756 (citation omitted); *see also Camp v. Alexander*, 300 F.R.D. 617, 626 (N.D. Cal. 2014) (invalidating opt-out declarations obtained by defendant from class members and issuing corrective notice).[1]

Other courts of appeals "have reasoned, consistent with the relevant portion of *Wang*, that district courts have the power to remedy misleading and coercive communications used to obtain agreements from prospective plaintiffs that affect their participation in the pending lawsuit." *Dominguez*, 88 F.4th at 793 (collecting cases). For example, in *Billingsley v. Citi Trends, Inc.*, the Eleventh Circuit affirmed the district court's decision allowing workers to join a collective action notwithstanding arbitration agreements they had signed while the action was pending after finding that the roll out of the arbitration agreements "was confusing, misleading, coercive, and clearly designed to thwart unfairly the right of its store managers to make an informed choice as to whether to participate in this FLSA collective action." 560 F. App'x 914, 922 (11th Cir. 2014). The court emphasized that, in invalidating the agreements and allowing the workers to join the collective action, "[t]he district

[1] Similarly, the Supreme Court has recognized in the context of opt-in collective actions that the district court may "need to cancel consents obtained in an improper manner," such as through misleading communications to members of the collective action. *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 172 (1989).

court simply did what other district courts routinely do: exercise discretion to correct the effects of pre-certification communications with potential FLSA collective action members after misleading, coercive, or improper communications are made." *Id.*

Likewise, in *Degidio v. Crazy Horse Saloon & Restaurant, Inc.*, the Fourth Circuit affirmed the district court's decision to invalidate arbitration agreements that were imposed during the pendency of a collective action and that were "executed without knowledge of the court and in the context of an employment relationship in which the employer alone could profess the requisite legal expertise." 880 F.3d 135, 144 (4th Cir. 2018). And in *Fox v. Saginaw County, Michigan*, the Sixth Circuit affirmed the district court's decision to nullify class members' agreements with a claims-handling service that engaged in abusive communications, stating: "The district court has the authority to protect the class-action process. That is what it did here." 35 F.4th 1042, 1051 (6th Cir. 2022).

District courts in this Circuit also routinely invalidate agreements obtained through misleading or coercive communications with class members. *See, e.g.*, *Dominguez v. Better Mortgage Corp.*, 2022 WL 1564552, at *6 (C.D. Cal. May 17, 2022), *affirmed in part by* 88 F.4th 782 (9th Cir. 2023); *Reed v. Sci. Games Corp.*, 2021 WL 2473930, at *5 (W.D. Wash. June 17, 2021); *McKee v. Audible, Inc.*, 2018 WL 2422582, at *5-6 (C.D. Cal. Apr. 6, 2018); *Johnson v. Serenity Trans. Inc.*, 2017

WL 4236798, at *6 (N.D. Cal. Sept. 25, 2017); *Jimenez*, 2015 WL 4914727, at *5-6.

TEK would have this Court go against this well-reasoned authority based on a crabbed reading of the text of Rule 23(d). It focuses on Rule 23(d)(1)(C) in isolation, arguing that the language of that subsection does not give the district court the authority to regulate communications between defendants and class members because it mentions imposing conditions only on "representative parties and intervenors." Opening Br. at 17. It dismisses the rest of Rule 23(d) as "irrelevant" because the district court did not specifically quote it and, in TEK's view, it does not authorize the district court's actions. *Id.* at 17 n.3. That is wrong.

To begin with, the district court did not rely on only that single provision of Rule 23(d) but rather its "broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." 1-ER-11 (quoting *Gulf Oil Co.*, 452 U.S. at 100). The district court appropriately relied on the *entirety* of Rule 23(d), which allows courts to not only "impose conditions on the representative parties or on intervenors," Fed. R. Civ. P. 23(d)(1)(C), but also "deal with *similar* procedural matters." Fed. R. Civ. P. 23(d)(1)(E) (emphasis added); *see also Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068, 1073 (9th Cir. 2016) (when analyzing a statute, courts should "not look at its words in isolation" and must read the statute "as a whole" to give it meaning (cleaned up)). Because

imposing conditions on defendants is "similar" to imposing conditions on representative parties and intervenors, the court has authority to do so. *See Dominguez*, 88 F.4th at 791.

Not only is TEK's narrow reading of Rule 23(d) to prohibit the district court from exercising its discretion to regulate communications by defendants with class members undermined by Rule 23(d)'s plain text, it is also contrary to precedent from this Court and other courts of appeals holding that district courts *do* have such authority. *See, e.g.*, *id.*; *Wang*, 623 F.3d at 756; *Billingsley*, 560 F. App'x at 922; *Degidio*, 880 F.3d at 144. And the single out-of-circuit case cited by TEK does not override this precedent. *See* Opening Br. at 17-18 (citing *Cobell v. Kempthorne*, 455 F.3d 317, 323 (D.C. Cir. 2006)). TEK focuses on dicta from *Cobell* stating that Rule 23(d)(1)(C)'s "limitation to 'representative parties and intervenors' is 'hardly a technicality'" because the "rule's purpose" is "ensuring proper representation of class interests." *Id.* But even if Rule 23(d)(1)(C)'s purpose is so narrowly limited (it is not), the rest of the rule is far broader. "Rule 23(d)'s conferral of authority is not only to protect class members in particular but to safeguard generally the administering of justice and the integrity of the class certification process." *O'Connor v. Uber Techs., Inc.*, 2014 WL 1760314, at *3 (N.D. Cal. May 2, 2014). Certainly, to effectuate these purposes, courts must sometimes regulate defendants' conduct, as this Court has explicitly recognized. *See Dominguez*, 88 F.4th at 791.

In any event, *Cobell* is distinguishable. In *Cobell*, the D.C. Circuit held that the district court abused its discretion by requiring the defendant to include a notice in *all* its mailings—not just those to class members—that required the defendant "to attest to facts it disputed" on the merits of the case. 455 F.3d at 325. The court concluded that some of the information in the notice was "both unsupported by the record and likely quite harmful to the [defendant] and its programs," and that it therefore fell "outside of Rule 23(d)(2)'s scope." *Id.* That case provides no support for TEK's position that a district court can *never* issue orders related to a defendant's conduct.

B. The exercise of the court's discretionary power under Rule 23(d) does not conflict with the FAA.

TEK contends that the FAA prevents the district court from using its power under Rule 23(d) to invalidate arbitration agreements that were obtained through coercive and misleading communications with class members. Opening Br. at 20-28. Not so. The FAA requires enforcement of any arbitration agreement within its scope, "save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (explaining that the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses'" (citation omitted)). Rule 23(d) is one such generally applicable ground because it applies to *any* contract that is the result of misleading and coercive communications to the class, not only arbitration

agreements. For example, in addition to arbitration agreements, courts have used Rule 23(d) to invalidate opt-out notices, *see Wang*, 623 F.3d at 756, attorney-client representation agreements, *see Fox*, 35 F.4th at 1050-51, and releases of legal claims, *see Dominguez*, 2022 WL 1564552, at *6; *Johnson*, 2017 WL 4236798, at *6. *See also Reed*, 2021 WL 2473930, at *5 ("Numerous federal courts have concluded that [Rule 23(d)] is properly invoked to invalidate agreements—settlement agreements, opt-out agreements, arbitration agreements, etc.—that were obtained through communications that lacked judicial oversight and posed a risk to the fair conduct of class action litigation.").

For that reason, district courts in this Circuit have held that the FAA does not pose a barrier to a court exercising its authority to invalidate arbitration agreements under Rule 23(d). *See, e.g.*, *McKee*, 2018 WL 2422582, at *8; *O'Connor v. Uber Techs., Inc.*, 2013 WL 6407583, at *3-4 (N.D. Cal. Dec. 6, 2013); *Balasanyan v. Nordstrom, Inc.*, 2012 WL 1944609, at *2 (S.D. Cal. May 30, 2012); *see also Tomkins v. Amedisys, Inc.*, 2014 WL 129401, at *2 (D. Conn. Jan. 13, 2014) (rejecting argument that invalidating arbitration agreement under Rule 23(d) conflicted with arbitration because "the primary issue of concern" was not arbitration itself but "the implementation of an arbitration agreement during ongoing litigation combined with the waiver of rights to proceed in the litigation without affirmative agreement by putative class members").

Indeed, if this Court were to accept TEK's argument and hold that Rule 23(d) could be used to invalidate any kind of contract *except* arbitration agreements, that would violate the rule that federal courts cannot "invent special, arbitration-preferring procedural rules." *Morgan v. Sundance*, 596 U.S. 411, 418 (2022). Although TEK repeatedly argues that arbitration "has been explicitly favored by federal statute and the Supreme Court for decades," Opening Br. at 25, 28, the Supreme Court clarified in *Morgan* that "[t]he policy is to make 'arbitration agreements as enforceable as other contracts, but not more so." *Id.* (citation omitted). Therefore, "a court must hold a party to its arbitration contract just as the court would to any other kind." *Id.* And it "*may not devise novel rules to favor arbitration over litigation*." *Id.* (emphasis added). Holding that courts are prohibited from applying Rule 23(d) to arbitration agreements solely because they are arbitration agreements is precisely the type of arbitration-preferring rule the Supreme Court found impermissible in *Morgan*. *See Balasanyan*, 2012 WL 1944609, at *2 ("Strictly limiting the grounds by which arbitration agreements (but not typical contracts) can be invalidated would run contrary to [the FAA].").

TEK tries to get around the straightforward application of the FAA's savings clause to Rule 23(d) in two ways, neither of which passes muster. First, without explanation or support, TEK writes into the FAA's savings clause the requirement that it is limited to contract defenses under state law. Opening Br. at 28-30. But the

savings clause applies to generally applicable grounds for invalidating "*any* contract," whether under state or federal law. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("We have previously noted that [r]ead naturally, the word 'any' has an expansive meaning" (cleaned up)); *Home Depot U. S. A., Inc. v. Jackson*, 587 U.S. 435, 455 (2019) (Alito, J., dissenting) ("In case after case, we have given effect to this expansive sense of 'any.'"). For example, in *Morgan*, the Supreme Court addressed arguments for invalidating an arbitration agreement based on waiver, which it treated as a question of federal procedural law. *See* 596 U.S. at 416-17. Given that, TEK "fails to sufficiently demonstrate that the [savings clause] precludes the court from using a Federal Rule of Civil Procedure to invalidate an arbitration agreement on the same basis as would be used for any type of contract." *Balasanyan*, 2012 WL 1944609, at *2.

Second, TEK tries to import case law from a different context: when a party argues that the FAA's mandate to enforce arbitration agreements conflicts with a substantive provision in another federal statute. Opening Br. at 20-27. In such cases, the Supreme Court has held that the court must examine the statute at issue for a "contrary Congressional command" that overrides the FAA. *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). But none of the cases on which TEK relies involved the enforceability of a particular arbitration agreement under a generally applicable contract defense. Instead, they answered the question whether, *assuming*

an arbitration agreement is otherwise enforceable, a court should nonetheless decline to enforce it because Congress intended to override the FAA as to particular statutory claims. *See, e.g.*, *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (examining whether arbitration interferes with substantive rights under antitrust laws); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) (addressing whether "compulsory arbitration of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA"). Here, the arbitration agreement is *not* enforceable under the FAA because there is a generally applicable contract defense—Rule 23(d)—that invalidates it. *See Morgan*, 596 U.S. at 418 ("If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it."). There is no need to look for a "contrary congressional command" in another statute.

TEK also relies on the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, arguing that arbitration agreements cannot be invalidated simply because individual arbitration "by its very nature" would interfere with the class action. Opening Br. at 28 (citing 584 U.S. 497, 507 (2018)). That is not in dispute. Here, the district court held not that the arbitration agreements *themselves* interfered with the fairness of the class action proceeding, but that the communications through which TEK obtained the agreements were misleading and "usurped the Court's ability to

manage the opt-out process from the class action." 2-ER-32. Indeed, *Epic Systems* recognized that it would be a different case if the workers argued that "their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable." *Id.* (emphasis in original). Because Plaintiffs are not challenging the fact that the arbitration agreements require individualized proceedings and instead are challenging the *way* Defendants obtained the agreements under a generally applicable rule—Rule 23(d)—there is no conflict with the FAA.

C. The district court did not abuse its discretion by invalidating the agreements based on the record before it.

TEK next argues that, even if the district court had discretionary authority to invalidate the agreements, it abused that discretion here. Opening Br. at 32-39. It did not. As explained above, district courts have "broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Hoffman-La Roche*, 493 U.S. at 171 (quoting *Gulf Oil*, 452 U.S. at 100). An order under Rule 23(d) is upheld so long as it is "based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil*, 452 U.S at 101. That standard is met here.

The district court carefully analyzed TEK's communications and agreements, as well as the surrounding circumstances, and concluded that TEK's actions

threatened the fairness of the litigation. *See* 1-ER-12-14. First, as the district court explained, the statements about class actions were misleading. They suggested class members "may have to pay 'exorbitant fees' to attorneys if they opt into the class action," while asserting that arbitration would not be more expensive. 1-ER-13. In reality, of course, class members would *not* have to pay class counsel out-of-pocket, and the court must approve any class action settlement, which would prevent attorneys from recovering "exorbitant fees." *See Johnson*, 2017 WL 4236798, at *6 (finding communications misleading in part because they did not mention court approval of settlement was required). TEK disparaged class actions in other ways, too, stating that "[a] class claim requires the Company to ignore individual employee issues and concerns," 2-ER-272, and that class actions are a "wasteful, inefficient means for resolving disputes," 2-ER-263. In repeatedly mischaracterizing class actions as "inefficient" and arbitration as "efficient," TEK failed to mention that the class action had been actively litigated for nearly two years, meaning that starting over again in individual arbitration—if even possible—would *not* be efficient because it would deprive class members of the benefit of discovery and motion practice that had already occurred in the class action. 1-ER-14.

TEK's communications to class members went even further than misrepresenting the cost of class actions: they disparaged class action attorneys, suggesting that class actions were designed to enrich only attorneys at the cost of class members.

1-ER-12; *see Wright v. Adventures Rolling Cross Country, Inc.*, 2012 WL 2239797, at *5 (N.D. Cal. June 15, 2012) (finding that similar statements about class counsel were "problematic" and justified corrective action under Rule 23(d)). In contrast, the communications failed to provide any information about the relief class members could obtain through the lawsuit, leaving them without the information needed to assess the veracity of the claim that the lawyers, not them, would be the "biggest winners" in a class action or that a class action "tends to enrich only attorneys rather than [] individuals." 2-ER-270. 2-ER-272; *see Dominguez*, 2022 WL 1564552, at *6 (without information about "value of their claims[,] . . . class members cannot make an informed decision about whether to accept or reject" the agreement (citation omitted)); *Johnson*, 2017 WL 4236798, at *6 (finding communication to class members misleading in part because it misstated the length of the class period).

The statements about this class action were particularly misleading given that TEK's "emails disparaging class actions and class action attorneys were the first communication many putative class members received about the case." 1-ER-13. Indeed, as the district court pointed out at the motion to compel hearing, by sending out the first communication to class members and requiring, essentially, an "opt-in" process, TEK "usurped the Court's ability to manage the opt-out process"—and in doing so, used language disparaging class actions that a court would never have approved in a class notice. 2-ER-32. Making things worse, the email to class members

stated only that class members were "of course free to consult your attorney" without providing contact information for class counsel or explaining that they could consult class counsel for free about the case. 2-ER-200. The district court reasonably concluded that a worker would read that to mean that they must pay an attorney to advise them, which most workers are unlikely to be able to afford. 1-ER-13.

Second, TEK's communications were coercive. The arbitration agreement was self-executing, meaning that if class members took no action, they would be bound to it and give up their rights in this class action. *See Piekarski v. Amedisys Illinois, Inc.*, 4 F. Supp.3d 952, 956 (N.D. Ill. 2013) (finding arbitration agreement imposed during litigation coercive in part because it "was binding on all employees unless they affirmatively opted out of the agreement"); *Tomkins*, 2014 WL 129401, at *2 ("[T]he Court is troubled that defendant unilaterally issued a self-executing arbitration agreement that substantively affects the rights of putative members in this litigation."); *Williams v. Securitas Sec. Servs. USA, Inc.*, 2011 WL 2713741, at *2 (E.D. Pa. July 13, 2011) (finding that self-executing arbitration agreement "stands the concept of fair dealing on its head and is designed to thwart employees of Securitas from participating in this lawsuit"). As *Williams* explained, "[l]ay persons commonly understand a document labeled an 'agreement' which is presented to them unsigned and not previously negotiated as not binding on them until they agree to it by affixing their signatures." 2011 WL 2713741, at *2. That is particularly true here,

where workers were asked to affirmatively sign even though the agreement was self-executing.

The communications were also coercive because the first email and the Arbitration Agreement both stated that arbitration was a condition of employment, and only the later second email provided an option to sign a *different* document to opt out—the deadline for which was after the Agreement supposedly went into effect. 1-ER-14-15; 2-ER-200. At best, then, workers were left with conflicting information about whether they would lose their jobs if they did not agree to arbitration. *See Dominguez*, 88 F.4th at 792 ("This coercive tactic—telling employees they would be fired if they did not agree to have claims already being asserted on their behalf in a pending lawsuit channeled out of that collective and class action in a federal court into individual arbitrations—smacks of retaliation and interference with both federal and state statutory rights."); *see also Dominguez*, 2022 WL 1564552, at *5 (finding agreements coercive where employer sent invitation to sign arbitration agreement in one email and then sent a different email providing information about the pending lawsuit a day later).

Further heightening the coercive nature of the emails was the time pressure of being asked to make a decision in only three weeks over the holidays, 1-ER-15, and the fact that workers were told not to share the email they received about opting out, thus discouraging workers from seeking advice as to whether they should opt out of

the agreement. *See Dominguez*, 2022 WL 1564552, at *6 (finding communication misleading and coercive because it "warned [class] members that they could not share the email").

TEK contends that the district court clearly erred because it did not rely on class member testimony to find that any class member was subjectively misled or coerced into signing the agreement. Opening Br. 34-35. But proof that class members were subjectively misled is not required before issuing an order under Rule 23(d). In *Dominguez*, this Court held that the district court had made the requisite findings under *Gulf Oil* because it "carefully parsed [the defendant's] communications and determined that they were misleading," 88 F.4th at 791, and it "also paid attention to the timing of the messages, to how the different messages presented inconsistent and thus confusing information, and to missing content that could have helped employees better evaluate their options," *id.* at 792. That is exactly what the district court did here, and no more was required.

TEK alternatively argues that, even assuming the communications were misleading or coercive, the district court abused its discretion by invalidating the agreements rather than providing a "simple corrective notice" or other unspecified "alternative, narrower remedies." Opening Br. at 39-41. But the court's decision to invalidate the arbitration agreements flows directly from its conclusion that the way those agreements were *entered* was coercive and misleading. *See Dominguez*, 2022 WL

1564552, at *6 (finding it "necessary to invalidate the agreements" after concluding that they "were obtained through coercive or misleading information"). If the court did not invalidate the agreements, class members who were misled or coerced into waiving their right to participate in this action would have no recourse. Corrective notice may help prospectively, but it does not provide relief to class members who were already misled into agreeing to individual arbitration. Invalidating the agreements was the only way to ensure that the action was administered fairly and that, if class members do decide to not participate in the class action, they do so knowingly and voluntarily by opting out in response to court-approved class notice.

TEK relies on *McKee* to argue that the district court should have stopped short of invalidating the agreements. Opening Br. at 41. But the court in *McKee did* invalidate the arbitration agreements: it concluded that arbitration agreements entered into during the period when Audible had a coercive and misleading sign-up process were "null and void." 2018 WL 2422582, at *8. As the court explained, nullifying the agreements "remedies Audible's ability to use coercion and/or incomplete information to shrink the size of Plaintiff's potential class." *Id.* The same is true here.

D. Whether an agreement should be invalidated under Rule 23(d) is a question for a court, not an arbitrator.

TEK argues that the district court erred in reaching the Rule 23(d) issue because whether the agreements should be invalidated must be decided by an arbitrator. Opening Br. at 42. TEK points to the fact that the arbitration agreement cites "the

JAMS Employment Arbitration Rules and Procedures, which specify that arbitrators have the power to determine their own jurisdiction." *Id.* It contends that the passing reference to the JAMS rules in the agreement reflects a clear agreement to delegate threshold "arbitrability" issues like "validity" to the arbitrator. *Id.*; *see also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." (cleaned up)). That is wrong for several reasons.

First, the court's inherent authority to manage class proceedings—including by invalidating the fruit of improper communications with class members—cannot be delegated to an arbitrator. "[D]istrict courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases." *Dietz v. Bouldin*, 579 U.S. 40, 47 (2016). "Rule 23(d) is a specific application of this broad case management authority in the class action context." *Cornet v. Twitter, Inc.*, 2022 WL 18396334, at *1 (N.D. Cal. Dec. 14, 2022). Private parties, therefore, cannot simply divest the court of this inherent power by signing an arbitration agreement. To allow them to do so would hobble district courts' ability to manage their dockets by taking away an important tool for protecting class members and managing class proceedings.

Indeed, holding that the Rule 23(d) issue should be delegated to the arbitrator would be the same as holding that TEK's misleading communications to the class

cannot be remedied at all, as an arbitrator in an individual arbitration would not have the power to issue a corrective order under Rule 23(d). TEK appears to recognize as much, stating that Plaintiffs can instead challenge the agreement on "unconscionability grounds" before the arbitrator. Opening Br. at 43. But the requirements for unconscionability are different than Rule 23(d), and an agreement may interfere with a class action even if it is not unconscionable: "Unconscionability is a contract doctrine. Rule 23(d) is a means of managing class actions." *Chen-Oster v. Goldman, Sachs & Co.*, 449 F.Supp.3d 216, 271 (S.D.N.Y. 2020). Thus, if the Court accepts TEK's argument, defendants like TEK would be free to improperly coerce and mislead class members into waiving their rights, so long as they also coerced and misled them into agreeing to a delegation clause while they were at it.

Second, even if an agreement could delegate the court's inherent authority to manage a class action—which it cannot—the delegation clause here is invalid for the same reason as the rest of the agreement: it was obtained through misleading and coercive communications with class members. As the Supreme Court recently explained, "[a]rbitration and delegation agreements are simply contracts, and, normally, if a party says that a contract is invalid, the court must address that argument before deciding the merits of the contract dispute." *Coinbase, Inc. v. Suski*, 602 U.S. 143, 151 (2024). As a result, "if a party challenges the validity of the precise agreement to arbitrate at issue, the federal court must consider the challenge before

ordering compliance with that arbitration agreement." *Id.* (cleaned up) (quoting *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010)). Here, because the entire agreement—including the purported delegation provision—was the product of coercive and misleading communications, the court was required to decide whether those communications were grounds for invalidating the agreement before it could enforce *any* portion of the agreement, including the delegation clause.

Finally, the Rule 23(d) issue should not be delegated to the arbitrator because there is no delegation clause in the agreement. TEK cites not a single case to support its contention that the reference to the JAMS rule is sufficient to send the Rule 23(d) issue to the arbitrator. Opening Br. at 42. This Court has only ever addressed whether citing to arbitral rules is sufficient to delegate arbitrability in the context of a contract between "sophisticated parties," holding that referencing JAMS or AAA rules was sufficient to "clearly and unmistakably" delegate an unconscionability challenge to the arbitrator. *Brennan v. Opus Bank*, 796 F.3d 1125, 1131 (9th Cir. 2015); *see also Patrick v. Running Warehouse, LLC*, 93 F.4th 468, 481 (9th Cir. 2024) (applying *Brennan* to JAMS rules and noting that the Ninth Circuit "has not yet decided whether *Brennan*'s holding should extend to arbitration clauses . . . between a sophisticated entity and an average unsophisticated [party]"). This case is distinguishable from those cases for at least two reasons.

First, unlike the high-level bank executive in *Brennan*, Plaintiffs are unsophisticated entry-level workers. And there is good reason to treat unsophisticated parties differently. As the Supreme Court explained when adopting the "clear and unmistakable" standard, the question of who decides arbitrability "is rather arcane." *First Options of Chi., Inc.*, 514 U.S. at 945. As a result, "[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *Id.* And as this Court has repeatedly recognized, a party's sophistication (or lack thereof) impacts their understanding of what a contract means—and is therefore relevant to determining the intent manifested by that contract. *See, e.g.*, *Sierra Diesel Injection Serv., Inc. v. Burroughs Corp.*, 890 F.2d 108, 112 (9th Cir. 1989) (sophistication relevant to determining parties' intent as to whether a contract is final); *In re Foam Sys. Co.*, 893 F.2d 1338, at *3 (9th Cir. 1990) (tbl) (sophistication relevant to determining whether contract created a trust). That is particularly so when an unsophisticated worker is faced with an agreement that does not mention the term delegation at all but rather references rules that they then need to cross-reference and read in their entirety to understand what powers the agreement may be delegating to an arbitrator. Indeed, if the sophistication of the parties were irrelevant, this Court's decision in *Brennan* would make no sense because there would be no reason for this Court to distinguish between sophisticated parties, for whom the Court held incorporation of arbitral rules meets the clear and unmistakable standard,

and unsophisticated parties, as to whom the Court withheld judgment. *See* 796 F.3d at 1130.

For those reasons, multiple district courts in this Circuit have held that, in the context of an unsophisticated party, a reference to a set of arbitral rules that supposedly include a delegation clause cannot be clear and unmistakable evidence of their intent to delegate questions of enforceability. *See, e.g.*, *Lewis v. Kelly Servs. Global LLC*, 2024 WL 5220080, at *4 (C.D. Cal. Nov. 7, 2024), *appeal docketed*, No. 24-7483 (9th Cir. Dec. 6, 2024); *Eiess v. USAA Fed. Sav. Bank*, 404 F.Supp.3d 1240, 1253-54 (N.D. Cal. 2019); *Calzadillas v. Wonderful Co., LLC*, 2019 WL 2339783, at *4 (E.D. Cal. June 3, 2019); *DeVries v. Experian Info. Sols., Inc.*, 2017 WL 733096, at *10 (N.D. Cal. Feb. 24, 2017); *Ingalls v. Spotify USA, Inc.*, 2016 WL 6679561, at *3 (N.D. Cal. Nov. 14, 2016); *Mikhak v. Univ. of Phoenix*, 2016 WL 3401763, at *5 (N.D. Cal. June 21, 2016); *Money Mailer, LLC v. Brewer*, 2016 WL 1393492, at *2 (W.D. Wash. Apr. 8, 2016); *Vargas v. Delivery Outsourcing, LLC*, 2016 WL 946112, at *7-8 (N.D. Cal. Mar. 14, 2016).

Second, the unconscionability challenges in *Brennan* and *Patrick* were undisputedly the type of challenges that fell within the reference in the JAMS rules to the arbitrator's authority to decide disputes about "validity" or "interpretation" of an arbitration agreement. But, as described above, the JAMS rules neither explicitly nor implicitly give an arbitrator the authority to issue orders under Rule 23(d) in an

individual arbitration. Indeed, the Federal Rules of Civil Procedure usually do not apply in arbitration at all. As a result, even if incorporation of the JAMS rules could be read to delegate questions of "validity" of the arbitration agreement to the arbitrator, it is not at all "clear and unmistakable" that the parties' reference to the JAMS rules delegated to an arbitrator the court's authority—grounded in the Federal Rules of Civil Procedure—to manage its docket by invalidating arbitration agreements that were obtained in a manner that interfered with the fairness of a class action. Thus, there is no agreement delegating this question to the arbitrator.[2]

II. Alternatively, The District Court's Decision Should Be Affirmed on The Ground That No Arbitration Agreement was Formed.

For the same reasons that the agreement was misleading under Rule 23(d), the Court can affirm on the alternative ground that no arbitration agreement was formed between TEK and class members.[3] To form a contract under California law, there

[2] TEK also asserts in a footnote that the arbitration agreement delegates disputes about the arbitrability to an arbitrator because "arbitration is a condition of employment, and any dispute about the 'terms and conditions' of employment is subject to arbitration." Opening Br. at 54 n.14. But that contradicts TEK's position in this litigation that arbitration was *not* a condition of employment because TEK provided an opportunity for class members to opt out. *See id.* at 34-35. And, in any event, TEK has provided no support for the proposition that the reference to "terms and conditions" of employment, standing alone, was sufficient to clearly and unmistakably delegate arbitrability to the arbitrator.

[3] This Court "may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning [this Court] adopt[s]." *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003).

"must be actual or constructive notice of the agreement and the parties must manifest mutual assent." *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 512-13 (9th Cir. 2023). Here, the misleading roll out of TEK's arbitration policy prevented any contract from being formed for at least two reasons.

First, class members lacked even constructive notice of the rights they were waiving by signing the agreement. Rather than put class members on notice, the emails TEK sent to class members provided false and misleading information about this lawsuit specifically and class actions generally. California courts have held that there is no notice of, and thus no mutual assent to, a contract if the context in which the contract is formed is misleading or leaves out important information. *See, e.g.*, *Herzog v. Superior Ct.*, 101 Cal.App.5th 1280, 1299 (Cal. Ct. App. 2024), *review denied* (Aug. 28, 2024) (finding lack of mutual assent where website described some terms but omitted key information about legal rights plaintiff was giving up by agreeing); *Doe v. Massage Envy Franchising, LLC*, 87 Cal.App.5th 23, 32 (Cal. Ct. App. 2022) (finding lack of mutual assent where online sign-in process suggested that consumer was entering an agreement with a different party).

Here, TEK's false characterization of class litigation as a "wasteful inefficient means for resolving disputes" that "tend[s] to enrich only attorneys rather than the individuals who may have legitimate claims," 2-ER-263, 270, did not put class members on notice that they were being asked to waive an important right to join with

other workers to bring claims that they may not otherwise be able to afford to bring individually. In fact, it gave the false impression that class actions are harmful and that they would have to pay money in a class action but would save money by agreeing to arbitration. *See* 2-ER-262 (characterizing arbitration as "more efficient and cost effective for both employees and the Company"); 2-ER-272 (stating that class action attorneys often "charg[e] exorbitant fees to both the class and the employer involved, reducing the money actually received by class members"). As noted above, that is not true. Indeed, switching to individual arbitration at such a late stage in the case—if class members could even find an attorney to individually represent them—would be neither "efficient nor cost effective." For that reason, TEK's unequivocal statement that arbitration will not be "more expensive" than litigation was false. Likewise, TEK's false statements that "[a] class claim requires the Company to ignore individual employee issues and concerns" and that "attorneys, not employees, are often the biggest winners in class actions," 2-ER-272, misled workers about the actual rights they were giving up by signing the agreement. Moreover, the opt-out agreement was insufficient because it failed to accurately inform class members what the class action was about, stating that the claims in the class action are for "back overtime pay and various penalties," 2-ER-200, even though the lawsuit was seeking *ongoing* overtime wages through the present and additional damages—not

"penalties"—for violations like unpaid meal and rest breaks, which are not mentioned in the notice at all.

In short, because they were rife with misleading and disparaging statements about class actions and this case, the communications to class members were insufficient to provide notice of the rights and benefits class members were giving up by agreeing to opt out of the class action and arbitrate their claims individually.

Second, the confusing information about how to accept the agreement was insufficient to put class members on notice of what conduct would constitute assent. A party can manifest assent through conduct, but "the conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents." *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 855 (9th Cir. 2022) (quoting Restatement (Second) of Contracts § 19(2) (1981)). Here, the arbitration agreement states in all capital letters: "YOU WILL BE DEEMED AS HAVING ACCEPTED THIS AGREEMENT IF YOU REMAIN EMPLOYED BY TEKSYSTEMS ON OR AFTER JANUARY 1, 2024." 2-ER-266. And it contains a clause stating that it supersedes any prior agreement between the parties. 2-ER-267. But the separate notice and opt-out agreement sent to class members provides conflicting information, stating that class members will be bound by the arbitration agreement unless they opt out by "signing below and returning this form no later

than January 9, 2024." 2-ER-200. Read together, the two agreements are confusing at best and conflicting at worst, particularly given the clause stating that one could supersede the other. 2-ER-267. In particular, they provide different answers to the question of whether a worker who takes no action but remains employed after January 1, 2024, is bound to the arbitration agreement. And the arbitration agreement both asks for a signature and provides that anyone who does *not* sign anything is bound. *See Williams*, 2011 WL 2713741, at *2 (explaining that labeling a document "agreement" suggests to a lay person that they will not be bound unless they take affirmative action to agree). In short, this confusing, unclear, and conflicting information fails to provide class members with adequate notice that by doing nothing, they would be assenting to waive their right to participate in this action.

III. TEK Waived Its Right to Compel Arbitration.

The district court also correctly held that TEK waived both its right to impose arbitration agreements on class members and its right to enforce those agreements. 1-ER-15-16. Waiver occurs when a party (1) "has knowledge of" an existing right and (2) "acts inconsistently with that right." *Hill v. Xerox Business Servs., LLC*, 59 F.4th 457, 468 (9th Cir. 2023). Both elements are met here because TEK used arbitration as a back-up plan, waiting until more than a year into the litigation to roll out individual arbitration agreements to its employees and then waiting until after it had lost at class certification to move to compel arbitration.

First, TEK waived its right to unilaterally impose an arbitration policy on class members. Parties "can waive almost any right," "even constitutional rights." 1-ER-16 (citing *Fox v. Johnson*, 832 F.3d 978, 989 (9th Cir. 2016)). As the district court found, "TEK knew of its right to impose a mandatory arbitration agreement even before it removed the action to" federal district court. 1-ER-16. Indeed, TEK's contractor employees already had mandatory arbitration provisions in their contracts. SER 52-53 ¶ 8. TEK then acted inconsistently with that known right by engaging in hard-fought litigation in court and waiting until after the parties had engaged in discovery for more than a year and had briefed class certification to impose agreements requiring individual arbitration. That was waiver.

Second, TEK waived its right to compel arbitration once the agreements went into effect. TEK implemented its arbitration program in December 2023, and the arbitration agreements took effect at the start of January 2024. 1-ER-15. At that time, as the district court correctly held, TEK had "knowledge of an existing right to compel arbitration." 1-ER-16. Yet, TEK engaged in "intentional acts inconsistent with" that right, *Hill*, 59 F.4th at 468, because it chose "to delay [its] right to compel arbitration by actively litigating [its] case to take advantage of being in federal court," *id.*at 471, waiting more than six months and until *after* it lost its motion for class certification to decide to move to compel arbitration. Accordingly, TEK waived its right to enforce the arbitration agreements.

Although each of these waivers alone would warrant denying TEK's motion to compel arbitration, TEK's nearly two-year delay in implementing its mandatory arbitration policy *combined* with its subsequent six-month delay in moving to enforce the agreements make TEK's waiver of its right to arbitrate undeniable. Despite having the ability to impose mandatory arbitration on its employees at the inception of the case and despite having concrete plans since at least September 2023 to implement a mandatory arbitration policy, TEK did not inform the court or Plaintiffs that it intended to compel arbitration at any point during the class action proceedings. *See Degidio*, 880 F.3d at 141 (defendant "did not need to wait to inform the district court about its arbitration strategy until [workers] who had signed arbitration agreements joined the case."). To the contrary, even at the January 4, 2024 hearing on the motion for a protective order, TEK indicated that it had not decided whether to file a motion to compel. 2-ER-221. Then, at the class certification hearing on February 1, 2024—a month after the arbitration agreements went into effect—TEK did not say a word about arbitration. SER 102-32.

In other words, TEK intentionally avoided even mentioning that it intended to compel arbitration until after it learned on February 13, 2024, that its effort to oppose class certification had failed. Only after it was clear that it would be required to litigate Plaintiffs' claims on a class-wide basis did TEK decide to move for individual arbitration. That delay was even more problematic because TEK's motion to

compel also came after Plaintiffs filed their motion for summary judgment, which has since been granted. Courts do not tolerate delaying the invocation of arbitration "as a strategy to manipulate the legal process," *Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 427 (D.C. Cir. 2008) (quotation marks omitted), nor do they permit parties to play "heads I win, tails you lose" by shifting fora as soon as one seems inhospitable, *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995). As the district court concluded, "[s]uch wait and see conduct is inconsistent with the right to arbitrate." 1-ER-15.

Other courts have found waiver under nearly identical circumstances where, as here, a defendant waits to roll out arbitration agreements until litigation is pending and then fails to move to enforce them until after it loses at class certification. *See Degidio*, 880 F.3d at 138-39; *Scott v. Fam. Dollar Stores, Inc.*, No. 08 Civ. 540, 2017 WL 4126354, at *1 (W.D.N.C. Jan. 4, 2017), *aff'd*, 2017 WL 4084059 (W.D.N.C. Feb. 9, 2017). As in this case, in *Degidio*, the defendant waited until more than a year into the litigation, "at the very end of the discovery period," to begin entering into arbitration agreements with putative class members. 880 F.3d at 138. Then, it waited about another two months until it filed its opposition to the plaintiff's motion for class certification to raise arbitration for the first time. *Id.* at 139. The Fourth Circuit held that the defendant waived its right to compel arbitration by "employ[ing] judicial proceedings to pursue a litigation strategy for over three years." *Id.* at 141.

Like TEK here, the defendant "did not seek to use arbitration as an efficient *alternative* to litigation; it instead used arbitration as an insurance policy in an attempt to give itself a second opportunity to evade liability." *Id.* (emphasis original).

Similarly, in *Scott*, the court found that the defendant had waived its right to compel arbitration by waiting until one month after oral argument in the court of appeals on class certification to "solicit putative class members to sign agreements opting for arbitration rather than participation as members of the class in this case" and then moved compel arbitration only after the order certifying a class was affirmed on appeal. *See* 2017 WL 4126354, at *1. The court found that "Defendant's decision to litigate the class certification issue prior to pursuing arbitration is contrary to the purpose of arbitration which is to reach full settlement of disputed matters without litigation." *Id.* (cleaned up). Likewise, here, TEK's decision to wait until losing on class certification was inconsistent with its right to compel arbitration. *See id.* (collecting cases finding waiver when party did not move to compel until after class certification).

TEK nevertheless argues that it did not waive its rights to impose or enforce arbitration agreements. Each of its arguments miss the mark. TEK first contends that it did not have an "existing right" to compel arbitration of absent class members until the class was certified and the notice period closed on June 15, 2024. Opening Br. at 47. But this Court rejected the very same argument in *Hill*: the fact that "the district

court could not compel nonparties to the case to arbitrate until after a class had been certified and the notice and opt-out period were complete" did not negate the existing right. 59 F.4th at 469. As this Court emphasized, "we have never suggested that for waiver purposes, knowledge of an existing right to arbitrate requires a present ability to move to enforce an arbitration agreement." *Id.* As a result, the defendant "had knowledge of and knew how to assert its right to compel arbitration . . . well before class certification and notice was complete." *Id.* at 471. That makes sense: even if a court could not compel absent class members to arbitrate until after class certification, a defendant's assertion of the right before or during class certification proceedings "would have fundamentally changed the course of the litigation, ensured a more expedient and efficient resolution of the trial, and prevented [] improper gamesmanship." *In re Cox Enters., Inc. Set-top Cable Television Box Antitrust Litig.*, 790 F.3d 1112, 1119 (10th Cir. 2015). Thus, TEK's argument that it did not have an "existing right" until June 15, 2024 fails. And, in any event, TEK's argument is undermined by the facts: it has not explained why, if it did not have a right to move to compel arbitration until after June 15, it was able to do so on June 10.

TEK also takes issue with the court's conclusion that it had an existing right to impose arbitration on its employees even before the arbitration agreements went into effect. 1-ER-16; *see* Opening Br. at 49-52. Because TEK at a minimum had an existing right to compel arbitration at the time the arbitration agreements went into

effect, the Court need not reach this issue if it concludes that TEK acted inconsistently with its right to compel arbitration after that point. Nonetheless, TEK is wrong. As the district court explained, from the beginning of the litigation, TEK had the right to unilaterally implement an arbitration policy for its employees, 1-ER-16, and that was true even if it lacked the "present ability to move to enforce an arbitration agreement." *Hill*, 59 F.4th at 469.

Consistent with *Hill*, the *Degidio* court rejected the defendant's argument there that it could not move to compel arbitration until after the arbitration agreements were signed and a class was certified. 880 F.3d at 142. It explained that, if anything, the late roll out of arbitration agreements was even more inconsistent with the right to arbitrate: "When such agreements are executed during the pendency of litigation, there is an increased risk that arbitration will operate not to expedite the resolution of disputes, but to prolong the entire process and to give defendants a second opportunity to contest unfavorable judgments." *Id.* The same is true here. Indeed, TEK's waiver is even more egregious because, rather than imposing arbitration and then waiting only two months to try to enforce the agreements during class certification briefing like the defendant in *Degidio*, TEK waited for more than six months and until after it had lost at class certification before moving to compel.

TEK also contends that it did not waive its right to enforce the arbitration agreements because it raised arbitration with class counsel and the district court.

Opening Br. at 48. As an initial matter, "[a] statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver." *Hill* 59 F.4th at 471 (quoting *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016)). And the communications TEK cites simply bolster the argument that its actions were inconsistent with enforcing its right to arbitrate. TEK first points to the fact that it notified class counsel about the arbitration agreement after it was rolled out on December 19, 2023. It does not help its cause that, though it had been planning to impose arbitration agreements since mid-2023, TEK waited until *after* they had been sent to class members and after class certification briefing was complete to notify class counsel—and not the court—about the agreements. *See* SER-40-41; *Degidio*, 880 F.3d at 141. Had TEK simply notified the court of its plans to roll out an arbitration agreement *before* it did so, "the trial judge would have been able to monitor communications between [TEK] and potential plaintiffs," thus avoiding the coercive and misleading communications that ultimately resulted. *Id.* Moreover, it was Plaintiffs—not TEK—who informed the court of the communications when they filed their emergency motion for a protective order. 3-ER-316-34. It is unclear when—if at all—TEK would have mentioned the arbitration agreements to the court.

TEK's statements at the hearing on the motion for a protective order do not help it either. Rather than say whether it would be moving to compel, TEK stated, "*if* we decide to make that argument down the road, it will only be because we think

we have a good faith basis to assert it, and we'll make our case to the judge then."2-ER-221 (emphasis added). In other words, TEK was waiting to see what happened at class certification before deciding whether to use arbitration as an escape hatch "down the road." That gamesmanship is inconsistent with preserving the right to compel arbitration.

TEK also points to the fact that, *after* the class was certified, in a March 7, 2024, Joint Case Management Order, it stated that it "intended to move to compel arbitration . . . within one week of the close of the notice period." Opening Br. at 48. That statement, coming after TEK had lost at class certification, was too late. It only confirms that TEK was in fact using arbitration as a back-up plan in case a class was certified. Moreover, at the Case Management Conference held on March 14, 2024, the court expressly *rejected* TEK's proposed timing, stating "I see no reason why the motion to compel arbitration can't be filed while notice is going out." SER-71. The court then told counsel for TEK to "start working on" the motion to compel, warning that, at the next case management conference in early April, "I may tell you to file it by the next week." SER-71-72. But rather than doing as the court directed, TEK continued to sit on its rights as the parties negotiated and sent out notice to class members, a briefing schedule for summary judgment was set, and Plaintiffs filed a motion for partial summary judgment on the merits. In short, despite the court repeatedly telling TEK to file its motion to compel—after it had already failed to do

so for months—it intentionally did not do so on the timeline the court requested. That is the textbook definition of waiver.

Next, TEK argues that the district court's waiver ruling disfavored arbitration agreements by holding that TEK waived its right to impose an arbitration agreement on its employees. Opening Br. at 50. To begin with, as in *Degidio* and *Scott*, the district court's holding was not based solely on the timing of the imposition of the arbitration agreements but also on the fact that TEK then waited to enforce those arbitration agreements—even though they were undisputedly in effect—until after class certification. 1-ER-15-16. In any event, contrary to TEK's argument, the district court's holding did not apply "only to arbitration agreements," nor did it "derive [its] meaning from the fact that it was an arbitration agreement at issue." Opening Br. at 50 (quoting *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 650 (2022)). The basic waiver principles underlying the district court's opinion apply to waiver of any right, not just the right to compel arbitration. *See Morgan*, 596 U.S. at 417. For example, the waiver analysis would have been the same had TEK rolled out an agreement with a forum selection clause in the middle of litigation and then sought to transfer this case to another forum after it lost in the district court on class certification. *See Allen v. Scribner*, 812 F.2d 426, 436 (9th Cir. 1987) (motion to transfer venue denied because it was filed following substantial litigation).

TEK argues that a defendant would not "waive its ability to offer a settlement contract to a plaintiff by litigating the case first for 18 months." Opening Br. at 51. True, but that misses the point. Waiver occurs when a litigant acts "inconsistently" with a known right. *Hill*, 59 F.4th at 460. Litigating for years in court is not inconsistent with the right to enter into a settlement agreement. Indeed, settlement positions may change over the course of litigation, and it is not unusual for a case to settle right before or during trial. On the other hand, litigating in one forum *is* inconsistent with exercising the right to litigate in another one, in this case, arbitration.

In short, TEK does not contest that the FAA allows courts to find that a party waived the right to *compel* arbitration by litigating a case for years and moving to compel only after a class was certified. But it asks this Court to create a loophole by holding that a party who waits until years into the litigation to *impose* arbitration agreements and *then* moves to compel arbitration only after a class was certified is in the clear. As the district court found, "[i]n either scenario the employer litigated the case rather than take actions to impose arbitration. It is thus unsurprising that TEK could not find any case anywhere that draws the distinction it urges the Court to make." 1-ER-16.

Finally, TEK argues that the question of whether it waived the right to compel arbitration is for the arbitrator to decide. Ninth Circuit precedent forecloses that argument, making clear that waiver is for the court to decide, even in the presence of

a clear delegation clause. *See Martin*, 829 F.3d at 1124 ("We have made clear that courts generally decide whether a party has waived his right to arbitration by litigation conduct."). As it must, TEK acknowledges that this is the Ninth Circuit rule, but argues that the district court "did not actually find that TEK waived its right to compel arbitration through 'litigation conduct.'" Opening Br. at 55. Nonsense. The district court's holding here is no different than any other waiver case: it concluded that TEK's conduct in the litigation—its "litigation conduct"—was inconsistent with exercising its known rights to impose arbitration agreements and to compel arbitration. 1-ER-15-16. It is precisely that issue that this Court has held is for a court to decide.

CONCLUSION

For these reasons, the Court should affirm the district court's denial of TEK's motion to compel arbitration.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,958 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Times New Roman font.

Dated: March 14, 2025

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 14, 2025. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the appellate CM/ECF system.

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