NCLC would like to thank Karla Gilbride, an attorney with the national nonprofit legal advocacy organization Public Justice, for contributing this pleading.

No. 15-15437

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SFBSC MANAGEMENT, LLC,
Defendant-Appellant,

vs.

JANE ROES 1-2
Plaintiffs-Appellees.

Appeal from the United States District Court
for the Northern District of California
Case No. 3:14-cv-03616-LB
The Honorable Laurel Beeler

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

ABBREVIATIONS USED IN THIS BRIEF

AC: Amended Complaint

AOB: Appellant's Opening Brief

ER: Appellant's Excerpts of Record

SER: Appellees' Supplemental Excerpts of Record

STATEMENT OF THE ISSUES PRESENTED

1. May SFBSC compel Plaintiffs to arbitrate their claims, despite not being a signatory to the contract containing the arbitration clause, as an alter ego, agent, or principal of the signatory nightclubs, where it offered no evidence to establish an agency or alter ego relationship, denied allegations regarding its control over the nightclubs' activities, and submitted declarations distancing itself from the nightclubs' operations?

2. May SFBSC compel Plaintiffs to arbitrate their claims, despite not being a signatory to the contract containing the arbitration clause, under the doctrine of equitable estoppel when the Complaint alleges statutory violations and common law conversion, does not rely upon the contract containing the arbitration clause for any of its claims, and does not allege a pattern of misconduct by SFBSC or a signatory of the contract regarding their obligations under the contract?

3. Did the district court properly find the arbitration provision and class action ban procedurally unconscionable based on Plaintiffs' evidence that they were pressured to review and sign the contract containing those clauses quickly when they were mostly naked and were told they had to accept the arbitration and class action ban clauses in order to continue working?

4. Did the district court properly find the class action ban, which prevented performers but not the nightclubs from bringing class or representative actions and consolidating claims with others, substantively unconscionable because it was explicitly one-sided and entitled the nightclubs to "fees and costs for enforcing" it?

5. Did the district court properly find the term allowing costs of arbitration to be split evenly between the parties to be substantively unconscionable given Plaintiffs' evidence of their inability to pay for an arbitrator's hourly fees and their likely abandonment of their claims in light of the risk of such costs?

6. Did the district court properly conclude under California law that these multiple unconscionable provisions should not be severed, as doing so would have required rewriting the contract?

An addendum of pertinent statutes follows this brief.

STATEMENT OF JURISDICTION

Appellees agree with Appellant's Statement of Jurisdiction. AOB at 4-5.

STATEMENT OF THE CASE[1]

I. Relationship Between SFBSC and the Nightclubs

Jane Roe 1 and Jane Roe 2 ("Plaintiffs")[2] allege in the Amended Complaint ("AC") that Defendant SFBSC Management, LLC ("Defendant," "BSC," or "SFBSC") has "operated, controlled," "dictated employment policies" and "maintain[ed] ownership . . . interests" at various nightclubs in San Francisco, including Hungry I, Centerfolds, Roaring 20's, Garden of Eden, Larry Flynt's Hustler Club, Little Darlings, Gold Club, Market Street Cinema, New Century, Showgirls, and Condor Gentlemen's Club ("the Nightclubs"). ER/518 ¶2; ER/520 ¶9. The AC further alleges that "[e]ach of the Nightclubs is controlled by senior management of Defendant, whose management controls the employment status, classification, and treatment of exotic dancers" and that "the Nightclubs share with

[1] Plaintiffs will not provide a full recitation of the facts and procedural history where that would be duplicative of facts presented by SFBSC, but will correct the factual presentation in areas where SFBSC's statement was incomplete or inaccurate.

[2] The district court permitted the plaintiffs in this action to use pseudonyms in all publicly filed documents. ER/558, Dkt. No. 32 (1/12/2015 order), published at *Roes 1-2 v. SFBSC Mgmt., LLC*, 77 F.Supp.3d 990 (N.D. Cal. 2015).

Defendant certain officers, directors, managers, and employees, who control material matters pertinent to the exotic dancers' work at the Nightclubs." ER/521 ¶13.

In its Answer, SFBSC denied all of these allegations, admitting only that "the listed nightclubs permit nude or semi-nude exotic dancing," SER 3 ¶9, and that SFBSC "provided consulting and administrative services, pursuant to written agreements, to the nightclubs listed in the AC, including marketing and advertising, human resources support, payroll coordination, and contract review and administration." SER 4 ¶13. Gary Marlin, who attests that he served as president of SFBSC from 2004 to 2013 and as a consultant for SFBSC thereafter, submitted multiple declarations in which he explained the relationship between Defendant and the Nightclubs in similarly minimalistic terms. ER/494 ¶3; ER/126 ¶3 (SFBSC does not own the Nightclubs and each of the Nightclubs has its own payroll, employees, tax ID number, bank accounts and business records).

Mark Calcagni, the general manager at the Condor Gentlemen's Club where Jane Roe 1 worked during 2014, submitted a declaration in which he stated that he was "not employed by BSC Management" and understood that "BSC is a management consulting company the Condor contracts with for management and administrative services." ER/131 ¶3. Craig Bordeau, the general manager of the

Gold Club, where both Jane Roe 1 and Jane Roe 2 worked, submitted a declaration including a similar statement about the club's relationship with BSC. ER/135 ¶4.

II. General Conditions Surrounding Performer Contracts at the Nightclubs

Darius Rodrigues, who worked at the Hustler Club and the Gold Club between December 2010 and August 2014, including in several management roles, submitted two declarations to the district court in which he described his experiences at the nightclubs and his knowledge of SFBSC policies and practices. ER/172-180; ER/86-88. Rodrigues explained that while each new dancer was given the "Offer of Employee status" form upon beginning at a club, the appearance of free choice communicated by that form did not match actual events, because dancers were instructed to sign and date the form on the line that states "I choose contract status." ER/176 ¶11.

Rodrigues explained that this lack of meaningful choice continued with respect to the Performer Contract that contained the arbitration clause and class action ban: "BSC executives and managers with oversight over all of the Nightclubs stated that each exotic dancer must agree to arbitration of disputes." ER/177 ¶12. During the time period when the Performer Contracts contained lines where a performer could "accept" or "reject" the arbitration and class action ban clauses, Managers "were directed to make sure that each woman initial [sic] the

'accept' line." *Id.* ¶¶13-14. Managers implemented this directive by highlighting the place where the performer was supposed to sign, or, in cases where a woman initialed "reject" instead, by firing her or intentionally "losing" the form where the "reject" option was chosen, and instructing her to fill out the form again "correctly." *Id.*

Rodrigues also stated that nightclub managers routinely rushed dancers to sign the contracts and did not explain terms, like "arbitration," to them. ER/87 ¶4. They also did not permit dancers to take the contracts home to review them, notwithstanding the statement on the contract that dancers should consult an attorney or another trusted person before signing. *Id.* Rodrigues also described other conditions in the Nightclubs suggestive of unequal bargaining power and an inability for dancers to make knowing, voluntary choices with respect to arbitration. *See* ER/86-87 ¶3 (dancers were encouraged to drink alcohol with customers and frequently used illegal drugs, with the knowledge and tacit acceptance of management); ER/87 ¶4 (dancers were given contracts to sign when they were mostly naked); ER/88 ¶¶7-9 (dancers were subjected to unwanted sexual advances by managers).

Although Rodrigues stated that BSC policy required all dancers to sign a Performer Contract, ER/176 ¶12, this policy was not always followed. Rodrigues estimates that at any given time during his employment at Hustler and Gold Club,

20% of the women performing as exotic dancers did not have a current "Performer Contract" in effect. ER/179-80 ¶26. He attributed these contract gaps to the fact that each Performer Contract had a specified ending date (usually January 31) and "oftentimes it would take months after that ending date for a new 'Performer Contract' to be signed for the next 12 month period." ER/180 ¶26.

III. Facts Specific to Plaintiffs Jane Roe 1 and Jane Roe 2

When Jane Roe 1 began working at the Gold Club in March of 2013, she was given a Performer Contract to sign and placed her initials next to the line indicating "reject" for both the arbitration clause and the class action ban. ER/246-247 ¶2. On March 6, 2013, she was approached by management at the Gold Club and told that they had "lost" the paperwork and that she needed to fill it out again, this time marking the line for "accept" on both of those paragraphs, if she wanted to continue working there. ER/247 ¶2. Roe 1 stated in her declaration that she "did not want to initial the 'accept' lines, but I had no choice but to follow the management's instructions because I needed the income in order to support myself and my family." *Id.* She therefore completed the Performer Contract again with the "accept" lines initialed. This is the version of the Performer Contract that appears in the record. ER/250-252.

That contract had an expiration date of January 31, 2014, but she was not asked to sign another contract at the Gold Club until approximately April of 2014,

despite continuing to work there. ER/247 ¶3.[3] When she signed her next Performer Contract at the Gold Club in April of 2014, and a subsequent Performer Contract at the Condor Club in June of 2014, she did not have the option to either "accept" or "reject" the arbitration clause and class action ban paragraphs in those contracts. ER/247-248 ¶¶3-4; ER/253-260. Roe 1 understood that these contracts were non-negotiable and could not be modified. *Id.*

Jane Roe 2 worked at Larry Flynt's Hustler Club from April to June of 2012. ER/261 ¶2. Marlin confirmed in his declaration that, based on tax records, Roe 2 had worked at Hustler Club during that time, but did not sign a Performer Contract there. ER/495 ¶10. Roe 2 next worked at Centerfolds for approximately two weeks in July of 2012 and at the Gold Club beginning in July of 2012. ER/261-262 ¶ ¶3-4. She signed Performer Contracts for both of these clubs, with expiration dates of January 31, 2013, in which she successfully initialed the line for "reject" next to both the arbitration clause and class action ban paragraphs. *Id.*; ER/266-271. However, when she signed her second Performer Contract with the Gold Club in February of 2013, again marking "reject" for both the arbitration clause and class action ban paragraphs, she had a similar experience to Jane Roe 1, where a

[3] Marlin's second supplemental declaration includes a contract extension purportedly signed by Roe 1 to cover the February 2014-April 2014 time period, ER/90-95, but this purported contract extension was the subject of disagreement before the district court, ER/52-54, 65-78.

manager came to her on February 11, 2013, told her that her contract had been "lost," and that she needed to fill it out again with initials on the "accept" line for those two paragraphs. ER/262-263 ¶5. Feeling she had no choice, she followed those instructions for both the February 2013 contract and another one she signed for the Gold Club in November of 2013. ER/263 ¶¶5-6; ER/272-277.[4] The last contract she signed with the Gold Club, dated April 11, 2014, did not include an option for her to "accept" or "reject" the arbitration clause or class action ban paragraphs. ER/263-264 ¶7; ER278-281. Roe 2 understood that the terms of these contracts were non-negotiable and could not be modified. *Id.*

Both Plaintiffs stated in their declarations that no one ever explained the term "arbitration" to them or that it involved loss of the right to a trial by jury. ER/248 ¶5; ER/264 ¶8. They also both attested that each time they were asked to sign one of these contracts, they were mostly naked, were told that the document was time-sensitive and needed to be signed right away, and did not have an opportunity to take it home with them to review. ER/248 ¶6; ER/264 ¶9.

Both Plaintiffs also attested to personal financial circumstances that would make it impossible for them to pay costs associated with arbitration. Roe 1 attested

[4] Marlin's second supplemental declaration includes a contract extension purportedly signed by Roe 2 to cover the February 2014-April 2014 time period. ER/90-95, but this purported contract extension was the subject of disagreement before the district court, ER/52-54, 65-78.

that she was in search of full-time work, had only $500 in savings and approximately $2,210 in monthly living expenses, as well as pre-existing debts. ER/248-249 ¶7. Roe 2 attested that she was unemployed, had $3,500 in savings and monthly expenses of $2,050, as well as pre-existing debts. ER/265 ¶10.

IV. Nature, and Current Status, of Plaintiffs' Claims

Plaintiffs have alleged that Defendant has implemented multiple illegal policies in all of its Nightclubs, including misclassifying exotic dancers as independent contractors rather than employees; requiring them to share their table dance tips with the nightclub; requiring them to "tip out" a portion of their table dance tips to managers, doormen, and other employees who do not usually receive tips; and refusing to pay exotic dancers any wages. ER/522 ¶14. Plaintiffs have pled ten causes of action in their AC, most of which allege violations of federal and California statutes regarding employee compensation and one of which alleges a violation of San Francisco's minimum wage ordinance. ER/537-543 ¶¶72-104, 543-546 ¶¶111-122. The AC also includes a claim for common law conversion. ER/543 ¶¶105-110.

SUMMARY OF THE ARGUMENT

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, the party seeking to compel arbitration has the burden of proving that an arbitration agreement exists and that it applies to the dispute at issue. SFBSC admits that it is

not a signatory to the Performer Contracts containing the arbitration provisions, as those contracts were entered into by Plaintiffs and the Nightclubs where they worked. And at every turn, SFBSC has denied exerting the sort of control over those Nightclubs that might enable it to compel arbitration as either an alter ego or principal of the Nightclubs. Thus SFBSC's attempt to enforce the arbitration provision under agency principles fails for lack of proof. Nor can it compel arbitration under the doctrine of equitable estoppel, for the allegations in the AC do not support a finding of equitable estoppel where the Performer Contracts were mentioned only in passing and are not the basis of any of Plaintiffs' claims.

As an independent, sufficient basis for affirming the district court's judgment, the arbitration provision and class action ban in the Performer Contracts were procedurally and substantively unconscionable. They were presented to performers as adhesive terms, and even when Plaintiffs tried to exercise the apparent option to reject them, they were often prevented from doing so. Moreover, the terms were presented as a condition of working at the Nightclubs, and Plaintiffs were rushed to sign them when they were mostly or completely naked. The substantively unconscionable aspects of these provisions included an explicitly one-sided ban on class actions which, when read in conjunction with the arbitration clause that prohibits consolidated claims, would allow the Nightclubs but not the dancers to bring collective or class actions in court—as SFBSC-

affiliated nightclubs have done in the past. On top of this, the fee-splitting provision allows an arbitrator to allocate the costs of arbitration in any manner, including a 50-50 split of all fees that would be financially ruinous to these low-income women, and that would prevent them from effectively vindicating their rights.

Finally, if this Court is inclined to find the arbitration provision and class action ban enforceable, a remand is necessary to determine the scope of that enforcement. First, each of the Performer Contracts has a defined temporal scope, and SFBSC cannot compel arbitration or prohibit collective action for time periods when no contract was in effect, or when Plaintiffs successfully rejected the arbitration provision and class action ban in the operative contract. Second, the Complaint in this case includes representative claims under the Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2699, and this Court has held that PAGA claims may not be waived through an arbitration agreement. *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015).

ARGUMENT

I. Standard of Review

This Court reviews a district court's decision to deny a motion to compel arbitration de novo. *Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1152

(9th Cir. 2004). The district court's factual findings are reviewed for clear error. *Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 917 (9th Cir. 2011).

One specific issue reached by the district court is subject to an even more deferential standard of review: whether or not to sever terms in a contract that have been found unconscionable is reviewed for abuse of discretion. *Bridge Fund Capital v. Fastbucks Franchise*, 622 F.3d 996, 1000 (9th Cir. 2010). Under the abuse of discretion standard, this Court may reverse the district court's decision only if that decision was [1] illogical, [2] implausible, or [3] without support in inferences that may be drawn from the facts in the record. *Forest Grove Sch. Dist. v. T.A.*, 638 F.3d 1234, 1238 (9th Cir. 2011) (citations and internal quotation marks omitted).

II. The Issues Raised in This Appeal Are for Courts, Not Arbitrators, to Decide.

By filing its motion to compel arbitration with the district court and never arguing before either the district court or this Court that an arbitrator should decide any of the issues raised by its motion, Defendant has correctly conceded that the courts are the proper forum for deciding the issues implicated by its motion to compel, including a) SFBSC's ability to enforce the arbitration clause as a nonsignatory and b) the clause's unconscionability.

In assessing whether a court or an arbitrator is to decide whether a particular arbitration provision is valid and enforceable, the U.S. Supreme Court has held that such authority is delegated to the arbitrator only if there is "clear and unmistakable evidence" that the parties intended such a delegation. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). (citations, internal quotation marks and alterations omitted). No such "clear and unmistakable evidence" exists here. *See Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir. 2013) (finding no clear and unmistakable evidence that arbitrator should decide whether arbitration clause between dealerships and car purchasers could be enforced by a nonsignatory car manufacturer).

III. SFBSC Does Not Have Standing to Enforce the Arbitration Provisions in the Performer Contracts as a Nonsignatory to Those Contracts.

SFBSC cursorily addresses a topic that took up most of the parties' attention in their briefing of the motion to compel arbitration before the district court: whether SFBSC may compel arbitration under the terms of Performer Contracts to which it was not a party. AOB at 63-67. This purely legal issue was fully developed in the district court record, its resolution is clear, and this Court would further the ends of justice by resolving it now. *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986). In resolving the nonsignatory issue, this Court need not consider the "federal policy favoring arbitration," AOB at 22 (quoting *Moses H.*

Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). That policy concerns "the scope of arbitral issues" rather than the parties who can invoke, or be bound by, arbitration agreements. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.11 (9th Cir. 2006). When the question, as here, is whether an arbitration provision applies to a particular party, "the liberal federal policy regarding the scope of arbitrable issues is inapposite." *Id.*

"The right to compel arbitration stems from a contractual right" that "may not be invoked by one that is not a party to the agreement and does not otherwise possess the right to compel arbitration." *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir, 1993). The means by which a nonsignatory would "otherwise possess the right to compel arbitration" are the "[g]eneral contract and agency law principles" of veil piercing/alter ego, agency, and estoppel. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009).

As the party seeking to compel arbitration under the FAA, SFBSC had the burden of establishing that an alter ego or agency relationship existed between itself and the signatory Nightclubs. Instead, SFBSC consistently denied Plaintiffs' allegations that it controlled operations at the Nightclubs, even offering declarations from SFBSC's former president and nightclub managers stating that the Nightclubs were autonomous and that SFBSC merely provided them with "administrative services." ER/131 ¶3; ER/494 ¶3. Moreover, SFBSC cannot

compel arbitration based on a theory of equitable estoppel where Plaintiffs' claims against SFBSC involve violations of federal, state and local labor laws; though the AC mentions the Performer Contracts on a few occasions, they are not referenced as a source of legal obligations binding upon SFBSC but rather are dismissed as an ineffective shield that cannot protect SFBSC from liability for statutory violations. ER/527 ¶ 33.

A. The Questions Surrounding SFBSC's Right to Compel Arbitration as a Nonsignatory Are Purely Legal and Were Fully Developed Before the District Court, and It Would Be Appropriate for This Court to Rule on Them.

SFBSC suggests that this Court should not reach the issue of its ability to enforce the arbitration clause as a nonsignatory because the district court did not rule upon it. AOB at 63. But the same cases that SFBSC cites for this proposition state that this Court has the discretion to decide an issue not reached by the district court where "the issue presented is a purely legal one and the record below has been fully developed." *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1094 (9th Cir. 2014) (citing *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986)); *see also Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003). In deciding whether to exercise its discretion, this Court considers "whether the resolution of the issue is clear and whether injustice would otherwise result." *Davis*, 755 F.3d at 1095.

Whether SFBSC may compel arbitration as an alter ego, agent, or principal of the signatory Nightclubs are purely legal questions. *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986) (whether a non-signatory may enforce an arbitration clause through contract and agency principles is an issue of law). And the record on those questions has been fully developed. Indeed, SFBSC addressed its nonsignatory status as a threshold matter in briefing below. ER/479-80. The issue was extensively discussed in the parties' district court briefs. ER/482-83; ER/154-157; ER/104-108; ER/79-83. The parties also argued the issue at the hearing on the motion to compel, before Judge Beeler indicated that she was likely to rule on unconscionability instead. ER/38-42.

Moreover, resolution of this issue is clear as a matter of California substantive law on alter ego, agency, and equitable estoppel, and as a matter of federal procedural law regarding the burden of proof when a party moves to compel arbitration under § 4 of the FAA. Also, under the second factor discussed in *Davis* and *Quinn*, failing to address this fully developed issue, and remanding for the district court to address it in the first instance, would result in injustice in the form of further delay in reaching the merits of the wage claims advanced by Plaintiffs and others who wish to opt in to their FLSA collective action. As demonstrated in their declarations, Plaintiffs are not financially equipped to wait for years to determine whether their claims can proceed in court.

SFBSC's standing to enforce the arbitration provision is a threshold issue that should be addressed before reaching the contract defense of unconscionability. *Britton v. Co-op Banking* Group, 916 F.2d 1405, 1413 n.9 (9th Cir. 1990). Unlike in Britton, however, the nonsignatory issues are fully developed, and this Court should reach them.

B. As a Matter of California Substantive Law and Federal Procedural Law, SFBSC Cannot Enforce the Arbitration Provision in the Performer Contracts as an Alter Ego, Agent, or Principal of the Signatory Nightclubs.

SFBSC maintains that it can compel arbitration under alter ego and agency theories because of allegations in the AC. AOB at 64-65 (supporting alter ego theory by citing ER/517, 520-23 ¶¶1, 9, 12, 13 and 16); AOB 66 (supporting agency theory by citing ER/521-23 ¶¶11, 13, 16). But in its Answer filed on March 16, 2015, Defendant denied all of the allegations in each of these paragraphs with two limited exceptions. It admitted that "the listed nightclubs permit nude or semi-nude exotic dancing," SER 3 ¶9, and that SFBSC "provided consulting and administrative services, pursuant to written agreements, to the nightclubs listed in the AC, including marketing and advertising, human resources support, payroll coordination, and contract review and administration." SER 4 ¶13.

SFBSC cites inapposite California cases for the proposition that allegations in a complaint constitute "judicial admissions" that enable the opposing party to

compel arbitration. *Rowe v. Exline*, 153 Cal.App.4th 1276, 1285 (2007) (a party explicitly sued as an alter ego of another entity that signed an agreement containing an arbitration provision, and where breach of that agreement was alleged as a cause of action in the complaint, was "entitled to the benefit of the arbitration provisions" despite not being a signatory) (citations and internal quotation marks omitted); *Thomas v. Westlake*, 204 Cal.App.4th 605, 614-15 (2012) ("a plaintiff's allegations of an agency relationship among defendants is sufficient to allow the alleged agents to invoke the benefit of an arbitration agreement executed by their principal even though the agents are not parties to the agreement").

But here, the AC does not include the explicit allegations of alter ego liability, let alone breach of the contract containing the arbitration provision, found dispositive in *Rowe*, 153 Cal.App.4th at 1280 ("The first cause of action is for breach of contract … based on an alter ego theory").

More fundamentally, *Rowe* and *Westlake* were decided under California's arbitration statute, California Code of Civil Procedure § 1280 et seq. Both cases turned on whether a particular exception under that statute permitted the court to decline to order arbitration because of the risk of inconsistent results with related, non-arbitrable claims involving third parties. Cal. Code Civ. Proc. § 1281.2(c) (a court may refuse to order arbitration where a "party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party,

arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact"); *Rowe*, 153 Cal.App.4th at 1282-83 (discussing applicability of Cal. Code Civ. Proc. § 1281.2(c)); *Thomas*, 204 Cal.App.4th at 612 (same).

By contrast, this appeal is governed by the FAA, and SFBSC has never argued to the contrary. ER/260 (Performer Contract states that "[a]ll disputes between the parties … shall be decided by binding arbitration, … pursuant to the Federal Arbitration Act."). Where the arbitration provision at issue specifies that disputes will be arbitrated "pursuant to the Federal Arbitration Act," California courts have reasoned that the procedural provisions of the FAA preempt state procedural law regarding arbitration and that Cal. Code Civ. Proc. § 1281.2(c) does not apply. *Rodriguez v. Am. Technologies, Inc.*, 136 Cal.App.4th 1110, 1116-22 (2006).

SFBSC contended at the hearing on its motion to compel that it could rely upon these California precedents, despite Plaintiffs' arguments to the contrary, because Justice Scalia wrote in his opinion in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009) that state contract law governs the question of whether nonsignatories may compel arbitration. ER/40-41. But *Arthur Andersen* specifically limited this holding to "background principles of state contract law regarding the scope of agreements (including the question of who is bound by

them) … if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Carlisle*, 556 U.S. at 630-31. California Code of Civil Procedure § 1281.2(c) is not a "background principle[] of state contract law" that "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." Rather, it is a statute dealing explicitly with arbitration procedure, and here, where the parties agree that the FAA applies instead, § 1281.2(c) and the *Rowe* and *Thomas* cases interpreting it are of no moment.

Under § 4 of the FAA, the procedural provision under which SFBSC brought its motion to compel arbitration, the party seeking to compel arbitration has the burden "to show (1) the existence of a valid, written agreement to arbitrate; and, if it exists, (2) that the agreement to arbitrate encompasses the dispute at issue." *Ashbey v. Archstone Prop. Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015). As the party with the burden of establishing that it may enforce the arbitration provisions in the Performer Contracts against Plaintiffs, SFBSC may not simply rely upon unverified allegations in the AC—let alone allegations that SFBSC has denied in its Answer. Instead it must offer evidence proving that it is entitled to enforce the provisions of those contracts under California law governing alter ego and agency. To the extent that it has offered any evidence on those issues, that evidence suggests just the opposite.

1. SFBSC May Not Compel Arbitration as the Nightclubs' Alter Ego.

In California, a party may pierce the corporate veil and hold the equitable owner of a corporation liable for the corporation's actions under an alter ego theory where "there is such a unity of interest and ownership that the individuality, or separateness, of such [equitable owner] and corporation has ceased" and where "an adherence to the fiction of the separate existence of the corporation would … sanction a fraud or promote injustice." *Roman Catholic Archbishop v. Superior Court*, 15 Cal.App.3d 405, 411 (1971) (citations and internal quotation marks omitted). Some of the factors courts use to determine if the alter ego theory applies are whether the two entities comingle funds and assets, whether they share the same equitable owners, whether they have the same offices and employees, and whether one entity is used "as a mere shell or conduit for the affairs of the other." *Id.* Addressing some of these precise issues, Marlin made the following statements, under penalty of perjury, in his declaration:

> BSC does not own the nightclubs listed in Plaintiffs' Amended Complaint or in Mr. Rodrigues' declaration. (the "Client Nightclubs"). Each of the Client Nightclubs is owned by a different company or business entity (with the exception of Larry Flynt's Hustler Club and the Condor, which are both owned by the same business entity). In addition to being separately owned, the Client Nightclubs have their own separate payroll, employees, tax identification number, books and records, bank accounts, business premises, etc. The Client Nightclubs also operate independently and not in a uniform manner.

ER/126 ¶3.

Mark Calcagni, the general manager at the Condor Gentlemen's Club where Roe 1 worked, similarly stated that he was "not employed by BSC Management" and understood that "BSC is a management consulting company the Condor contracts with for management and administrative services." ER/131 ¶3. Craig Bordeau, the general manager at the Gold Club, had similar things to say in his declaration. ER/135 ¶4 ("I am not employed by BSC Management ("BSC"). BSC is a management company with which the Gold Club contracts for consulting and administrative services.").

Far from the "unity of interest and ownership" that California law requires to establish an alter ego relationship, the declarations of Marlin, Calcagni and Bordeaux portray an arms-length contractual relationship in which BSC provides marketing, human resources support, and other administrative "services" for its independently operating "clients." And although SFBSC states in its Answer that these services are provided "pursuant to written agreements" with the Nightclubs, SER 4 ¶13, it has never produced these purported agreements so that the court could assess the scope of its relationship with the clubs. SFBSC has had numerous opportunities to produce these documents, and having failed to do so, SFBSC has also failed to meet its burden of establishing that it has standing to enforce the arbitration provisions in the Performer Contracts as an alter ego of the signatory

Nightclubs. Instead, it has introduced several pieces of evidence cutting against the existence of such a relationship, and it is "bound by the legal consequences" of those declarations. *Cf. Thomas v. Westlake*, 204 Cal.App.4th at 614.

2. SFBSC May Not Compel Arbitration as the Nightclubs' Agent.

The same evidentiary deficiencies and contradictions doom SFBSC's argument that it can enforce the arbitration provisions in the Performer Contracts as the Nightclubs' agent. Under California law, "an agent is one who represents another, called a principal, in dealings with third persons." Cal. Civ. Code § 2295. But representation alone is not enough: California law also requires, as an element of proving agency, that the principal have the power to control the agent. *Desuza v. Andersack*, 63 Cal.App.3d 694, 699 (1976) ("The right of the alleged principal to control the behavior of the alleged agent is an essential element which must be factually present in order to establish the existence of agency"). There is no evidence in the record suggesting that any of the Nightclubs have the right to control SFBSC as their agent.

A contractual relationship through which two entities do business with one another, the type of relationship that Marlin and the nightclub managers attested to in their declarations, simply does not connote the level of control and responsibility that would allow a nonsignatory to compel arbitration under its principal's

agreement using principles of agency. *Murphy v. DirectTV, Inc.*, 724 F.3d 1218, 1233 (9th Cir. 2013) (refusing to allow Best Buy to compel arbitration under an agreement between customers and DirectTV, based on agency, because "Best Buy has presented no evidence … that DirecTV controlled its behavior in ways relevant to Plaintiffs' allegations."); *Swift v. Zinga Game Network, Inc.*, 805 F.Supp.2d 904, 916 (N.D. Cal. 2011) (denying manufacturer of video game content's motion to compel arbitration as agent of signatory Internet game provider because the nonsignatory denied, in its Answer, the Complaint's allegations that it was the signatory's agent and the evidence indicated that the alleged principals and the alleged agents were "corporate third parties simply engaged in arms length business transactions"). On this record, SFBSC cannot credibly claim to be an agent of the Nightclubs as that term is defined under California law.

3. SFBSC May Not Compel Arbitration as the Nightclubs' Principal.

The evidence is more mixed with respect to SFBSC's converse claim of being the Nightclubs' principal. Certainly, Rodrigues has offered evidence in his declarations suggesting that SFBSC controls operations at the Nightclubs, including the relationships with the dancers who work there. ER/172-73 ¶3; ER/174-79 ¶¶6-24. But Marlin contested many of Rodrigues's statements in his own supplemental declaration, undermining the factual showing necessary to establish SFBSC as the Nightclubs' principal:

> Mr. Rodrigues' statement in his declaration that BSC "exerts control over all aspects of the Nightclubs as well as the working relationship with the exotic dancers" is false. As noted in my first declaration, BSC provides the Client Nightclubs with a portfolio of services including marketing and advertising, human resources support, payroll coordination, and contract review and administration. There are many aspects of the Client Nightclubs' operations with which BSC has no role. As for BSC's role in the Nightclubs' working relationship with exotic dancers, BSC does monitor developments regarding state and local laws regulating exotic dancer conduct and it advises the Client Nightclubs on such issues.

ER/126-27 ¶6.

The limited consulting and advisory relationship described by Marlin is not sufficient to establish SFBSC as a principal under California law. *Desuza*, 63 Cal.App.3d at 699 ("The right of the alleged principal to control the behavior of the alleged agent is an essential element which must be factually present in order to establish the existence of agency"); *see also Mance v. Mercedes-Benz USA*, 901 F.Supp.2d 1147, 1155 n.6 (N.D. Cal. 2012) (rejecting Mercedes-Benz's argument that it could compel arbitration under agreement between car buyer and dealership, where it claimed to be the dealership's principal, because "Mercedes–Benz has not put forth evidence to demonstrate that Dealer even was its agent.").

Moreover, even if SFBSC were able to establish on this record that it is the Nightclubs' principal, the law is not clear that such a relationship would allow it to compel arbitration under a contract signed by its agent. California law provides that a contract entered into by an agent "for an undisclosed principal is for most

purposes the contract of the principal" and that "an undisclosed principal may claim the benefits of the contract" unless "excluded by the terms of the agreement made by the agent." *Am. Builders Ass'n v. Au-Yang*, 226 Cal.App.3d 170, 176 (1990) (citations and internal quotation marks omitted). Here, the "Terms of the agreement made by the agent," the arbitration provision in the Performer Contracts, specify that only "disputes between the Parties" are subject to arbitration, ER/260, and as SFBSC admits, it was not a party to those agreements. AOB at 7. Thus, SFBSC is "excluded" from claiming the arbitration benefits of the Performer Contract according to its terms. *Compare Au-Yang*, 226 Cal.App.3d at 173 n.2 (arbitration provision did not contain limiting language about "the parties" and simply provided that "[a]ll claims or disputes arising out of this Contract or the breach thereof shall be decided by arbitration").

Nor do the underlying reasons for allowing nonsignatory agents to compel arbitration under the contracts of their principals apply with equal force to nonsignatory principals and the contracts of signatory agents. "Courts have generally applied the agency principle to prevent parties from evading arbitration obligations by suing a signatory's agents instead of the principal." *Soto v. Am. Honda Motor Co.*, 946 F.Supp.2d 949, 956 (N.D. Cal. 2012) (collecting cases). Because claims against purported principals are already aimed at the allegedly

responsible entity, courts are less likely to allow nonsignatory principals to compel arbitration under the contracts of their agents. *Id.* at 956-957.

The only case SFBSC was able to find in support of its position that nonsignatory principals may enforce the arbitration agreements of their agents, *Garcia v. Stonehenge, Ltd.*, No. C–97–4368–VRW, 1998 WL 118177, at *3 (N.D. Cal. March 2, 1998), is an unpublished decision filed before January 31, 2007, and should not be cited. Fed. R. App. Proc. 32.1(a). SFBSC is well aware of this rule. AOB at 52 n.6. *Garcia*'s reasoning was also disapproved by the more recent opinion in *Soto* because it "fail[ed] to consider the purpose of the agency principle." *Soto*, 546 F.Supp.2d at 557. *Garcia* is thus neither binding nor persuasive.[5]

Finally, agency principles allow a nonsignatory to invoke the arbitration clause in an agreement only when the acts of wrongdoing alleged against that nonsignatory arise from or relate to obligations under the contract containing the arbitration clause. *Britton v. Co-op Banking Group*, 4 F.3d 742, 747-48 (9th Cir. 1993). In *Britton*, this Court found that a nonsignatory could not impose arbitration

[5] *Garcia* is distinguishable. Like the arbitration provision in *Au-Yang*, it lacked the limiting language about "disputes between the parties" found in the Performer Contracts here. *Garcia*, 1998 WL 118177, at *2 (arbitration provision read: "In the event of any controversy or claim arising out of this agreement not settled by the parties or their legal representatives, such controversy or claim shall be settled by arbitration"). And unlike SFBSC, the estate of Jerry Garcia, as the party seeking to compel arbitration, offered *evidence* of an agency relationship. *Id.* at *3.

upon the plaintiff, despite being an agent and employee of the signatory, because the allegations against the nonsignatory in the complaint involved "subsequent, independent acts of fraud, unrelated to any provision or interpretation of the contract" and as such "do not impose any contractual liability, vicariously or otherwise, upon" the nonsignatory. *Id.* at 748.

As discussed below, the allegations against SFBSC in this case do not rely upon or allege a breach of SFBSC's obligations under the Performer Contract. Rather, they allege statutory violations (and one count of common law conversion) based on SFBSC's policies of not paying wages to exotic dancers at the Nightclubs and requiring them to share their tips. These claims, like those in *Britton*, are "independent acts. . . unrelated to any provision or interpretation of the contract" containing the arbitration clause, and so SFBSC may not take advantage of any agency relationship that may exist between it and the Nightclubs to compel arbitration under a provision in a contract that is irrelevant to this action. In short, SFBSC lacks standing to enforce arbitration against the Plaintiffs as an alter ego, agent, or principal of the Nightclubs that actually signed the Performer Contracts.

C. SFBSC May Not Compel Arbitration Under the Doctrine of Equitable Estoppel Because Plaintiffs Are Neither Suing Under Nor Claiming Benefits of the Performer Contracts.

In its briefing before the district court, SFBSC cited *Goldman v. KPMG LLC*, 173 Cal.App.4th 209, 217-218 (2009) for the proposition that a nonsignatory may enforce an arbitration clause when the signatory alleges "substantially interdependent and concerted misconduct" by it and a signatory and the alleged misconduct is "founded in or intimately connected with the obligations of the underlying agreement." ER/482. This is a statement of the principle of equitable estoppel, which "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (internal quotation marks omitted). But this doctrine has no bearing here, for Plaintiffs are not claiming that SFBSC breached any obligations under the Performer Contracts or attempting to claim any legal benefits of those contracts.

This Court recently outlined the law of equitable estoppel in California, as well as the reason that it is unavailing to SFBSC, in *Murphy v. DirectTV*:

> Where a nonsignatory seeks to enforce an arbitration clause, the doctrine of equitable estoppel applies in two circumstances: (1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are intimately founded in and intertwined with the underlying contract, and (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement.

724 F.3d 1218, 1229 (9th Cir. 2013).

The first, "reliance" version of equitable estoppel requires that the plaintiff's claims arise from the specific obligations of the contract. *Goldman*, 173 Cal.App.4th at 230 (where a complaint's "allegations reveal no claim of any violation of any duty, obligation, term or condition imposed by the" contracts containing the arbitration clauses, and "the claims are fully viable without reference to the terms of those agreements," equitable estoppel does not apply).

In *Murphy*, this Court, applying California law, held that mere references to a transaction in the complaint were insufficient to establish the "reliance" form of equitable estoppel where the complaint was based on statutory violations rather than the details of the contracts governing that transaction. *Murphy*, 724 F.3d at 1230-31; *see also Kramer*, 705 F.3d at 1030-32 (Toyota could not use equitable estoppel to compel arbitration under agreements between customers and dealerships merely because the complaint relied on the fact that purchases occurred and those purchases were governed by contracts, when the claims involved violations of consumer protection laws rather than breaches of contract). Specifically, the misconduct alleged in *Murphy* was that Best Buy sold equipment from DirectTV without informing customers that they were only leasing the equipment rather than buying it. This Court concluded that the complaint alleged misrepresentations based on words and deeds at point of sale and that "[n]one of

these allegations rely on the customer agreement [with DirectTV] or attempt to seek any benefit from its terms." 724 F.3d at 1230. Accordingly, the consumer protection statutes alleged in the complaint "allow Plaintiffs to sue Best Buy for misleading consumers regardless of whether or not they signed largely unrelated contracts with DirectTV." *Id.* at 1231.

Under the second, "concerted misconduct" version of equitable estoppel, it is similarly not enough for the complaint to allege that the nonsignatory colluded with a signatory if those allegations of collusion are not "intimately founded in and intertwined with the obligations imposed by the contract containing the arbitration clause." *Id.* In *Murphy*, the district court had applied equitable estoppel to allow Best Buy to compel arbitration because the complaint alleged collusion between Best Buy and DirectTV. *Id.* at 1231-32. But this Court reversed because the allegations of collusion did not derive from the DirectTV contract containing the arbitration clause. "Even where a plaintiff alleges collusion, the *sine qua non* for allowing a nonsignatory to enforce an arbitration clause based on equitable estoppel is that the claims the plaintiff asserts against the nonsignatory are dependent on or inextricably bound up with the contractual obligations of the agreement containing the arbitration clause." *Id.* at 1232 (citations and internal quotation marks omitted).

Here, as in *Goldman*, *Kramer*, and *Murphy*, the allegations in the AC are not closely related enough to the Performer Contracts containing the arbitration clause to trigger equitable estoppel. Many of the practices alleged in the AC as violations of law, such as not paying overtime premiums or waiting time penalties, ER/540-542, do not appear anywhere in the Performer Contracts. Even those practices that are referenced in the contracts, such as classifying the dancers as independent contractors rather than employees, would still be statutory violations regardless of whether or not there were purported contracts in existence to memorialize them. The AC mentions the contracts not to rely upon them or claim their benefits but rather to disavow their legal significance. ER/538 ¶¶75-76 (alleging that SFBSC attempts to avoid its obligations under labor laws by employing exotic dancers under non-negotiable "independent contractor" agreements that do not offer them a true "choice" between employee and independent contractor status and thus are a "sham").

Mentioning in the AC that performers at SFBSC-controlled nightclubs are required to sign contracts does not make the statutory wage claims in the AC dependent upon the terms of those contracts any more than the facts about sales transactions in Kramer and Murphy made the statutory claims in those cases dependent upon the contracts governing those sales. In all three cases, the

gravamen of the complaint involved statutory violations only peripherally related to a contract, and thus the doctrine of equitable estoppel does not apply.

III. The Arbitration Clause and Class Action Ban Are Unconscionable and Unseverable.

This Court should also affirm the district court's judgment on the independent basis that the arbitration provisions and class action bans ("the Clauses") in those contracts are procedurally and substantively unconscionable. Moreover, the district court did not abuse its discretion in refusing to enforce the Clauses in their entirety rather than attempting to rewrite them.

Under the Supreme Court's FAA jurisprudence, courts are empowered to invalidate arbitration agreements based on any "generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations and internal quotation marks omitted). To determine whether to invalidate an arbitration agreement, courts "apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. Because Plaintiffs were employed in California, the Court should apply California law on unconscionability. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002).

In California, the unconscionability doctrine is comprised of two elements: procedural and substantive unconscionability. *Armendariz v. Found. Health*

Psychcare Servs., 24 Cal.4th 83, 114 (2000). The procedural element of the doctrine looks to the "manner in which the contract was negotiated and the circumstances of the parties at that time." *Gatton v. T-Mobile USA*, 152 Cal.App.4th 571, 581 (2007). It weighs the relative bargaining power of the parties, and in particular considers whether the negotiations and context led to "oppression" or "surprise" of the less powerful party. *Armendariz*, 24 Cal.4th at 114. Here "oppression" refers to the absence of meaningful negotiation or choice for the less powerful party, while "surprise" describes a situation where the less powerful party lacks notice of relevant contract terms. *Flores v. Transamerica HomeFirst*, 93 Cal.App.4th 846, 853 (2001).

Substantive unconscionability focuses on the content of the relevant agreement and asks whether the terms lead to "overly harsh or one-sided results." *Armendariz*, 24 Cal.4th at 114 (citation and internal quotation marks omitted).

A contract must be both procedurally and substantively unconscionable for a court to invalidate it, but the two elements need not be equally present; a court may invalidate an agreement that is only slightly procedurally unconscionable if it is highly substantively unconscionable, and vice versa. *Id.* The inquiry is therefore flexible and fact-specific, and "[t]he ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances,

that a court should withhold enforcement." *Sanchez v. Valencia Holding Co.*, 61 Cal.4th 899, 912 (2015).

A. The Arbitration Provision and Class Action Ban Are Procedurally Unconscionable.

Defendant sought to enforce two provisions of the Performer Contracts in the district court: the arbitration provision and the class action ban. The district court held that the conditions surrounding the formation of the Clauses were marked by "at least mild procedural unconscionability" because "the plaintiffs . . . signed their contracts under conditions in which ordinary people similarly situated would detect unequal bargaining power, and would feel that they had no 'real' chance to negotiate, no 'meaningful choice' but to sign." ER/21-22. If anything, the district court understated the case, as Plaintiffs' purported "acceptance" of the Clauses contain numerous indicia of procedural unconscionability.

1. The Clauses are adhesive agreements.

In California, the first step in the procedural unconscionability analysis is to determine whether the relevant agreement is an adhesion contract—wherein the non-drafting party is presented with terms on a take-it-or-leave-it basis. *Armendariz*, 24 Cal.4th at 113. Adhesion contracts are "imposed and drafted by the party of superior bargaining strength," and thus by definition the party of inferior

bargaining strength has little meaningful choice or ability to negotiate terms. *Id.* (quoting *Neal v. State Farm Ins. Cos.*, 188 Cal.App.2d 690, 694 (1961)).

The California Supreme Court has recently held that adhesion contracts are always procedurally unconscionable to "some degree." *Sanchez*, 61 Cal.4th at 915.

Here, the Clauses are adhesive agreements. Defendant presented the Clauses to Plaintiffs as take-it-or-leave-it offers, which Plaintiffs had no opportunity or power to negotiate. ER/246-48, Decl. of Roe 1, ¶¶2-6; ER/262-64, Decl. of Roe 2, ¶¶3-9. SFBSC claims that "there is no record evidence that either plaintiff could not have rejected the arbitration provisions" or the class action bans. AOB at 28. This is plainly incorrect. ER/246-47 ¶2 (recounting Roe 1's unsuccessful attempt to reject the Clauses); ER/262-63 ¶5 (recounting Roe 2's unsuccessful attempt to reject the Clauses). Plaintiffs have also proffered evidence that presenting dancers and applicants with adhesion contracts was standard practice in SFBSC's nightclubs, including one of the clubs in which both Plaintiffs worked. ER/176-77, Decl. of Rodrigues, ¶¶11-14.

Defendant asserts that Plaintiffs actually did have the power to negotiate or reject the terms of the Clauses, pointing to the fact that the Performer Contracts contain a statement encouraging dancers to "seek the advice of counsel" before accepting. AOB at 28-29. But Plaintiffs have attested that when managers at the

Nightclubs actually presented the contracts for signature, they told Plaintiffs that their only option was to accept, and that Plaintiffs could not take the contracts home to consider their options. ER/248 ¶6, 264 ¶9. Also, Defendant's assertion is disingenuous, as courts have recognized that "it is unrealistic to expect anyone other than higher echelon employees to hire an attorney to review what appears to be a routine personnel document." *Jackson v. S.A.W. Entm't*, 629 F.Supp.2d 1018, 1023 n.2 (N.D. Cal. 2009) (quoting *Gentry v. Superior Court*, 42 Cal.4th 443, 471 (2007)).

SFBSC also argues that because Plaintiffs worked in the nightclubs without operative contracts for limited periods of time, and that for a period of time Roe 2 worked at Centerfolds and the Gold Club after she had selected the "REJECT" option next to a contract's arbitration clause, Plaintiffs must have had a meaningful choice over whether or not to accept the Clauses and their terms. AOB at 28. These facts prove nothing about the Plaintiffs' ability to negotiate the terms of the Clauses. If anything, they prove only that the management teams at the Nightclubs were careless or disorganized with paperwork, as Defendant's counsel himself admitted at oral argument before the district court. ER/54 ("file management may not be the strong suit . . . at a strip club."). As Plaintiffs' declarations make clear, the periods in which they worked without contracts came about either because they worked for a short time at a club without ever being given a contractor because

management was not prompt in renewing a contract after the previous one had expired. ER/247 ¶3 (three-month gap before Roe 1 given a new contract at Gold Club); ER/261 ¶2 (Roe 2 worked at Hustler without ever being given a contract). *See also* ER/179-180 ¶26 (Rodrigues confirming that the reason for gaps in contract coverage was management's slow pace of getting dancers to sign renewal contracts after old ones expired, and estimating that 20% of dancers at SFBSC nightclubs were performing without an operative contract at any given time due to these renewal lapses). On all the occasions when Plaintiffs were presented with contracts, they were told that they could not negotiate the terms. ER/248 ¶5; ER/264 ¶8.

Similar erratic policy enforcement explains the period of time in which Jane Roe 2 performed under contracts in which she had opted out of the arbitration provision and class action ban—first at Centerfolds and then at the Gold Club, both during July of 2012. ER/261-62 ¶¶3-4. While inconsistent enforcement by nightclub managers permitted her to exercise a choice on these two occasions, on every other occasion when she or Roe 1 attempted to opt out of the Clauses, their applications were "lost," they were presented with new contracts, and told in no uncertain terms that the "correct" choice on the Clauses was "ACCEPT." ER/246-47 ¶2; ER/262-63 ¶5.

This reading of Plaintiffs' experiences is consistent with the evidence from Rodrigues that dancers were "routinely" fired or not hired if they did not accept the Clauses. ER/177 ¶¶13-14. It is likewise consistent with Rodrigues's attestation that it was regular practice to "lose" the contracts of dancers who chose to opt out of the arbitration clause or class action ban, and to present new contracts to be re-signed and the Clauses accepted. *Id*.

2. The Clauses are Conditions Imposed on Plaintiffs' Ability to Find and Retain Work.

California law recognizes that adhesion contracts are especially problematic in the workplace. This is because individuals seeking work, or seeking to retain work, experience particular pressure to accept contractual terms when such acceptance is a condition of that work. In these cases, the terms "stand[] between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." *Armendariz,* 24 Cal.4th at 115; *Sanchez,* 61 Cal.4th at 919-20 ("A family in search of a job confronts a very different set of burdens than one seeking a new vehicle.") (citations omitted).

This form of procedural unconscionability exists here because nightclub managers told Plaintiffs that their assent to the Clauses was a requirement of gaining or maintaining positions at Defendant's Nightclubs. ER/246-48 ¶¶2-4, 262-64 ¶¶5-7. Rodrigues attested that this was the general practice of management

at SFBSC nightclubs. ER/176-77 ¶¶12-14. Plaintiffs also attest that they were compelled by their financial circumstances to accept Defendant's terms unconditionally. ER/246-47 ¶2 (Roe 1) ("I felt I had no choice but to follow the management's instructions because I needed the income in order to support myself and my family"); ER/263 ¶5 (Roe 2) (same).

It is irrelevant whether the Performer Contracts were employment contracts or independent contractor agreements, because the leverage Defendant exerted over Plaintiffs is exactly the same. As this Court has noted, unconscionability analysis focuses on the "circumstances of the parties at [the] time" of contract formation. *Ingle v. Circuit City Stores*, 328 F.3d 1165, 1171 (9th Cir. 2003) (citation and internal quotation marks omitted). Plaintiffs were in urgent need of work when they were presented with the Performer Contracts, and their overriding concern at *those* times was making a living.

Defendant's only response to this point is to again highlight the fact that there were periods during which Plaintiffs worked without Performer Contracts or effective arbitration clauses. AOB at 28. These facts do not prove that acceptance of the Clauses was not a condition of work at Defendant's nightclubs; rather, they show that management failed to promptly present applicants and dancers with Performer Contracts. For the approximately 80% of dancers who did have operative Performer Contracts in effect, including Plaintiffs for most of the time

they worked at the Nightclubs, Performer Contracts were treated as a mandatory condition of working at the clubs. ER/176-77 ¶¶12-14; ER246-248 ¶¶2-4; ER262-64 ¶¶5-7.

3. Plaintiffs were Presented with the Clauses When They Were Completely or Partially Nude.

In addition to presenting Plaintiffs and other dancers with contracts of adhesion while they were looking to gain or retain work, SFBSC employed oppressive tactics to undermine the workers' bargaining positions. For example, club management approached Plaintiffs with the Performer Contracts, and had Plaintiffs sign them, at times when they were completely or partially nude. ER/248 ¶6; ER/264 ¶9. Furthermore, Rodrigues attested that management actively encouraged dancers to drink or use illicit drugs to ensure dancers had the right "attitude" and "spirit" when interacting with customers. ER/86-87 ¶3. By approaching Plaintiffs and other dancers when they were physically vulnerable, Defendant severely undermined their ability to negotiate the terms of the Clauses.

Defendant blithely dismisses these concerns by arguing that being naked is "a normal part of working as an exotic dancer." AOB at 30. Plaintiffs are, of course, fully aware that nudity is a part of their jobs, but it is a part of their jobs when they are performing for or interacting with customers, not when they are

presented with important legal documents by members of the management team.[6]. The conditions under which Plaintiffs accepted the Clauses were therefore procedurally unconscionable. See *Sosa v. Paulos*, 924 P.2d 357, 362-63 (Utah 1996) (arbitration agreement procedurally unconscionable where doctor presented agreement to patient who was wearing only a surgical gown, minutes before surgery, and patient felt "rushed and hurried" to agree). The district court committed no clear error in crediting Plaintiffs' specific evidence on the conditions under which they agreed to the Clauses, and finding these conditions procedurally unconscionable. ER/20.

4. Plaintiffs Were Not Given Reasonable Time to Understand and Consider the Clauses.

Nightclub management also exerted unfair pressure on Plaintiffs by rushing them to read and agree to the Performer Contracts, and by not giving them adequate time to understand and consider the Clauses or their terms. Pushing a party to sign an agreement that waives important rights without giving her the time or opportunity to understand and consider the terms is oppressive, and supports a finding of procedural unconscionability. *Carlson v. Home Team Pest Def.*, 239 Cal.App.4th 619, 632 (2015) (demanding that employee sign employment contract

[6] In at least some circumstances, this physical vulnerability and inequality was compounded by the fact that the same managers who were presenting these contracts to the dancers while they were partially or completely nude also subjected them to unwanted sexual advances. ER/88 ¶¶7-9.

"that day" or have a job offer withdrawn was oppressive); *Tiri v. Lucky Chances, Inc.*, 226 Cal.App.4th 231, 246 (2014) ("Tiri's lack of sophistication, and the failure of Lucky Chances to provide adequate time to review the agreement all add to the oppression").

Defendant's assertions that Plaintiffs were not rushed, or that any rush was inconsequential, lack merit. Defendant first asserts that Plaintiffs presented "no evidence" that they were actually rushed to sign the agreements, but rather only that "they *felt* rushed." AOB at 28. This assertion is flatly contradicted by Plaintiffs' declarations, which attest that management did, in fact, rush them to initial and sign the Performer Contracts, telling them that the contracts were "time sensitive" and had to be filled out "immediately." ER/248 ¶6, 264 ¶9. Plaintiffs also testified that they were not permitted to take the agreements home to review, and were denied time to consider the terms at the clubs. *Id.*

Defendant then argues that even if Plaintiffs were rushed, this factor cannot, "standing alone," demonstrate procedural unconscionability. AOB at 29. But as the district court correctly found, this factor does not stand alone. It is rather one factor among many that demonstrates the procedural unconscionability here. ER/21-22 ("the plaintiffs have spoken more specifically; they have shown that they signed their contracts under conditions in which ordinary people similarly situated would detect unequal bargaining power").

Finally, BSC argues that a person who agrees to a contract is charged with understanding its terms. AOB at 30. But the cases BSC cites for this proposition were all concerned with contract formation, not unconscionability, and are therefore inapposite to this appeal. Plaintiffs have not contested whether contracts were formed; rather, they argue that, given the circumstances surrounding the formation, the Clauses should not be enforced because they are unconscionable.

Procedural unconscionability is "highly dependent on context" and must be considered "in light of all relevant circumstances." *Sanchez*, 61 Cal.4th at 912-13. Here it is clear that the context and circumstances in which Plaintiffs agreed to the Clauses were procedurally unconscionable. Plaintiffs, subject to the distinct pressures of looking for and retaining work, were presented with adhesive contract terms by a party with greater bargaining power. They were presented with these terms at times when they were completely or partially nude, and were told that they could not negotiate the terms and had to accept them immediately or risk their jobs. Every one of these conditions is procedurally unconscionable under California law; taken together, these facts show that the "manner in which the contract was negotiated and the circumstances of the parties at that time" were highly oppressive. *Gatton*, 152 Cal.App.4th at 581. The district court committed no clear error in any of its factual findings, nor did it err in concluding that these facts satisfied the legal standard.

B. The Arbitration Clauses and Class Action Bans Are Substantively Unconscionable.

The district court also correctly concluded that the content of the Clauses is substantively unconscionable. First, the Clauses are one-sided, barring only Plaintiffs from consolidating claims, and permitting only the Nightclubs to recover fees for enforcing the Clauses. Second, the Clauses contain a fee-splitting provision that effectively frustrates Plaintiffs' ability to access a forum to pursue remedies for statutory violations.

1. The Clauses Impose a One-Sided Bar on Joinder, Collective and Class Actions.

Under California law a contractual term is substantively unconscionable when it lacks a "modicum of bilaterality" in its application. *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1071-72 (2003) (citation omitted). Here, the Clauses impose on Plaintiffs a bar against class or collective actions, while leaving the Nightclubs free to bring collective claims in a judicial forum or joint defenses in arbitration.

The arbitration clause provides that "[a]n arbitrator may not consolidate more than one person's claims, and may not preside over any form of representative or class proceeding." ER/260. By forbidding an arbitrator from consolidating "more than one person's claims" the provision effectively blocks class actions, or the equivalent of mass or collective actions, in the arbitral forum.

It does not, however, prevent parties responding to demands for arbitration from banding together to mount joint defenses, as it forbids consolidation of "claims," but not consolidation of "defenses." Nor does it prevent a respondent in arbitration from joining multiple petitioners in the equivalent of a counterclaim, as such an action would again join multiple parties as respondents rather than joining multiple claims.

While this language appears mutual on the surface, Defendant's past conduct reveals that it actually benefits SFBSC and its Nightclubs to the detriment of Plaintiffs and other dancers. Nightclubs affiliated with Defendant previously brought counterclaims against a defendant class of dancers, which the language of this arbitration clause would allow to happen again so long as the action was styled as an arbitration against multiple dancers rather than as a "representative or class proceeding." ER/282-283 (Request for Judicial Notice); ER/315-327 (Counterclaim in *Doe v. Cin-Lan, Inc.*, 2:08-12719 (E.D. Mich)); ER/378-461 (Settlement); ER/462-464 (Letter). SFBSC protests that counterclaims were brought against a defendant class of dancers only because a plaintiff class of dancers initiated suit. But this does not demonstrate that Plaintiffs and the district court have misread the import of the arbitration clause's anti-consolidation provision.

The class action ban in the Performer Contracts is even worse, providing in openly one-sided language:

> Performer agrees that any claim she may make against Owner shall be in her individual capacity, and not as a class or representative action; she agrees not to consolidate any claim she may have against Owner with the claims of others.

ER/260. On its face, this provision bars the dancer from bringing a class action claim in a judicial forum, but nothing bars the Nightclubs from doing so. Read together, the clauses permit the Nightclubs to join defenses in arbitration and to bring collective or class actions in court, while Plaintiffs may not consolidate claims in any forum.

California courts have acknowledged that there are times when imbalanced contractual provisions can "provide[] the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable." *Armendariz*, 24 Cal.4th at 117 (internal quotation marks omitted). However, the party with superior bargaining power must demonstrate the need for extra protection to justify the imbalance. *Id.* Defendant has offered no such justification here. The Clauses therefore plainly lack even the "modicum of bilaterality" required to avoid a finding of substantive unconscionability. *Id.* at 119.

SFBSC claims that the district court erred by focusing on the language of the class action ban in isolation and ignoring the contract interpretation principle that provisions should be read in the context of the whole contract. AOB at 36. According to SFBSC, the district court should have ported over the arbitration clause's bar on the consolidation of "more than one person's claims" to provide the "other" side of the facially one-sided language of the class action ban. *Id.*

Plaintiffs agree that the Court should read the Clauses in relation to each other. But SFBSC ignores the equally important contract interpretation rule that courts should give every term in an agreement full effect, and avoid interpretations that render terms surplusage. *London Mkt. Insurers v. Superior Court*, 146 Cal.App.4th 648, 662 (2007); *City of El Cajon v. El Cajon Police Officers' Ass'n*, 49 Cal.App.4th 64, 71 (1996). If the Court reads the anti-consolidation provision of the arbitration clause to bar all collective actions by both parties, in both arbitral and judicial forums, then the entire class action ban would be rendered surplusage. The Court should not adopt this reading.

The Clauses are better read as providing that all disputes between the parties will be "decided by binding arbitration" *except* those that require the arbitrator to "consolidate more than one person's claims" or "preside over any form of representative or class proceeding." As the parties cannot bring class or collective claims before an arbitrator, they must do so in a judicial forum, *except* that

performers may not do that either. Thus only the workers, not the employer, are foreclosed from pursuing class and collective actions entirely. This reading takes the Clauses together and gives every term its plain meaning and effect without surplusage. It also reveals the Clauses' unfair and one-sided nature. *Armendariz*, 24 Cal.4th at 120 ("the lack of mutuality can be manifested as much by what the agreement does not provide as by what it does.")

2. The Clauses' Fee-Splitting and Fee-Shifting Provisions Frustrate Plaintiffs' Ability to Effectively Vindicate Their Rights.

The Clauses' fee-splitting and fee-shifting provisions are also substantively unconscionable. California courts have held that a fee-splitting provision that effectively blocks a party from accessing any forum (including an arbitral forum) to vindicate their rights is substantively unconscionable. *Gutierrez v. Autowest, Inc.*, 114 Cal.App.4th 77, 89-90 (2003) ("To state it simply: it is substantively unconscionable to require a consumer to give up the right to utilize the judicial system, while imposing arbitral forum fees that are prohibitively high."). Here, the Clauses place two unconscionable financial obstacles between Plaintiffs and a forum where they could afford to vindicate their state and federal statutory rights. First, the arbitration clause provides that Plaintiffs must bear the costs of the arbitration equally, including all administrative and arbitrators' fees. Second, the class action ban makes performers and *not* club owners uniquely responsible for

paying the costs of enforcing the ban.

The fee-splitting provision of the arbitration clause provides that "costs of arbitration shall be borne equally by performer and owner unless the arbitrator concludes that a different allocation is required by law." ER/260. In theory, an even split of costs seems reasonable. In practice, this provision, along with the provision requiring each performer to proceed on an individual basis, would make the arbitral forum far too expensive for any one dancer to bring legitimate claims. In *Chavarria v. Ralphs Grocery Co.*, this Court examined a provision in an adhesive employment contract that required each party to pay its own attorneys' fees, and to split the cost of any arbitrator's fees. 733 F.3d 916, 920-21 (9th Cir. 2013). The defendant argued that this provision did no more than apply the "American Rule", that each party bears its own fees and costs, in the arbitral forum. *Chavarria*, 733 F.3d at 925. The Court, however, noted that imposing the traditional rule on an arbitral proceeding "misses the point" because "the cost allocation provision relates to the arbitrator fees" which the defendant estimated at between $7,000 and $14,000 per day. *Id*. The Court concluded that this fee arrangement was substantively unconscionable under California law because it "imposes great costs on the employee" and "mak[es] many claims impracticable." *Id.*

A similar cost-splitting provision was held unconscionable by this Court in

Ingle v. Circuit City Stores, 328 F.3d 1165 (9th Cir. 2003). There, the clause also provided that the arbitrator could force the losing party to pay the costs of the prevailing party, but was not required to do so. *Ingle*, 328 F.3d at 1177-78. This discretionary power was held unconscionable because it left open the possibilities that employees would not have their costs and fees reimbursed even if they prevailed, or that they would be forced to reimburse the employer's costs and fees if they lost. *Id.*

Here, too, the arbitration clause directs that the "costs of arbitration *shall* be borne equally" *unless* the arbitrator decides otherwise. ER/260 (emphasis added). The risk that a performer *might* have to split all costs of arbitration, including the arbitrator's compensation, or might be assessed an even more punitive portion of fees and costs at the arbitrator's discretion, effectively takes the arbitral forum off the table. As Plaintiffs have both attested, they cannot afford the many costs and fees associated with pursuing an individual arbitration. ER/248-49 ¶7, 265 ¶10. The arbitration clause, however, forces them to choose between leaving their statutory rights unvindicated, or embarking on a potentially financially ruinous effort to secure a remedy.

Defendant's only counterargument to Plaintiffs' evidence that arbitration would be prohibitively expensive is to suggest that if Plaintiffs really cannot afford arbitration, then the arbitrator will not make them pay for it. AOB at 51. This

assertion is cold comfort to Plaintiffs who will not know what cost allocation the arbitrator will decide on until the end of the proceeding and who will have very limited recourse under the FAA to challenge a decision by the arbitrator that they consider unfair. More important, this rejoinder misses the point that it is the very uncertainty about what the ultimate costs will be that makes arbitration under this fee-splitting provision so dissimilar from litigation in court, and that prevents Plaintiffs from effectively vindicating their rights in the arbitral forum.

The second unconscionable fee-related provision appears in the class action ban. This provision states that "Owner shall be entitled to fees and costs for enforcing this term." ER/260. As with the other provisions of the class action ban, this term is explicitly one-sided, imposing costs on one party, but never on the other. Moreover, the term does not provide discretion to either a judge or arbitrator. Instead, a performer *shall* pay the owner's fees and costs should the owner successfully enforce an adhesive, unbalanced contract term. There can be no dispute that this brazenly one-sided provision lacks any "modicum of bilaterality." Defendant has failed to proffer any legitimate business reason for imposing such an imbalanced term on Plaintiffs. *Little*, 29 Cal.4th at 1071-72.

Together the fee-splitting term in the arbitration clause and the fee-shifting term in the class action ban "effectively block[] every forum for the redress of [wage] disputes, including arbitration itself." *Sonic-Calabasas A, Inc. v. Moreno*,

57 Cal.4th 1109, 1145 (2013). As such, they are substantively unconscionable.

3. The District Court's Unconscionability Holding Is Not Preempted by the FAA.

Defendant argues that the FAA preempts the district court's conclusion that the fee-splitting provision was substantively unconscionable. AOB at 39. Specifically, SFBSC suggests that the district court's reliance on the cost-allocation principles described above was erroneous because these California precedents were preempted under the reasoning of two opinions from the U.S. Supreme Court: *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), and *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013). Defendant is mistaken on both counts.

Defendant first asserts that *Concepcion* invalidated the unconscionability analysis set out by the California Supreme Court in *Armendariz*. AOB at 46. Citing to a dissenting opinion from a recent California Supreme Court decision, Defendant contends that *Concepcion* invalidated the "premise" on which *Armendariz* was decided. *Id.* (citing *Sanchez*, 61 Cal.4th at 918 (Chin, J., concurring & dissenting)).

The majority opinion in *Sanchez*, however, disagreed with this assessment. It explained that the effect of *Concepcion* is to preempt state law rules that facially disfavor arbitration, and those that disfavor arbitration "*as applied* by imposing

procedural requirements that interfere[] with fundamental attributes of arbitration" *Sanchez*, 61 Cal.4th at 912-13 (emphasis in original) (internal quotation marks omitted). But ensuring "that the arbitral scheme set forth in a contract is in practice 'an accessible, affordable process for resolving ... disputes'" does not "interfere with arbitration's fundamental attributes." *Id*. at 921 (citing *Sonic Calabasas A v. Moreno*, 57 Cal.4th 1109, 1158 (2013)). Since affordability is an attribute of arbitration, a state law rule insisting that the arbitral forum is, in fact, reasonably affordable actually bolsters a fundamental attribute of arbitration.

Defendant next claims that the U.S. Supreme Court held in the *Italian Colors* decision that provisions imposing impossibly high arbitration costs on one party could never be the basis for striking down an arbitration clause. AOB at 47-48. This is a fundamentally incorrect reading of *Italian Colors*. That opinion did not involve a fee-splitting provision. Rather, it answered whether courts could invalidate arbitration clauses that "do not permit class arbitration of a federal-law claim." *Am. Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2308 (2013). There, the plaintiffs had argued that the high cost of *proving* their claims through the use of experts meant that individual arbitration would make pursuit of their relatively low-value claims pointless. *Id.* The Court rejected this argument, holding that the high cost of proving a claim could not justify the imposition of a

procedure that frustrated one of the fundamental attributes of the arbitral forum, *i.e.* procedural informality. *Id.* at 2311.

The Court then went on to clarify that terms that constitute a "prospective waiver of a party's *right to pursue* statutory remedies" can indeed be barred by applicable state law rules. *Id.* at 2310 (citing *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985)) (emphasis in original). Such unfair terms could include "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at 2310-11; *see also Green Tree Financial Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights").

Defendant's assertion that Supreme Court precedent is at odds with the district court's decision is thus patently incorrect. The fee-splitting and fee-shifting provisions in the Clauses impose such a high burden on Plaintiffs that the arbitral forum is fundamentally "impracticable," and they are barred from "effectively vindicating [their] statutory rights." *See Italian Colors*, 133 S. Ct. at 2310-11 (citations and internal quotation marks omitted). No decision of either the California Supreme Court or the U.S. Supreme Court prevented the district court from reaching this conclusion.

C. The Unconscionable Provisions of the Arbitration Clause and Class Action Ban Cannot Be Severed.

Having found the Clauses both procedurally and substantively unconscionable, the district court was well within its discretion to hold the Clauses unenforceable in their entirety, rather than sever offending portions. In California, courts have a responsibility to "ensure that the terms of a bargain are not unreasonably harsh, oppressive, or one-sided" and "may not rewrite agreements and impose terms to which neither party has agreed." *Sonic-Calabasas*, 57 Cal.4th at 1143. The California Supreme Court has directed that severance is inappropriate where the relevant agreement contains multiple unlawful provisions, and where the unconscionable elements of those unlawful provisions "permeate" the agreements. *Armendariz*, 24 Cal.4th at 124-125.

In this case, both of these conditions are met. As discussed above, the Clauses contain at least four substantively unconscionable provisions: the one-way ban on claim consolidation in arbitration, the one-way ban on judicial class actions, the onerous fee-splitting provision, and the "performer pays" provision of the class action ban. In *Armendariz*, the Court explained that "multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." 24 Cal.4th at 124. The district court here recognized this same fact in noting that

"arbitration, however valuable and strongly preferred, is meant only to provide an alternative forum to litigation, not to overstuff one party's quiver." ER/26.

In addition, the formation of the Clauses was highly procedurally unconscionable. Not only have Plaintiffs found themselves on the losing end of multiple adhesive provisions, but they were forced to accept these unfair terms in extremely unfair circumstances in order to maintain their livelihoods. "Because a court is unable to cure this unconscionability through severance or restriction, and is not permitted to cure it through reformation and augmentation, it must void the entire agreement." *Armendariz*, 24 Cal.4th at 124-25 (citing *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519, 1552 (1997)).

This Court has repeatedly refused to sever unlawful provisions from arbitration agreements in similar circumstances. For example, in *Ingle*, this Court found that the plaintiff was presented with an adhesive arbitration agreement that he had no opportunity to negotiate. 328 F.3d at 1171-72. It further found that several provisions in the arbitration agreement were unjustifiably one-sided, and that the fee-splitting provision was unconscionable. *Id.* at 1173-78. Applying the *Armendariz* standard for severance, the Court concluded that the unconscionability of the terms and "the adhesive nature of the contract" rendered the offending provisions unseverable. *Id.* at 1180; *see also Ferguson v. Countrywide Credit*

Indus. 298 F.3d 778, 788 (9th Cir. 2002) (affirming lower court's decision not to sever due to multiple unconscionable provisions in adhesive agreement).

As the district court noted, the unconscionable provisions of the Clauses are so extensive that severing them would "leav[e] little more than the 'mere agreement to arbitrate'." ER/26 (citing *Newton v. Am. Debt Servs.*, 549 F.App'x 692, 695 (9th Cir. 2013), and *Jackson v. S.A.W. Entm't*, 629 F.Supp.2d 1018, 1029-30 (N.D. Cal. 2009)). Such extensive reformation of the Clauses would go far beyond the proper role of the court under California law. *See* Cal. Civ. Code § 1670.5(a) (permitting court to "enforce the rest of the contract, without the unconscionable clause" but not to modify or rewrite an unconscionable provision in a contract); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1293 (9th Cir. 2006) ("California Civil Code section 1670.5 does not grant us the discretion to reform or modify the arbitration provision through augmentation [to cure its unconscionable terms] and neither does the FAA.").

Because the Clauses contain multiple substantively unconscionable terms, and because the unconscionability of those terms "permeates" the Clauses, the Court should affirm the district court's conclusion that the offending provisions cannot be severed, and hold the Clauses unenforceable in their entirety.

V. If the Court Is Inclined to Find the Arbitration Clause Enforceable Against Plaintiffs, It Should First Remand for the District Court to Address Issues About Temporal Gaps and Plaintiffs' PAGA Claims.

If the Court believes that SFBSC has standing to enforce the arbitration clause against Plaintiffs and that the clause is not unconscionable, the proper next step is to remand this case to the district court. On remand, and prior to any arbitral proceedings, the district court should be permitted to resolve two issues regarding the scope of arbitration: the legal significance of the temporal gaps when Plaintiffs worked at Defendant's nightclubs without a Performer Contract, or with a contract where they successfully initialed the line for "Reject" next to the arbitration clause; and how to proceed with Plaintiffs' PAGA claims in light of this Court's opinion in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court hold that SFBSC lacks standing to enforce the arbitration clauses in the Performer Contracts. In the alternative, the Court should affirm the district court's holding that the arbitration clause and class action ban, taken together, are procedurally and substantively unconscionable and that the unconscionable provisions cannot be severed. Finally, if the Court determines that the arbitration provisions are enforceable, then remand is necessary to address the arbitration clauses' temporal

scope and the forum in which Plaintiffs may pursue their representative PAGA claims.

STATEMENT OF RELATED CASES

Plaintiffs are not aware of any related cases pending in this Court.

Dated: February 16, 2016 Respectfully submitted,

/s/ Karla Gilbride

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(b) because this brief contains 13,995 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 2010 in Times New Roman 14 point.

Dated: February 16, 2016

/s/ Karla Gilbride

ADDENDUM OF PERTINENT STATUTES

With the exception of the two statutes reproduced below, all other pertinent statutes were provided in the Addendum in Appellant's Opening Brief. AOB at A-1 through A-20.

TABLE OF CONTENTS

Page

CALIFORNIA STATUTES

California Civil Code

§ 2295. Agency, what. An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.

California Code of Civil Procedure

§ 1280. As used in this title:

(a) “Agreement” includes but is not limited to agreements providing for valuations, appraisals and similar proceedings and agreements between employers and employees or between their respective representatives.

(b) “Award” includes but is not limited to an award made pursuant to an agreement not in writing.

(c) “Controversy” means any question arising between parties to an agreement whether such question is one of law or of fact or both.

(d) “Neutral arbitrator” means an arbitrator who is (1) selected jointly by the parties or by the arbitrators selected by the parties or (2) appointed by the court when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them.

(e) “Party to the arbitration” means a party to the arbitration agreement:

(1) Who seeks to arbitrate a controversy pursuant to the agreement;

(2) Against whom such arbitration is sought pursuant to the agreement; or

(3) Who is made a party to such arbitration by order of the neutral arbitrator upon such party's application, upon the application of any other party to the arbitration or upon the neutral arbitrator's own determination.

(f) “Written agreement” shall be deemed to include a written agreement which has been extended or renewed by an oral or implied agreement.

§ 1280.2. Whenever reference is made in this title to any portion of the title or of any other law of this State, the reference applies to all amendments and additions thereto now or hereafter made.

§ 1281. A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.

§ 1281.1. For the purposes of this article, any request to arbitrate made pursuant to subdivision (a) of Section 1299.4 shall be considered as made pursuant to a written agreement to submit a controversy to arbitration.

§ 1281.12. If an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first.

§ 1281.2. On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special

proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

§ 1281.3. A party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when:

(1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and

(2) The disputes arise from the same transactions or series of related transactions; and

(3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

If all of the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court, if it orders consolidation, shall order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the parties. If the applicable arbitration agreements name separate arbitrators, panels, or tribunals, the court, if it orders consolidation, shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator in accord with the procedures set forth in Section 1281.6.

In the event that the arbitration agreements in consolidated proceedings contain inconsistent provisions, the court shall resolve such conflicts and determine the rights and duties of the various parties to achieve substantial justice under all the circumstances.

The court may exercise its discretion under this section to deny consolidation of separate arbitration proceedings or to consolidate separate arbitration proceedings only as to certain issues, leaving other issues to be resolved in separate proceedings.

This section shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

§ 1281.4. If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State and such application is undetermined, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until the application for an order to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only.

§ 1281.5. (a) Any person who proceeds to record and enforce a claim of lien by commencement of an action pursuant to Chapter 4 (commencing with Section 8400) of Title 2 of Part 6 of Division 4 of the Civil Code, does not thereby waive any right of arbitration the person may have pursuant to a written agreement to arbitrate, if, in filing an action to enforce the claim of lien, the claimant does either of the following:

(1) Includes an allegation in the complaint that the claimant does not intend to waive any right of arbitration, and intends to move the court, within 30 days after service of the summons and complaint, for an order to stay further proceedings in the action.

(2) At the same time that the complaint is filed, the claimant files an application that the action be stayed pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action to enforce the claim of lien.

(b) Within 30 days after service of the summons and complaint, the claimant shall file and serve a motion and notice of motion pursuant to Section 1281.4 to stay the action pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action to enforce the claim of lien. The failure of a claimant to comply with this subdivision is a waiver of the claimant's right to compel arbitration.

(c) The failure of a defendant to file a petition pursuant to Section 1281.2 at or before the time the defendant answers the complaint filed pursuant to subdivision (a) is a waiver of the defendant's right to compel arbitration.

§ 1281.6. If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of

appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.

When a petition is made to the court to appoint a neutral arbitrator, the court shall nominate five persons from lists of persons supplied jointly by the parties to the arbitration or obtained from a governmental agency concerned with arbitration or private disinterested association concerned with arbitration. The parties to the agreement who seek arbitration and against whom arbitration is sought may within five days of receipt of notice of the nominees from the court jointly select the arbitrator whether or not the arbitrator is among the nominees. If the parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the nominees.

§ 1281.7. A petition pursuant to Section 1281.2 may be filed in lieu of filing an answer to a complaint. The petitioning defendant shall have 15 days after any denial of the petition to plead to the complaint.

§ 1281.8.

(a) As used in this section, "provisional remedy" includes the following:

(1) Attachments and temporary protective orders issued pursuant to Title 6.5 (commencing with Section 481.010) of Part 2.

(2) Writs of possession issued pursuant to Article 2 (commencing with Section 512.010) of Chapter 2 of Title 7 of Part 2.

(3) Preliminary injunctions and temporary restraining orders issued pursuant to Section 527.

(4) Receivers appointed pursuant to Section 564.

(b) A party to an arbitration agreement may file in the court in the county in which an arbitration proceeding is pending, or if an arbitration proceeding has not commenced, in any proper court, an application for a provisional remedy in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief. The application shall be accompanied by a complaint or by copies of the demand for arbitration and any response thereto. If accompanied by a complaint, the application shall also be accompanied by a statement stating whether the party is or is not reserving the party's right to arbitration.

(c) A claim by the party opposing issuance of a provisional remedy, that the controversy is not subject to arbitration, shall not be grounds for denial of any provisional remedy.

(d) An application for a provisional remedy under subdivision (b) shall not operate to waive any right of arbitration which the applicant may have pursuant to a written agreement to arbitrate, if, at the same time as the application for a provisional remedy is presented, the applicant also presents to the court an application that all other proceedings in the action be stayed pending the arbitration of any issue, question, or dispute which is claimed to be arbitrable under the agreement and which is relevant to the action pursuant to which the provisional remedy is sought.

§ 1281.85.

(a) Beginning July 1, 2002, a person serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with the ethics standards for arbitrators adopted by the Judicial Council pursuant to this section. The Judicial Council shall adopt ethical standards for all neutral arbitrators effective July 1, 2002. These standards shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and disqualification requirements established by this chapter. The standards shall address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualifications, acceptance of gifts, and establishment of future professional relationships.

(b) Subdivision (a) does not apply to an arbitration conducted pursuant to the terms of a public or private sector collective bargaining agreement.

(c) The ethics requirements and standards of this chapter are nonnegotiable and shall not be waived.

§ 1281.9.

(a) In any arbitration pursuant to an arbitration agreement, when a person is to serve as a neutral arbitrator, the proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial, including all of the following:

(1) The existence of any ground specified in Section 170.1 for disqualification of a judge. For purposes of paragraph (8) of subdivision (a) of Section 170.1, the proposed neutral arbitrator shall disclose whether or not he or she has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within

the last two years, has participated in, discussions regarding such prospective employment or service with a party to the proceeding.

(2) Any matters required to be disclosed by the ethics standards for neutral arbitrators adopted by the Judicial Council pursuant to this chapter.

(3) The names of the parties to all prior or pending noncollective bargaining cases in which the proposed neutral arbitrator served or is serving as a party arbitrator for any party to the arbitration proceeding or for a lawyer for a party and the results of each case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the names of the parties' attorneys and the amount of monetary damages awarded, if any. In order to preserve confidentiality, it shall be sufficient to give the name of any party who is not a party to the pending arbitration as "claimant" or "respondent" if the party is an individual and not a business or corporate entity.

(4) The names of the parties to all prior or pending noncollective bargaining cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator served or is serving as neutral arbitrator, and the results of each case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the names of the parties' attorneys and the amount of monetary damages awarded, if any. In order to preserve confidentiality, it shall be sufficient to give the name of any party not a party to the pending arbitration as "claimant" or "respondent" if the party is an individual and not a business or corporate entity.

(5) Any attorney-client relationship the proposed neutral arbitrator has or had with any party or lawyer for a party to the arbitration proceeding.

(6) Any professional or significant personal relationship the proposed neutral arbitrator or his or her spouse or minor child living in the household has or has had with any party to the arbitration proceeding or lawyer for a party.

(b) Subject only to the disclosure requirements of law, the proposed neutral arbitrator shall disclose all matters required to be disclosed pursuant to this section to all parties in writing within 10 calendar days of service of notice of the proposed nomination or appointment.

(c) For purposes of this section, "lawyer for a party" includes any lawyer or law firm currently associated in the practice of law with the lawyer hired to represent a party.

(d) For purposes of this section, "prior cases" means noncollective bargaining cases in which an arbitration award was rendered within five years prior to the date of the proposed nomination or appointment.

(e) For purposes of this section, "any arbitration" does not include an arbitration conducted pursuant to the terms of a public or private sector collective bargaining agreement.

§ 1281.91.

(a) A proposed neutral arbitrator shall be disqualified if he or she fails to comply with Section 1281.9 and any party entitled to receive the disclosure serves a notice of disqualification within 15 calendar days after the proposed nominee or appointee fails to comply with Section 1281.9.

(b)(1) If the proposed neutral arbitrator complies with Section 1281.9, the proposed neutral arbitrator shall be disqualified on the basis of the disclosure statement after any party entitled to receive the disclosure serves a notice of disqualification within 15 calendar days after service of the disclosure statement.

(2) A party shall have the right to disqualify one court-appointed arbitrator without cause in any single arbitration, and may petition the court to disqualify a subsequent appointee only upon a showing of cause.

(c) The right of a party to disqualify a proposed neutral arbitrator pursuant to this section shall be waived if the party fails to serve the notice pursuant to the times set forth in this section, unless the proposed nominee or appointee makes a material omission or material misrepresentation in his or her disclosure. Except as provided in subdivision (d), in no event may a notice of disqualification be given after a hearing of any contested issue of fact relating to the merits of the claim or after any ruling by the arbitrator regarding any contested matter. Nothing in this subdivision shall limit the right of a party to vacate an award pursuant to Section 1286.2, or to disqualify an arbitrator pursuant to any other law or statute.

(d) If any ground specified in Section 170.1 exists, a neutral arbitrator shall disqualify himself or herself upon the demand of any party made before the conclusion of the arbitration proceeding. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or their respective representatives.

§ 1281.92.

(a) No private arbitration company may administer a consumer arbitration, or provide any other services related to a consumer arbitration, if the company has, or within the preceding year has had, a financial interest, as defined in Section 170.5, in any party or attorney for a party.

(b) No private arbitration company may administer a consumer arbitration, or provide any other services related to a consumer arbitration, if any party or attorney for a party has, or within the preceding year has had, any type of financial interest in the private arbitration company.

(c) This section shall operate only prospectively so as not to prohibit the administration of consumer arbitrations on the basis of financial interests held prior to January 1, 2003.

(d) This section applies to all consumer arbitration agreements subject to this article, and to all consumer arbitration proceedings conducted in California.

(e) This section shall become operative on January 1, 2003.

§ 1281.95.

(a) In a binding arbitration of any claim for more than three thousand dollars ($3,000) pursuant to a contract for the construction or improvement of residential property consisting of one to four units, the arbitrator shall, within 10 days following his or her appointment, provide to each party a written declaration under penalty of perjury. This declaration shall disclose (1) whether the arbitrator or his or her employer or arbitration service had or has a personal or professional affiliation with either party, and (2) whether the arbitrator or his or her employer or arbitration service has been selected or designated as an arbitrator by either party in another transaction.

(b) If the arbitrator discloses an affiliation with either party, discloses that the arbitrator has been selected or designated as an arbitrator by either party in another arbitration, or fails to comply with this section, he or she may be disqualified from the arbitration by either party.

(c) A notice of disqualification shall be served within 15 days after the arbitrator makes the required disclosures or fails to comply. The right of a party to disqualify an arbitrator shall be waived if the party fails to serve the notice of disqualification pursuant to this subdivision unless the arbitration makes a material omission or material misrepresentation in his or her disclosure. Nothing in this section shall limit the right of a party to vacate an award pursuant to Section 1286.2, or to disqualify an arbitrator pursuant to any other law or statute.

§ 1281.96.

(a) Except as provided in paragraph (2) of subdivision (c), a private arbitration company that administers or is otherwise involved in a consumer arbitration, shall collect, publish at least quarterly, and make available to the public on the Internet Web site of the private arbitration company, if any, and on paper upon request, a single cumulative report that contains all of the following information regarding each consumer arbitration within the preceding five years:

(1) Whether arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering private arbitration company.

(2) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity, and whether the nonconsumer party was the initiating party or the responding party, if known.

(3) The nature of the dispute involved as one of the following: goods; credit; other banking or finance; insurance; health care; construction; real estate; telecommunications, including software and Internet usage; debt collection; personal injury; employment; or other. If the dispute involved employment, the amount of the employee' s annual wage divided into the following ranges: less than one hundred thousand dollars ($100,000), one hundred thousand dollars ($100,000) to two hundred fifty thousand dollars ($250,000), inclusive, and over two hundred fifty thousand dollars ($250,000). If the employee chooses not to provide wage information, it may be noted.

(4) Whether the consumer or nonconsumer party was the prevailing party. As used in this section, "prevailing party" includes the party with a net monetary recovery or an award of injunctive relief.

(5) The total number of occasions, if any, the nonconsumer party has previously been a party in an arbitration administered by the private arbitration company.

(6) The total number of occasions, if any, the nonconsumer party has previously been a party in a mediation administered by the private arbitration company.

(7) Whether the consumer party was represented by an attorney and, if so, the name of the attorney and the full name of the law firm that employs the attorney, if any.

(8) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.

(9) The type of disposition of the dispute, if known, identified as one of the following: withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing. If a case was administered in a hearing, indicate whether the hearing was conducted in person, by telephone or video conference, or by documents only.

(10) The amount of the claim, whether equitable relief was requested or awarded, the amount of any monetary award, the amount of any attorney's fees awarded, and any other relief granted, if any.

(11) The name of the arbitrator, his or her total fee for the case, the percentage of the arbitrator's fee allocated to each party, whether a waiver of any fees was granted, and, if so, the amount of the waiver.

(b) The information required by this section shall be made available in a format that allows the public to search and sort the information using readily available software, and shall be directly accessible from a conspicuously displayed link on the Internet Web site of the private arbitration company with the identifying description: "consumer case information."

(c)(1) If the information required by subdivision (a) is provided by the private arbitration company in compliance with subdivision (b) and may be downloaded without a fee, the company may charge the actual cost of copying to any person who requests the information on paper. If the information required by subdivision (a) is not accessible by the Internet in compliance with subdivision (b), the company shall provide that information without charge to any person who requests the information on paper.

(2) Notwithstanding paragraph (1), a private arbitration company that receives funding pursuant to Chapter 8 (commencing with Section 465) of Division 1 of the Business and Professions Code and that administers or conducts fewer than 50 consumer arbitrations per year may collect and publish the information required by subdivision (a) semiannually, provide the information only on paper, and charge the actual cost of copying.

(d) This section shall apply to any consumer arbitration commenced on or after January 1, 2003.

(e) A private arbitration company shall not have any liability for collecting, publishing, or distributing the information required by this section.

(f) It is the intent of the Legislature that private arbitration companies comply with all legal obligations of this section.

(g) The amendments to subdivision (a) made by the act adding this subdivision shall not apply to any consumer arbitration administered by a private arbitration company before January 1, 2015.

CERTIFICATE OF FILING AND 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 February 16, 2016.

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.

Dated: February 16, 2016

PUBLIC JUSTICE, P.C.

s/ Karla Gilbride
Karla Gilbride
Counsel for Plaintiffs-Appellees