No. _____

In The
Supreme Court of the United States

AIR LIQUIDE INDUSTRIAL U.S. LP,

Petitioner,

v.

MARIO GARRIDO, in his individual capacity, and on behalf of all others similarly situated,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Two

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the California Court of Appeal err by holding, in direct conflict with *DirecTV v. Imburgia*, 136 S. Ct. 463 (2015), that the parties' agreement to apply the Federal Arbitration Act ("FAA") to govern their arbitration contract was unenforceable because the FAA's transportation worker exemption applied?

2. Did the California Court of Appeal err by holding, in direct conflict with the Second, Eighth and Eleventh Circuits, that an employee was exempt from the FAA as a "transportation worker" even though he was not employed in the transportation industry?

RULE 14.1(b) STATEMENT

The following were parties to the proceedings in the California Court of Appeal:

1. Mario Garrido, Plaintiff and Respondent on Review.
2. Air Liquide Industrial U.S. LP, Defendant and Petitioner on Review.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Air Liquide Industrial U.S. LP is a subsidiary of American Air Liquide Holdings, Inc., which is a publicly held corporation that owns 10% or more of Air Liquide Industrial U.S. LP's stock.

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OPINIONS BELOW

The California Superior Court's order denying Petitioner Air Liquide Industrial U.S. LP's ("Air Liquide") motion to compel individual arbitration is not published. (App. 42-59.)

The California Court of Appeal rendered two decisions below. The first was issued on June 3, 2015 and reversed the trial court, ordering that Respondent's claim be arbitrated individually. That opinion is unpublished. (App. 21-41.)

On October 26, 2015, the Court of Appeal vacated its first opinion and issued a second decision following the grant of Respondent Mario Garrido's ("Garrido") petition for rehearing that affirmed the trial court's denial of Air Liquide's motion to compel arbitration. The second decision is a published opinion, reported at *Garrido v. Air Liquide Industrial U.S. LP*, 194 Cal. Rptr. 3d 297 (Cal. Ct. App. 2015). (App. 1-20.)

Air Liquide timely sought review in the California Supreme Court on December 4, 2015.

BASIS FOR JURISDICTION

The California Supreme Court denied Air Liquide's petition for review on February 3, 2016. The jurisdiction of the United States Supreme Court is timely invoked under 28 U.S.C. § 1257(a).

PERTINENT STATUTORY PROVISIONS

The relevant provisions of the Federal Arbitration Act ("FAA") are set forth below.

Section 2 of the FAA provides in relevant part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 4 of the FAA provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any . . . court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.

The Section 1 exemption from the FAA for transportation workers provides:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1.

In construing the Section 1 exemption, this Court considered two provisions of the FAA in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-116 (2001). This Court first examined Section 2, which defines the broad sweep of the FAA's coverage. Section 2 also extends the Act's coverage to, among other things, a contract "evidencing a transaction involving commerce." This Court next evaluated the Section 1 exemption. It had little difficulty holding that the Section 1 exemption is limited to transportation workers who are actually engaged in interstate commerce. This Court found that the clause "workers engaged in . . . interstate

commerce" should be read to give effect to the terms "seamen" and "railroad employees" and should be "controlled and defined" by reference to these enumerated categories. Thus, this Court reasoned that workers "engaged in interstate commerce" refers to workers actually engaged in interstate transportation.

STATEMENT OF THE CASE

I. Summary

Less than five months ago, this Court confirmed in *DirecTV v. Imburgia* (*Imburgia*), 136 S. Ct. 463 (2015), that ordinary contract law principles must be applied to arbitration contracts and contracting parties' choice to apply the FAA to govern their dispute must be enforced. Specifically, this Court stated:

> [T]he Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions, including the law governing enforceability of a class-arbitration waiver. . . . Since the interpretation of a contract is ordinarily a matter of state law to which we defer, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989), we must decide not whether its decision is a correct statement of California law but whether (assuming it is) that state law is consistent with the Federal Arbitration Act.

Imburgia, 136 S. Ct. at 468.

Congress enacted the FAA for the "central purpose" of ensuring "that private agreements to arbitrate are enforced according to their terms." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (internal quotations and citations omitted). Section 2 of the FAA states that a "written provision . . . to settle by arbitration a controversy" arising out of any "contract evidencing a transaction involving commerce" shall be "valid, irrevocable and enforceable, save upon any grounds that exist at law, or in equity, for the revocation of any contract." 9 U.S.C. § 2. "The effect of this section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Here, the parties to the instant arbitration contract entered into a choice of law clause as expressly permitted by *Imburgia*, selecting the FAA itself to govern their agreement. Yet the California Court of Appeal, in direct conflict with the FAA and *Imburgia*, concluded that the FAA did not apply, and applied California law instead. The Court of Appeal then unsurprisingly concluded that the arbitration agreement was not enforceable under California law.

The California Court of Appeal's decision to apply the FAA's Section 1 exemption for transportation workers to remove the contract from FAA coverage negated the choice of law clause that even the Court of Appeal itself was forced to admit was facially enforceable. Moreover, the application of the Section 1

exemption directly contradicted the parties' clear and expressly-stated intent to apply the FAA to their dispute. The Court of Appeal's conclusion that the parties somehow intended to apply an exemption to the FAA to vitiate the very choice of law provision that they entered into, when in fact their intention was directly opposite, defied reason. Indeed, it could only be explained by hostility to arbitration. Rather than simply enforce the parties' routine choice of law provision as compelled by a wealth of both state and federal authority, the Court of Appeal undertook a roundabout and internally contradictory analysis to ultimately defeat arbitration – not unlike the tortured analysis it embarked upon in *Imburgia* (prior to this Court's eventual reversal). The California Court of Appeal's decision was emblematic of the continuing disparity between how California courts treat contracts to arbitrate, on the one hand, and all other contracts, on the other hand.

The Court of Appeal compounded its error when it concluded that Garrido, the employee and signatory to the arbitration agreement, was a "transportation worker" within the meaning of the exemption. This was so despite that neither Garrido nor Air Liquide, his employer, were engaged in the transportation industry. In so doing, the Court of Appeal adopted the minority view held by only the Seventh Circuit: that the mere crossing of state lines is sufficient to bring the employee within the Section 1 exemption. The Second, Eighth and Eleventh Circuits, in contrast, have

all held that the FAA's transportation worker exemption applies only to employees in the transportation industry.

This Court's review is necessary to: 1) ensure that the strong federal policy behind the FAA to promote arbitration, which preempts state law, is not defeated by California state laws hostile to arbitration; and 2) resolve the fundamental split in the Circuits concerning the scope of the Section 1 exemption to the FAA for transportation workers.

II. Statement of Facts

Air Liquide's business is focused on the production of industrial gases, such as oxygen, nitrogen, hydrogen and rare gases, and the preparation of its gases for market and distribution. (*See* App. 2.) Garrido was employed by Air Liquide as a truck driver from June 2009 until January 2011. (App. 2-3, 4 & 43.) His job duties consisted of delivering Air Liquide's industrial gases to market. (App. 3.) Neither Air Liquide nor Garrido ever worked as a common carrier or transported the goods of anyone other than Air Liquide.

Respondent Garrido entered into an Alternative Dispute Resolution agreement ("Arbitration Agreement" or "Agreement") with Air Liquide upon his hire in June 2009. (App. 3, 42 & 61-71.) At Section 2.10 of the Agreement, Air Liquide and Garrido expressly and unequivocally agreed that the FAA would govern their dispute:

> This Agreement, any arbitration proceedings held pursuant to this Agreement, and any proceedings concerning arbitration under this Agreement are subject to and governed by the Federal Arbitration Act, 9 U.S.C. section 1 et seq.

(App. 66.)

The Agreement further stated that it would apply to "all disputes" arising out of Garrido's employment with Air Liquide, including unfair competition and wage and hour claims. Specifically, Section 2.1 of the Arbitration Agreement provided, in pertinent part:

> All disputes arising out of or relating to the interpretation and application of this ADR Agreement or the employee's employment with Air Liquide or the termination of employment, including for example and without limitation, any claims for unfair competition, theft of trade secrets, wrongful termination, unlawful discrimination, sexual harassment or other unlawful harassment, or retaliation, shall be resolved through ADR, including binding arbitration if necessary.

(App. 62.) The Agreement further specifies that "[d]isputes within the scope of this Agreement shall include, but not be limited to . . . alleged violations of federal, state and/or local constitutions, statutes or regulations" and that arbitration is "the exclusive means for formal resolution of all such disputes between an employee and Air Liquide and is binding upon both Air Liquide and the employee." (App. 62-63.)

The Agreement also expressly precludes class actions. The class action waiver is highlighted in bold in Section 2.11 of the Agreement and states, "there is no right or authority for any dispute covered by this Agreement to be heard or arbitrated on a class or collective action basis. . . ." (App. 67.)

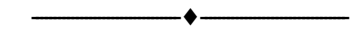
On June 5, 2012, Garrido filed a class action complaint against Air Liquide in California Superior Court alleging that it failed to provide timely meal periods (Cal. Lab. Code, §§ 226.7, 512) and accurate itemized wage statements (Cal. Lab. Code, §§ 226, 226.3), failed to pay compensation due upon separation of employment (Cal. Lab. Code, §§ 201-203), and committed unfair business practices (Cal. Bus. & Prof. Code, §§ 17200, *et seq.*). (App. 4.)

Air Liquide promptly moved to compel individual arbitration in the trial court. The trial court found that the FAA plainly controlled by virtue of the choice of law clause in the Agreement. However, the trial court declined to enforce the arbitration agreement, finding that the now-defunct *Gentry* doctrine applied to invalidate the class action waiver in arbitration, as set forth in *Gentry v. Super. Ct.*, 165 P.3d 556 (Cal. 2007). (App. 42-59.) Air Liquide timely appealed.

The California Court of Appeal issued its initial decision on June 3, 2015. In its opinion, the Court of Appeal reversed the trial court and concluded that although the FAA did not apply, the arbitration agreement was valid and enforceable on an individual basis under California law. (App. 21-41.)

Respondent Garrido filed a petition for rehearing on June 22, 2015, which the Court granted on July 6, 2015. Following supplemental briefing, the Court of Appeal decided to affirm the trial court by a decision dated October 26, 2015. (App. 42-59.) Neither party sought further rehearing. The Court of Appeal's second decision became final on November 25, 2015.

Air Liquide timely sought review of the Court of Appeal's decision with the California Supreme Court. Air Liquide filed its petition for review on December 4, 2015. The California Supreme Court denied the petition for review on February 3, 2016. (App. 60.) This Petition for a Writ of Certiorari timely followed.



REASONS FOR GRANTING THE WRIT

I. The California Court of Appeal's Refusal to Enforce the Parties' Choice of the FAA to Control Their Contract Directly Conflicts With Both *Imburgia* and the FAA Itself.

There is no question that parties to an arbitration agreement may choose what law will control their dispute, including the FAA. In *Imburgia*, the California Court of Appeal avoided enforcing an arbitration agreement with a class action waiver by applying the now-preempted "law of the state" of California concerning arbitration as it was prior to *AT&T Mobility LLC v. Concepcion* (*Concepcion*), 563 U.S. 333 (2011). *Imburgia*, 136 S. Ct. 468. The Supreme Court found

this interpretation to be untenable. *Imburgia* made clear that such efforts made simply to avoid arbitration are impermissible:

> The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.
>
> * * *
>
> [T]he Federal Arbitration Act allows parties to an arbitration agreement considerable latitude to choose what law governs some or all of its provisions, including the law governing enforceability of a class-arbitration waiver. [Citations.] In principle, they might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California including the *Discover Bank* rule and irrespective of that rule's invalidation in *Concepcion*.

Id.

The circuit courts have also uniformly and consistently enforced the directive that the parties to an arbitration agreement may choose the FAA to control their dispute. *See Biller v. Toyota Motor Corp.*, 668 F.3d 655, 662-663 (9th Cir. 2012) (" . . . [W]e conclude that the plain language of the Severance Agreement requires that the FAA governs the arbitration proceedings here."); *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1162 (9th Cir. 2013)

(enforcing the parties' choice of the FAA to control their dispute); *Renard v. Ameriprise Fin. Servs., Ltd.*, 778 F.3d 563 (7th Cir. 2015) (enforcing parties' choice of the FAA to control their dispute).

Likewise, state appellate courts outside of California recognize that even where the FAA would not apply by default, the FAA may nevertheless be adopted by the parties. *See, e.g.*, *Teel v. Beldon Roofing & Remodeling Co.*, 281 S.W.3d 446 (Tex. App. 2007) ("[W]hen there is an express agreement to arbitrate under the FAA, courts have upheld such choice-of-law provisions even though the transaction at issue does not involve interstate commerce." (citing *In re Kellogg Brown & Root*, 80 S.W.3d 611, 617 (Tex. App. 2002))); *J.B. Hunt v. Hartman*, 307 S.W.3d 804, 807 (Tex. App. 2010) (same); *Harrison v. Eberhardt*, 651 S.E.2d 826 (Ga. Ct. App. 2007) (same).

But the California Court of Appeal did not view this matter as the simple contract case that it is. Rather, the court did what it is expressly forbidden to do: it evaluated the parties' Agreement through a different lens solely *because* it contains an arbitration provision. The court held that a contract containing a choice of law clause selecting the FAA should nevertheless be examined to determine whether the FAA would have applied *absent* the choice of law clause. If not, according to the California court, the parties' choice of the FAA was unenforceable. Of course, the very purpose of a choice of law clause is to select a set of laws that *would not* have applied in the first instance, or to provide certainty when it is unclear which law may apply.

See Restatement (Second) of Conflict of Laws § 187, comment e (The "[p]rime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. . . . Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations."). Otherwise, and as the California Court of Appeal interpreted it here, a choice of law provision would be mere surplusage.

By applying the Section 1 exemption to the Agreement, the Court of Appeal accomplished indirectly what it could not do directly – defeat FAA preemption in order to apply California law instead. Not surprisingly, under California law, the court applied the abrogated *Gentry* doctrine, which even the California Supreme Court was forced to conclude was preempted by the FAA. *See Iskanian v. CLS Transp.*, 327 P.3d 129 (Cal. 2014). But because the Court of Appeal concluded that the FAA did not apply, it found that *Gentry* remained viable in spite of *Concepcion*, and operated here to subvert arbitration.

Notably, the Court of Appeal's failure to enforce the parties' choice of the FAA to control their contract was even directly contrary to California law, which strongly favors the enforcement of choice of law clauses. *Nedlloyd Lines B.V. v. Super. Ct.*, 11 Cal. Rptr. 2d 330, 333 (Cal. 1992) (citing *Smith, Valentino & Smith, Inc. v. Super. Ct.*, 551 P.2d 1206, 17 Cal. 3d 491,

494 (Cal. 1976), and Restatement (Second) of Conflict of Laws § 187).

Permitting the conflict to deepen between the California Court of Appeal's decision to ignore the parties' choice of law provision and this Court's precedent to the contrary would not only encourage forum shopping, but it would defeat the entire purpose behind arbitration in the first place: to promote the speedy and efficient resolution of disputes. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.* (*Italian Colors*), 133 S. Ct. 2304, 2312 (2013); *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1983). Indeed, in this case, the parties' clear intentions for speedy and efficient dispute resolution, as expressed through their agreement to arbitrate and adoption of the FAA, have been defeated given that this matter has now been pending in the court system since June 5, 2012.

Furthermore, arbitration agreements are effectively negated if they are only enforced in certain courts. If permitted to stand, the Court of Appeal's decision will gravely undercut the FAA's "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

In short, absent this Court's intervention, California will continue to flout the FAA by creating new and different exceptions, exclusions and end runs around mandatory arbitration. California state courts will

continue to "'chip away' at [this Court's] precedents broadly construing the scope of the FAA . . . despite [this Court's] admonition against doing so." *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 999 (Cal. 2003) (Brown, J., concurring and dissenting) (quoting *Circuit City*, 532 U.S. at 122).

Indeed, California's hostility to arbitration is well documented. *See, e.g.*, *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67 (Cal. 1999) (categorically prohibiting arbitration of claims for injunctive relief under California's Consumers Legal Remedies Act); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003) (extending *Broughton* to prohibit arbitration of claims for injunctive relief under California's unfair competition and misleading advertising laws); *Little*, 63 P.3d at 990 (holding that a common law claim for wrongful termination in violation of public policy is only arbitrable where the arbitration guarantees "availability of damages remedies equal to those available . . . in court, including punitive damages; discovery sufficient to adequately arbitrate [the] claims; a written arbitration decision and judicial review sufficient to ensure that arbitrators have complied with the law . . . ; and allocation of arbitration costs so that they will not unduly burden the employee"); *Ferrer v. Preston*, 51 Cal. Rptr. 3d 628, 634 (Cal. Ct. App. 2007) (refusing to enforce arbitration agreement for "controversies colorably arising under [California's] Talent Agencies Act"), *rev'd*, 552 U.S. 346 (2008); *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130 (Cal. 2011) (invalidating, as contrary to public policy, arbitration agreement that

waived certain administrative hearings before the California Labor Commissioner), *vacated*, 132 S. Ct. 496 (2011) (mem.); *see also* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54, 66 (2006).

Even after *Concepcion*, California law continues to display the same type of hostility toward arbitration agreements that the FAA was enacted to end. *See, e.g.*, *Brown v. Super. Ct.*, 157 Cal. Rptr. 3d 779, 781 (Cal. Ct. App. 2013) (holding that claim under California's Private Attorneys General Act of 2004 is not subject to arbitration because it "is necessarily a representative action intended to advance a predominantly public purpose"), *vacated for reconsideration in light of Iskanian*, 327 P.3d 129, *by* 331 P.3d 1274 (Cal. 2014); *James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020, 1036-37 (S.D. Tex. 2012) (concluding that, even after *Concepcion*, California courts continue to find arbitration forum-selection clauses unenforceable under a far more stringent test than that applicable to "forum-selection clauses outside of the arbitration context").

This Court's review is necessary to ensure that the FAA's mandate is uniformly enforced.

II. There Is an Irreconcilable Split Among the Circuits Regarding Whether the Section 1 Transportation Worker Exemption Under the FAA Applies to Employees Outside the Transportation Industry.

The circuit courts are deeply divided regarding the scope of the Section 1 exemption to the FAA. The Second, Eighth and Eleventh Circuits have held that the Section 1 exemption *only* applies to employees in the transportation industry, meaning common carriers who transport the goods of others. The Seventh Circuit, by contrast, has held that the mere incidental crossing of state lines by any employee, no matter how infrequent, is sufficient to render that employee a "transportation worker" under Section 1 and remove them from the FAA's coverage.

Here, the California Court of Appeal adopted the Seventh Circuit's interpretation, holding that it was irrelevant whether Garrido was in the transportation industry because he crossed state lines. This broad interpretation of the Section 1 exemption undercuts the very purpose of the FAA by removing any employee who happens to cross state lines from FAA coverage. It also creates the anomalous situation where an employee who is not in the transportation industry, but who happens to work in a border town and crosses state lines making routine pizza deliveries in the ordinary course of his workday, becomes exempt from the FAA as a "transportation worker," while his co-worker doing the exact same job at a branch a mere 20 miles

from the border is covered. The Section 1 exemption was not intended to be so capricious.

Instead, the scope of the Section 1 exemption must be viewed against the backdrop of the FAA and the underlying policy considerations supporting its enactment. The FAA was enacted in 1925 to reverse the longstanding judicial hostility towards arbitration. *See Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA embodies a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. Generally, the FAA provides for the enforceability of any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2, *see also Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1061 (11th Cir. 1998).

In construing the Section 1 exemption, this Court in *Circuit City*, *supra*, 532 U.S. at 114-116, reasoned that workers "engaged in interstate commerce" only refers to workers actually engaged in some type of interstate transportation. The majority found that there was a rationale for Congress to exclude seamen, railroad employees and other workers engaged in commerce from the FAA, but not all employees. This was because when the FAA was adopted, other regulatory schemes established dispute resolution procedures for these workers. Thus, there was no need to provide them with arbitration protections under the FAA.

Per *Circuit City*, the Second, Eighth and Eleventh Circuits have read the Section 1 exemption narrowly. In *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290

(11th Cir. 2005), the Eleventh Circuit weighed whether an employee outside the transportation industry was nevertheless exempt from FAA coverage under Section 1. The court held that, even if the employee traveled across state lines in the process of performing his job, he was not a "transportation worker" because he was not employed in the transportation industry. Here, it is undisputed that Air Liquide, a producer of industrial gases, is within the industrial gas industry, and not the transportation industry. (App. 2.)

The Eighth Circuit agreed in *Lenz v. Yellow Transp., Inc.*, 431 F. 3d 348 (8th Cir. 2005). In *Lenz*, the court held that to be a transportation worker within the meaning of the Section 1 exemption, an employee must: 1) work in the transportation industry; and 2) be directly involved in the transport of goods in interstate commerce. This is the prevailing view. *See Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 982 (2d Cir. 1997) (noting that "our Circuit's § 1 exclusion is limited to workers in the transportation industries," and citing *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972)).

The Seventh Circuit holds a contrary view and deems it irrelevant for the purposes of the Section 1 exemption whether the employer or employee work in the transportation industry. *Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012). Rather, the Seventh Circuit has adopted a bright-line approach: if employees simply cross state lines, they are "transportation workers" and thus subject to the Section 1 exemption. However,

if, as in *Circuit City*, the exemption is construed narrowly in accordance with the FAA's strong pro-arbitration policy, it is anomalous that it would apply so broadly.

The conflict between the Seventh Circuit and the Second, Eighth and Eleventh Circuits is profound and irreconcilable. This creates a grave divergence among the Circuits with respect to the scope of FAA coverage. In the Seventh Circuit, far fewer employees are currently subject to the mandate of the FAA, because that Circuit interprets the Section 1 exemption much more broadly. By contrast, in the Second, Eighth and Eleventh Circuits, the Section 1 exemption is appropriately narrow and the policies of the FAA are more consistently enforced. In the remaining Circuits and the various state courts, the outcome is unpredictable because of the split in guidance.

This rift impacts a wide range of arbitration agreements entered into by tens of thousands of employers and employees each year. As a result of the strong preemptive force of the FAA and this Court's recent decisions in *Concepcion* and *Italian Colors*, many of these agreements undoubtedly expressly incorporate the FAA as controlling. Thus, this issue touches all arbitration agreements irrespective of whether they contain a choice of law clause.

To the extent there is room for the lower courts to over-broadly interpret the Section 1 exemption to apply to any employee engaged in interstate commerce,

this will directly undermine the FAA's expansive arbitration mandate, and render the FAA toothless. A rule exempting employees who cross state lines from FAA coverage likely would spawn hair-splitting distinctions within the same organization and unnecessary litigation, thus gutting the FAA's central purpose, "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. The "transportation industry" showing should be a necessary threshold element of any Section 1 exemption claim, as cases easily can be screened by the industry in which they arose. Review is necessary to ensure that the scope of the FAA's coverage is consistent and is coextensive with both its congressional mandate and this Court's precedent.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARIO GARRIDO, Plaintiff and Respondent, v. AIR LIQUIDE INDUSTRIAL U.S. LP, Defendant and Appellant.	B254490 (Los Angeles County Super. Ct. No. BC485942 (Filed Oct. 26, 2015)

APPEAL from an order of the Superior Court of Los Angeles County. Amy D. Hogue, Judge. Affirmed.

Littler Mendelson, Nancy E. Pritikin, Dominic J. Messiha, Jennifer Tsao for Defendant and Appellant.

Esensten Law, Robert L. Esensten, Jordan Esensten, for Plaintiff and Respondent.

Plaintiff and respondent Mario Garrido entered into an agreement with his employer, defendant and appellant American Air Liquide, Inc. (Air Liquide). The agreement provided that all disputes arising out of Garrido's employment with Air Liquide would be resolved by arbitration, and the agreement prohibited class arbitration.

After being terminated, Garrido filed a class action complaint against Air Liquide, alleging various Labor Code violations and unfair business practices. The trial court denied a motion to compel arbitration brought by Air Liquide, finding that the agreement's class waiver provision was improper under the test laid out in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*). Following the trial court's ruling, our Supreme Court held, in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 364 (*Iskanian*), that *Gentry*'s rule against employment class waivers was preempted by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA).

In light of *Iskanian*, if this matter were governed by the FAA, arbitration (on an individual basis) would likely be required. This matter is not subject to the FAA, however, and *Gentry*'s holding has not been overturned under California law in situations where the FAA does not apply. We accordingly find that the agreement's class waiver provision is unenforceable. Neither party asserts that class arbitration is appropriate. Therefore, we affirm the trial court's order denying the motion to compel arbitration.

Factual and Procedural Background

Air Liquide[1] produces and distributes industrial gases throughout the United States. Garrido was

[1] Defendant states that it was named incorrectly in plaintiff's complaint, and that its actual name is Air Liquide Industrial

(Continued on following page)

hired as a truck driver by Air Liquide in June 2009. He transported Air Liquide gases to locations in California and neighboring states from Air Liquide's Sante Fe Springs production and distribution center.

Upon his hiring, Garrido entered into an "Alternative Dispute Resolution Agreement" (the ADR agreement). The ADR agreement stipulates that all disputes arising out of Garrido's employment with Air Liquide are to be resolved through alternative dispute resolution, including arbitration "if necessary." According to its terms, the agreement, and any arbitration proceedings, are governed by the FAA.

The ADR agreement allows the parties to conduct discovery and file motions in arbitration. Prior to an employee-initiated arbitration, the employee is required to contribute a sum toward the arbitrator's fee equal to the then-current filing fee in the applicable state or federal court for a complaint or first appearance, whichever is lower. The arbitrator is authorized to provide to the prevailing party all remedies and costs available under applicable law, and is required to issue a written opinion and award stating essential findings and the conclusions upon which the award is based. The ADR agreement prohibits arbitration on a class, collective, and representative basis, as well as private attorney general actions.

U.S. LP. Because the proper name of defendant is irrelevant to the matters decided in this appeal, we refer generally to defendant as Air Liquide.

Garrido's employment with Air Liquide was terminated in January 2011. In June 2012, Garrido filed a class action complaint against Air Liquide, alleging that it failed to provide mandated timely meal periods (Lab. Code, §§ 226.7, 512) and accurate itemized wage statements (Lab. Code, §§ 226, 226.3), failed to pay compensation due upon separation of employment (Lab. Code, §§ 201-203), and committed unfair business practices (Bus. & Prof. Code, § 17200 et seq.).

Air Liquide promptly moved to compel arbitration of Garrido's claims. Air Liquide argued that the ADR agreement is binding and requires Garrido to arbitrate all claims, and that the agreement's class action waiver should be enforced. Garrido opposed the motion, arguing that the FAA does not apply to transportation workers like Garrido under 9 United States Code section 1, and that the ADR agreement is unenforceable under the California Arbitration Act (Code Civ. Proc., § 1280 et seq.) (CAA).

The trial court denied Air Liquide's motion to compel individual arbitration. It found that the FAA applied due to the express terms of the ADR agreement, which states that the agreement and any proceedings are governed by the FAA. The court found, however, that, even under the FAA, the ADR agreement could not be enforced pursuant to *Gentry*, because, by denying the ability to bring a class claim, the agreement stood as an obstacle to an employee's right to vindicate statutory labor rights.

Air Liquide timely appealed.

DISCUSSION

An order denying a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) When a trial court's order is based on a question of law, we review the denial de novo. (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 60.) Decisions on issues of fact are reviewed for substantial evidence. (*Ibid.*)

I. The FAA does not apply

In moving to compel arbitration, Air Liquide argued, and the trial court agreed, that the ADR agreement is governed by the FAA. The trial court's decision was based entirely on the language of the ADR agreement, which states that the agreement, and any proceedings held pursuant to it, are subject to the FAA. Garrido contends that the ADR agreement is not governed by the FAA because the FAA does not apply to employment contracts entered into by truck drivers.

Section 1 of the FAA exempts from coverage of the FAA "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (9 U.S.C. § 1; *see also Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 109.) This "'any other class of workers engaged in foreign or interstate commerce'" has been defined to mean "transportation workers." (*Circuit City*, at p. 121.)

Contrary to the trial court's ruling, a transportation worker's employment agreement does not become subject to the FAA simply because the agreement declares that it is subject to the FAA. By stating that it is subject to and governed by the FAA, the agreement necessarily incorporates section 1 of the FAA, which includes the exemption for transportation workers. Accordingly, courts have found transportation workers' employment agreements exempt from the FAA, even when the agreements purport to be governed by the FAA. (*See, e.g., Palcko v. Airborne Express, Inc.* (3d Cir. 2004) 372 F.3d 588; *Veliz v. Cintas Corp.* (N.D.Cal. 2004) 2004 U.S. Dist. LEXIS 32208 (*Veliz*); *Western Dairy Transport, LLC v. Vasquez* (Tex.App.2014) 457 S.W.3d 458 (*Western Dairy*).)

This still leaves the question of whether Garrido was a "transportation worker" under section 1 of the FAA. We find that he was. Garrido worked as a truck driver transporting Air Liquide gases, frequently across state lines. "The most obvious case where a plaintiff falls under the FAA exemption is where the plaintiff directly transports goods in interstate, such as [an] interstate truck driver whose primary function is to deliver mailing packages from one state into another." (*Veliz*, *supra*, 2004 U.S. Dist. LEXIS 32208 at p. *18.) "[T]he FAA is inapplicable to drivers . . . who are engaged in interstate commerce." (*Harden v. Roadway Package Systems, Inc.* (9th Cir. 2001) 249 F.3d 1137, 1140; *see also Western Dairy*, *supra*, 457

S.W.3d at p. 466 [truck drivers are "indisputably transportation workers"].)

Air Liquide cites to *Hill v. Rent-A-Center, Inc.* (11th Cir. 2005) 398 F.3d 1286, 1290 (*Hill*), which, in determining the FAA section 1 exemption did not apply, found that "Congress was concerned only with giving the arbitration exemption to 'classes' of transportation workers within the transportation industry." Air Liquide argues that, like the defendant in *Hill*, it is not in the transportation industry because its primary business does not involve the transportation of third parties' goods. *Hill* did not delineate the contours of the "transportation industry." Indeed, it appears that the term is not rigid. "[T]he more related to the transportation industry an enterprise is, the less necessary it becomes for the employee to be directly transporting goods." (*Veliz*, *supra*, 2004 U.S. Dist. LEXIS 32208 at p. *23.)

A significant portion of Air Liquide's business involves the transportation of its gases across state lines. Thus, it must be said that Air Liquide is at least somewhat involved in the transportation industry. And unlike the plaintiff in *Hill* – an "account manager" whose truck delivery duties were incidental to his job (398 F.3d at pp. 1287, 1289) – Garrido's duty as a truck driver *was* the transportation of goods. Air Liquide cites to no authority holding that a truck driver whose responsibility is to move products across state lines does not fall under section 1 of the FAA. The fact that Garrido transported Air Liquide's own products (rather than those of an Air Liquide client)

is of little consequence: "a trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party; if he crosses state lines he is 'actually engaged in the movement of goods in interstate commerce.'" (*International Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast, LLC* (7th Cir. 2012) 702 F.3d 954, 957.)

Thus, because Garrido was a transportation worker, the FAA does not apply to the ADR agreement.

II. The CAA does apply

The parties disagree as to whether the CAA applies in the absence of the FAA. On appeal, Garrido asserts that, because the ADR agreement does not specifically reference the CAA, the agreement cannot be subject to the CAA, and since neither the CAA nor the FAA govern, arbitration of this action is improper.

Nothing in the CAA, however, requires that an arbitration agreement explicitly reference the CAA to be enforceable under California law. Code of Civil Procedure section 1281 provides that "[a] written agreement to submit to arbitration . . . is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." California has a "'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.'" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9) Any doubts of arbitrability are resolved

in favor of arbitration. (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 26.)

Rodriguez v. American Technologies, Inc. (2006) 136 Cal.App.4th 1110 (*Rodriguez*), a case relied on by Garrido, does not support his position. The court in that appeal found that an agreement to arbitrate pursuant to the FAA was enforceable and that the plaintiff could not avoid arbitration under Code of Civil Procedure section 1281.2, subdivision (c). (*Rodriguez*, at pp. 1117, 1121-1122.) The court did not analyze whether the CAA would apply had the FAA not governed.

In contrast, *Ruiz v. Sysco Food Services* (2004) 122 Cal.App.4th 520 examined the effect of the CAA on an arbitration agreement that did not explicitly reference the CAA. The plaintiff in *Ruiz* argued that California law was not incorporated into an arbitration provision because the provision did not expressly refer to California law. (*Ruiz*, at p. 533.) The appellate court deemed the lack of reference immaterial and directed the trial court to grant the defendant's petition to compel arbitration under California law. (*Id.* at pp. 538-539.) In reaching a similar conclusion, the appellate court in *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105 noted that the issue of whether it applied the FAA or the CAA to an arbitration agreement "appear[ed] to be academic," stating: "Assuming arguendo that the FAA does not apply, we would assess the validity of the parties' arbitration agreements under the California Arbitration Act." (*Lagatree*, at pp. 1120-1121.)

Garrido also contends that Air Liquide waived its right to move for arbitration under California law by basing its motion to compel arbitration on the FAA. We disagree. In the trial court, Air Liquide moved for an order "compelling arbitration and staying this civil action pending . . . arbitration" based on the "valid and enforceable arbitration agreement that requires Garrido to bring his claims in arbitration, and in his individual capacity." Although Air Liquide erroneously argued that arbitration should proceed under the FAA, it did not contend that arbitration was not compelled or was improper under the CAA. Moreover, after Garrido argued in his opposition that the FAA was inapplicable, Air Liquide replied that the ADR agreement was enforceable under California law. Under these circumstances, there is not cause to find that Air Liquide waived the right to move for arbitration under the CAA.

III. Continuing applicability of *Gentry*

As noted, the trial court ruled that denial of Air Liquide's motion to compel arbitration was mandated by *Gentry*. Following the trial court's order, our Supreme Court issued its decision in *Iskanian*, finding that *Gentry*'s holding was abrogated by a United States Supreme Court decision, *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 [131 S.Ct. 1740] (*Concepcion*). (*Iskanian*, *supra*, 59 Cal.4th 348, 364.) Based on *Concepcion, Iskanian* held that a state's refusal to enforce a class waiver on grounds of public

policy or unconscionability was preempted by the FAA. (*Iskanian*, at pp. 359-360, 364.)

In our original, unpublished opinion, filed on June 3, 2015, we found the argument that *Gentry* could still apply in the absence of the FAA – although briefly raised by Garrido – forfeited due to a failure to support the argument with reasoned analysis. In his petition for rehearing (Cal. Rules of Court, rule 8.268), Garrido again raised the argument, with analysis of the issue. We granted the petition for rehearing and requested that the parties provide further briefing on the potential application of *Gentry*. Because the parties have now had the opportunity to thoroughly brief the issue, and because of the issue's controlling aspect here, we find good cause to consider the issue in this opinion and exercise our discretion to do so. (*See Alameda County Management Employees v. Superior Court* (2011) 195 Cal.App.4th 325, 338, fn. 10.)

As in this case, the plaintiff in *Gentry* brought a class action claim for violations of the Labor Code, even though he had entered into an arbitration agreement with a class waiver. The *Gentry* court, finding that the statutory right to receive overtime pay is unwaivable, concluded that under certain circumstances a class arbitration waiver "would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws," and that such a waiver was contrary to public policy. (42 Cal.4th at pp. 453, 457.) The *Gentry* court laid out a four-factor test for determining

whether a class waiver should be upheld: "[W]hen it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the factors discussed above: the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration." (*Id.* at p. 463.) If a consideration of these factors revealed that class arbitration would more effectively allow employees to vindicate their statutory rights, the class arbitration waiver would be invalidated by the trial court. (*Ibid.*)

Concepcion did not address *Gentry*. Instead, in *Concepcion*, the United States Supreme Court examined the validity of the "*Discover Bank* rule," a rule enunciated in the case *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 153, in which the California Supreme Court held: "at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration." *Concepcion* addressed whether the FAA prohibited a state rule that conditioned "the enforceability of certain arbitration agreements on the availability of class-wide arbitration

procedures." (*Concepcion*, *supra*, 563 U.S. at p. ___, [131 S.Ct. at p. 1744].) The high court held that such a rule was invalid, because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Id.* at p. ___, [131 S.Ct. at p. 1748].)

Iskanian applied the holding of *Concepcion* to the *Gentry* rule against class waivers. In finding *Gentry* abrogated by *Concepcion*, our Supreme Court reasoned: "The high court in *Concepcion* made clear that even if a state law rule against consumer class waivers were limited to 'class proceedings [that] are necessary to prosecute small-dollar claims that might otherwise slip through the legal system,' it would still be preempted because states cannot require a procedure that interferes with fundamental attributes of arbitration 'even if it is desirable for unrelated reasons.' (*Concepcion*, *supra*, 563 U.S. at p. ___, [131 S.Ct. at p. 1753]; *see American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. ___, ___ & fn. 5 [186 L.Ed.2d 417 & fn. 5, 133 S.Ct. 2304, 2312] (*Italian Colors*).)" (*Iskanian*, *supra*, 59 Cal.4th 348, 364.) *Gentry*'s rule – under which employment class waivers were deemed invalid if individual arbitration or litigation could not approximate the advantages of a class proceeding – could not be squared with *Concepcion*'s holding that class proceedings interfere with fundamental rights of arbitration. (*Iskanian*, *supra*, 59 Cal.4th 348, 364, citing *Concepcion*, *supra*, 563 U.S. at p. ___, [131 S.Ct. at p. 1753.].)

Iskanian's focus, however, was whether the FAA preempted the *Gentry* rule. (*Iskanian*, *supra*, 59 Cal.4th 348, 359-360.) The question presented was "whether a state's refusal to enforce such a [class] waiver on grounds of public policy or unconscionability is preempted by the FAA." (*Ibid.*) The court answered the question by holding: "Under the logic of *Concepcion*, the FAA preempts *Gentry*'s rule against employment class waivers." (*Id.* at p. 364.) *Iskanian* did not discuss whether *Gentry* could apply in a case not governed by the FAA.

Gentry's holding – that a class waiver would not be enforced when it interfered with employees' ability to vindicate their right to overtime pay – was based on public policy grounds. (42 Cal.4th 443, 464.) Our Supreme Court previously held that, under the CAA, arbitration provisions which violate public policy are potentially unenforceable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 99 (*Armendariz*).) In explaining this holding, the *Gentry* court wrote: "*Armendariz* makes clear that for public policy reasons we will not enforce provisions contained within arbitration agreements that pose significant obstacles to the vindication of employees' statutory rights. The Legislature has amended the [CAA] several times since *Armendariz* . . . but has not overturned or modified the holdings in that case." (*Gentry*, at p. 463, fn. 7.) We are not aware of any post-*Gentry* authority determining that public policy no longer remains a valid defense to enforcement of an arbitration agreement governed by the CAA.

Although the CAA's scope is generally similar to the FAA's, there are differences in application. (*Armendariz*, *supra*, 24 Cal.4th 83, 97-98.) For example, Labor Code section 229 provides that actions "for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate." The FAA preempts Labor Code section 229, requiring enforcement of an arbitration agreement covering such a claim. (*Perry v. Thomas* (1987) 482 U.S. 483, 491.) In contrast, when only the CAA applies, an action under Labor Code section 229 may be maintained in court. (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 687-688 (*Lane*); *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1207.)[2]

We believe that the *Gentry* rule likewise may be asserted in matters governed by the CAA and not the FAA. In *Iskanian*, our Supreme Court had the opportunity to find *Gentry* comprehensively invalidated. It did not do so. While *Iskanian* made clear that the *Gentry* rule is preempted by the FAA, it did not go beyond that finding. Therefore, the *Gentry* rule remains valid under the CAA.

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[2] Because Garrido's claims are not for "due and unpaid wages," Labor Code section 229 does not apply here. (*Lane, supra*, 224 Cal.App.4th 676, 684.)

IV. Application of *Gentry*

In finding the ADR agreement's class waiver provision unenforceable, the trial court applied *Gentry*'s four-factor test. As noted above, these four factors are: "[1] the modest size of the potential individual recovery, [2] the potential for retaliation against members of the class, [3] the fact that absent members of the class may be ill informed about their rights, and [4] other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration." (*Gentry*, *supra*, 42 Cal.4th at pp. 453, 463.) Under *Gentry*, if the trial court "concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.'" (*Ibid.*) To the extent that the trial court's decision depended on resolution of disputed issues of fact or inferences to be drawn from the evidence, we review these determinations for substantial evidence. (*Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1287-1288 (*Franco*); *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 497.)

We find that the trial court's determinations were supported by substantial evidence.[3] Garrido's attorney submitted evidence estimating Garrido's likely recovery against Air Liquide at approximately $11,000. A potential award of as large as $37,000 has been found to satisfy the first *Gentry* factor requiring a modest size of potential recovery. (*Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 745-746; *Gentry*, *supra*, 42 Cal.4th 443, 458.) Indeed, in *Gentry*, the court observed that wage and hour cases will generally satisfy the "modest" recovery factor because they "usually involve[ ] workers at the lower end of the pay scale." (42 Cal.4th at pp. 457-458.)

Garrido also submitted evidence sufficient to satisfy the second factor of the *Gentry* test, the risk of retaliation. As the *Gentry* court recognized, "retaining one's employment while bringing formal legal action against one's employer is not 'a viable option for many employees.'" (*Gentry*, *supra*, 42 Cal.4th 443, 459.) In his declaration, Garrido stated that, had he known his statutory rights were being violated during his employment at Air Liquide, he would not have been willing to bring a lawsuit because of fear of retaliation by Air Liquide. According to Garrido, Air

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[3] Air Liquide did not dispute, either in the trial court or on appeal, the potential applicability of *Gentry* to any of the claims made by Garrido, in the event that *Gentry* remains viable. Meal period claims (Lab. Code, §§ 226.7, 512), like those asserted by Garrido, have been found subject to the *Gentry* test. (*Franco, supra*, 171 Cal.App.4th 1277, 1290.)

Liquide made its truck drivers frequently feel as if their jobs were in jeopardy. Similar evidence has been found to adequately demonstrate the potential for retaliation. (*See Franco*, *supra*, 171 Cal.App.4th 1277, 1296 [relying on plaintiff's declaration stating he felt he would be fired if he complained].)

As for the third factor, *Gentry* noted that "it may often be the case that the illegal employer conduct escapes the attention of employees" and "some individual employees may not sue because they are unaware that their legal rights have been violated." (42 Cal.4th 443, 461.) Garrido declared that he was unaware of his rights under the Labor Code while employed by Air Liquide, and that Air Liquide made no effort to inform him or other truck drivers of such rights. Furthermore, according to Garrido, he was unable to take meal breaks because Air Liquide assigned tight delivery schedules, leading him to believe that he was not entitled to breaks. From this evidence, the trial court could reasonably infer that absent class members may be ill informed of their rights.

With regard to the fourth factor – real world obstacles to the vindication of employee rights – the trial court relied on *Gentry*'s reasoning that a "requirement that numerous employees suffering from the same illegal practice each separately prove the employer's wrongdoing is an inefficiency that may substantially drive up the costs of arbitration and diminish the prospect that the overtime laws will be enforced." (*Gentry*, *supra*, 42 Cal.4th 443, 459.) In

finding the class waiver unenforceable, the trial court wrote: "Here, Plaintiff has offered evidence that the instant case involves precisely the sort of arbitration agreement with a class action waiver entered as a condition of employment by low-wage, limited-information employees in vulnerable, at-will employment environments that *Gentry* clearly held was unenforceable. . . ."

In light of these determinations, the trial court correctly found that a class proceeding here would be a significantly more effective way of allowing employees to vindicate their statutory rights. (*See Gentry*, *supra*, 42 Cal.4th 443, 463-464 ["'[T]rial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action. . . .'"].) Air Liquide moved exclusively for individual, not class arbitration, and neither party has indicated an intent or willingness to engage in class arbitration. For these reasons, based on its finding that the class waiver constituted an unlawful exculpatory clause, the trial court properly denied the motion to compel arbitration.

DISPOSITION

The order denying Air Liquide's motion to compel individual arbitration is affirmed.

CERTIFIED FOR PUBLICATION.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEALS OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARIO GARRIDO, Plaintiff and Respondent, v. AIR LIQUIDE INDUSTRIAL U.S. LP, Defendant and Appellant.	B254490 (Los Angeles County Super. Ct. No. BC485942) (Filed Jun. 3, 2015)

APPEAL from an order of the Superior Court of Los Angeles County. Amy D. Hogue, Judge. Reversed.

Littler Mendelson, Nancy E. Pritikin, Dominic J. Messiha, Jennifer Tsao for Defendant and Appellant.

Esensten Law, Robert Esensten, Jordan S. Esensten for Plaintiff and Respondent.

The trial court denied a motion to compel arbitration, finding that arbitration was improper under *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*). On appeal, neither party contends that *Gentry* is still controlling after its holding was found abrogated in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*). We find no remaining

basis to deny arbitration, and therefore reverse the trial court's order.

Factual and Procedural Background

Defendant and appellant American Air Liquide, Inc. (Air Liquide[1]) produces and distributes industrial gases throughout the United States. Plaintiff and respondent Mario Garrido was hired as a truck driver by Air Liquide in June 2009. Garrido transported Air Liquide gases to locations in California and neighboring states from Air Liquide's Sante Fe Springs production and distribution center.

Upon his hiring, Garrido entered into an "Alternative Dispute Resolution Agreement" (the ADR agreement). The ADR agreement stipulates that all disputes arising out of Garrido's employment with Air Liquide are to be resolved through alternative dispute resolution, including arbitration "if necessary." According to its terms, the agreement, and any arbitration proceedings, are governed by the Federal Arbitration Act (9 U.S.C. § 1, et seq.) (FAA).

The ADR agreement allows the parties to conduct discovery and file motions in arbitration. Prior to an employee-initiated arbitration, the employee is required

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[1] Defendant states that it was named incorrectly in plaintiff's complaint, and that its actual name is Air Liquide Industrial U.S. LP. The proper name of defendant is irrelevant to the matters decided in this appeal, and so we refer generally to defendant as Air Liquide.

to contribute a sum toward the arbitrator's fee equal to the then-current filing fee in the applicable state or federal court for a complaint or first appearance, whichever is lower. The arbitrator is authorized to provide to the prevailing party all remedies and costs available under applicable law, and is required to issue a written opinion and award stating essential findings and the conclusions upon which the award is based. The ADR agreement prohibits arbitration on a class, collective, and representative basis, as well as private attorney general actions.

Garrido's employment with Air Liquide was terminated in January 2011. In June 2012, Garrido filed a class action complaint against Air Liquide, alleging that it failed to provide mandated timely meal periods (Lab. Code, §§ 226.7, 512) and accurate itemized wage statements (Lab. Code, §§ 226, 226.3), failed to pay compensation due upon separation of employment (Lab. Code, §§ 201-203), and committed unfair business practices (Bus. & Prof. Code, § 17200, et seq.).

Air Liquide promptly moved to compel arbitration of Garrido's claims. Air Liquide argued that the ADR agreement is binding and requires Garrido to arbitrate all of his claims, and that the agreement's class action waiver should be enforced. Garrido opposed the motion, arguing that the FAA does not apply to transportation workers like Garrido under 9 United States Code section 1, and that the ADR agreement is unenforceable under the California Arbitration Act (Code Civ. Proc., § 1280 et seq.) (CAA).

The trial court denied Air Liquide's motion to compel individual arbitration. It found that the FAA applied due to the express terms of the ADR agreement, which states that the agreement and any proceedings are governed by the FAA. However, the court found that, even under the FAA, the ADR agreement could not be enforced pursuant to *Gentry*, because, by denying the ability to bring a class claim, the agreement stood as an obstacle to an employee's right to vindicate statutory labor rights.

Air Liquide timely appealed.

DISCUSSION

An order denying a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) When a trial court's order is based on a question of law, we review the denial de novo. (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 60.) Decisions of fact are reviewed for substantial evidence. (*Ibid.*)

As noted, the trial court found that denial of Air Liquide's motion to compel arbitration was mandated by *Gentry*. Following the trial court's order, our Supreme Court issued its decision in *Iskanian*, finding that *Gentry*'s holding was abrogated by a United States Supreme Court decision, *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740] (*Concepcion*). (*Iskanian*, *supra*, 59 Cal.4th 348, 364.) Based on *Concepcion, Iskanian* held that a state's refusal to enforce a class waiver on grounds of public

policy or unconscionability was preempted by the FAA. (*Iskanian*, at pp. 359-360, 364.)

Garrido does not submit any reasoned argument supporting the proposition that *Gentry*'s holding still constitutes an independent basis for denial of arbitration.[2] Accordingly, we turn to the parties' other contentions regarding the enforceability of the ADR agreement.

I. The FAA does not apply

In moving to compel arbitration, Air Liquide asserted, and the trial court agreed, that the ADR agreement is governed by the FAA. The trial court's decision was based entirely on the language of the ADR agreement, which states that the agreement, and any proceedings held pursuant to it, are subject to the FAA. Garrido contends that the ADR Agreement is not governed by the FAA because the FAA does not apply to employment contracts entered into by truck drivers.

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[2] Garrido bluntly states that the trial court's analysis of *Gentry* remains valid. Because Garrido offers no reasoned argument or citation to legal authority supporting this contention, we consider this argument forfeited. (*See Hill v. Affirmed Housing Group* (2014) 226 Cal.App.4th 1192, 1200; *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1300 [omission of analysis and legal authority results in forfeiture of argument].)

Section 1 of the FAA exempts from coverage of the FAA "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (9 U.S.C. § 1; *see also Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 109 (*Circuit City*).) This "'any other class of workers engaged in foreign or interstate commerce'" has been defined to mean "transportation workers." (*Circuit City*, at p. 121.)

Contrary to the trial court's finding, a transportation worker's employment agreement does not become subject to the FAA simply because the agreement declares that it is subject to the FAA. By stating that it is subject to and governed by the FAA, the agreement necessarily incorporates section 1 of the FAA, which includes the exemption for transportation workers. Accordingly, courts have found transportation workers' employment agreements exempt from the FAA, even when the agreements purport to be governed by the FAA. (*See, e.g., Palcko v. Airborne Express, Inc.* (3d Cir. 2004) 372 F.3d 588; *Veliz v. Cintas Corp.* (N.D.Cal. 2004) 2004 U.S. Dist. LEXIS 32208 (*Veliz*); *Western Dairy Transport, LLC v. Vasquez* (Tex.App. 2014) 2014 Tex.App. LEXIS 8368 (*Western Dairy*).)

This still leaves the question of whether Garrido was a "transportation worker" under section 1 of the FAA. We find that he was. Garrido worked as a truck driver transporting Air Liquide gases, frequently across state lines. "The most obvious case where a plaintiff falls under the FAA exemption is where the

plaintiff directly transports goods in interstate, such as [an] interstate truck driver whose primary function is to deliver mailing packages from one state into another." (*Veliz*, *supra*, 2004 U.S. Dist. LEXIS 32208 at p. *18.) "The FAA is inapplicable to drivers . . . who are engaged in interstate commerce." (*Harden v. Roadway Package Systems, Inc.* (9th Cir. 2001) 249 F.3d 1137, 1140; *see also Western Dairy*, *supra*, 2014 Tex.App. LEXIS at p. *6 [truck drivers are "indisputably transportation workers"].)

Citing to *Hill v. Rent-A-Center, Inc.* (11th Cir. 2005) 398 F.3d 1286, 1290 (*Hill*), which found that "Congress was concerned only with giving the arbitration exemption to 'classes' of transportation workers within the transportation industry," Air Liquide argues that it is not in the transportation industry and so the FAA section 1 exemption cannot apply. *Hill* did not delineate the contours of the "transportation industry." Indeed, it appears that the term is not rigid. "[T]he more related to the transportation industry an enterprise is, the less necessary it becomes for the employee to be directly transporting goods." (*Veliz*, *supra*, 2004 U.S. Dist. LEXIS 32208 at p. *23.)

A significant portion of Air Liquide's business involves the transportation of its gases across states lines. Thus, it must be said that Air Liquide is at least somewhat involved in the transportation industry. And unlike the plaintiff in *Hill* – an "account manager" whose truck delivery duties were incidental to his job (398 F.3d at pp. 1287, 1289) – Garrido's duty as a truck driver *was* the transportation of goods. Air

Liquide cites to no authority holding that a truck driver whose responsibility is to move products across state lines does not fall under section 1 of the FAA. The fact that Garrido transported Air Liquide's own products (rather than those of an Air Liquide client) is of little consequence: "a trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party; if he crosses state lines he is 'actually engaged in the movement of goods in interstate commerce.'" (*International Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast, LLC* (7th Cir. 2012) 702 F.3d 954, 957.)

Thus, because Garrido was a transportation worker, the FAA does not apply to the ADR agreement.

II. The CAA does apply

The parties disagree on whether the CAA applies in the absence of the FAA. Garrido asserts that, because the ADR agreement does not specifically reference the CAA, the agreement cannot be subject to the CAA, and since neither the CAA nor the FAA govern, arbitration of this action is improper.

Nothing in the CAA, however, requires that an arbitration agreement explicitly reference the CAA to be enforceable under California law. Code of Civil Procedure section 1281 provides that "[a] written agreement to submit to arbitration . . . is valid, enforceable and irrevocable, save upon such grounds as

exist for the revocation of any contract." California has a "'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.'" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) Any doubts of arbitrability are resolved in favor of arbitration. (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 26.)

Rodriguez v. American Technologies, Inc. (2006) 136 Cal.App.4th 1110 (*Rodriguez*), a case relied on by Garrido, does not support his position. The court in that appeal found that an agreement to arbitrate pursuant to the FAA was enforceable and that the plaintiff could not avoid arbitration under Code of Civil Procedure section 1281.2, subdivision (c). (*Rodriguez*, at pp. 1117, 1121-1122.) The court did not analyze whether the CAA would apply had the FAA not governed.

In contrast, *Ruiz v. Sysco Food Services* (2004) 122 Cal.App.4th 520 examined the effect of the CAA on an arbitration agreement that did not explicitly reference the CAA. The plaintiff in *Ruiz* argued that California law was not incorporated into an arbitration provision because the provision did not expressly refer to California law. (*Ruiz*, at p. 533.) The appellate court deemed the lack of reference immaterial and directed the trial court to grant the defendant's petition to compel arbitration under California law. (*Id.* at pp. 538-539.) In reaching a similar conclusion, the appellate court in *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105

(*Lagatree*) noted that the issue of whether it applied the FAA or the CAA to an arbitration agreement "appear[ed] to be academic," stating: "Assuming arguendo that the FAA does not apply, we would assess the validity of the parties' arbitration agreements under the California Arbitration Act." (*Lagatree*, at pp. 1120-1121.)

Garrido also contends that Air Liquide waived its right to move for arbitration under California law by basing its motion to compel arbitration on the FAA. We disagree. In the trial court, Air Liquide moved for an order "compelling arbitration and staying this civil action pending . . . arbitration" based on the "valid and enforceable arbitration agreement that requires Garrido to bring his claims in arbitration, and in his individual capacity." Although Air Liquide erroneously argued that arbitration should proceed under the FAA, it did not contend that arbitration was not compelled or was improper under the CAA. Moreover, after Garrido argued in his opposition that the FAA was inapplicable, Air Liquide replied that the ADR agreement was enforceable under California law. Under these circumstances, there is not cause to find that Air Liquide waived the right to move for arbitration under the CAA.

III. Arbitrability of Labor Code violations

Garrido next contends that his claims are not arbitrable pursuant to Labor Code section 229, which provides, in pertinent part, that actions "for the

collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate." This exemption from arbitration is effective, except when preempted by the FAA. (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1207.)

The problem Garrido faces is that none of his claims are for "due and unpaid wages." *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676 (*Lane*) examined the same Labor Code violations that Garrido alleges existed here. *Lane* found that an action under Labor Code section 226.7 was not one for due and unpaid wages, but rather for a failure to provide mandated meal and rest breaks. (*Lane*, at p. 684, citing *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1256-1257 ["'[A Labor Code] section 226.7 claim is not an action brought for nonpayment of wages; it is an action brought for nonprovision of meal or rest breaks.'"].) Similarly, an action under Labor Code section 226 is not for due and unpaid wages but instead addresses a failure to provide itemized wage statements, while Labor Code sections 201 through 203 assess "'waiting time penalties'" when wages are not immediately paid upon termination. (*Lane*, at p. 684.)

Since none of Garrido's causes of action seek the recovery of due and unpaid wages, the exemption from arbitration found in Labor Code section 229 does not apply.

IV. Unconscionability analysis

Garrido also argues that the ADR agreement cannot be enforced because it is unconscionable. "The party resisting arbitration bears the burden of proving unconscionability. [Citations.] Both procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on '"a sliding scale."' [Citation.] '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247 (*Pinnacle*).)

A. Procedural unconscionability

"[P]rocedural unconscionability requires oppression or surprise. '"Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form."'" (*Pinnacle*, *supra*, 55 Cal.4th 223, 247.)

Garrido asserts that the ADR agreement was presented on a "take it or leave it" basis without any room to negotiate its terms. Adhesion contracts in the employment context contain aspects of procedural unconscionability. (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 704 (*Serpa*).) Nevertheless, an agreement is not unenforceable simply because it is adhesive. (*Ibid.*; *see also*

Lagatree, *supra*, 74 Cal.App.4th 1105, 1123 ["the mandatory nature of an arbitration agreement does not, by itself, render the agreement unenforceable"].)

The ADR agreement provides that discovery and motion practice are to be conducted in accordance with the Federal Rules of Civil Procedure (FRCP). Garrido contends that Air Liquide's failure to provide him with a copy of the FRCP was procedurally unconscionable. Failure to attach a copy of arbitration rules can support a finding of procedural unconscionability when such a failure would result in surprise. (*Lane*, *supra*, 224 Cal.App.4th 676, 690.) When the applicable rules are commonplace and easily obtainable through the Internet, however – as the FRCP are – a failure to provide a copy does not in itself constitute procedural unconscionability. (*Lane*, at p. 691-692; *see also Bigler v. Harker School* (2013) 213 Cal.App.4th 727, 737 [absence of rules "is of minor significance"].)

Garrido also argues that the ADR agreement is concealed and inconspicuous. In *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1146, the arbitration agreement was made up of "11 pages of densely worded, single-spaced text presented in small typeface," was one of 37 sections of a larger document, and did not contain an individual heading. The court found that the agreement, written in English and presented to employees who could not read English, was procedurally unconscionable. (*Id.* at pp. 1145-1146.) In *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89 (*Gutierrez*), an arbitration clause

was "particularly inconspicuous," printed in eight-point font on the opposite side of a lease agreement. In contrast, the ADR agreement here is set off as an individual document, it has its own signature page, it is clearly labeled "Alternative Dispute Resolution," it is not densely formatted, and it is printed in reasonably large-sized text. In addition, there is no evidence that Garrido cannot read English. Unlike the agreements at issue in the cases relied on by Garrido, the ADR agreement here is not concealed or inconspicuous.

Garrido's remaining argument, that the ADR agreement conceals its nature by not adequately disclosing the requirement of binding arbitration, is also untenable. The agreement's title, "Alternative Dispute Resolution," is accurate, as the agreement provides for an initial informal dispute resolution process, as well as binding arbitration, if necessary. The agreement discusses binding arbitration at length, and arbitration is the subject of numerous distinct, individual paragraphs within the agreement. In addition, the front page of the ADR agreement states in bold capitalized letters: "NOTE: THIS ADR AGREEMENT IS A WAIVER OF THE PARTIES' RIGHTS TO A CIVIL COURT ACTION." This is not an example of a cryptic arbitration requirement buried in a prolix printed form. A brief perusal of the ADR agreement makes obvious that the parties waive their rights to court action and agree to binding arbitration when necessary.

When, as here, any oppression or surprise rests almost entirely on the adhesive nature of the agreement, "'the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high.'" (*Serpa*, *supra*, 215 Cal.App.4th 695, 704, quoting *Ajamian v. Cantor-CO2e, L.P.* (2012) 203 Cal.App.4th 771, 796.)

B. Substantive unconscionability

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."'" (*Pinnacle*, *supra*, 55 Cal.4th 223, 246.)

In arguing that the ADR agreement is substantively unconscionable, Garrido contends that the ADR agreement – when read in conjunction with other documents he signed upon hiring – is unilateral and only applies to claims made by employees, not claims made by Air Liquide. "[A]n arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83,

120 (*Armendariz*).) The terms of the ADR agreement itself are mutual. The agreement explicitly states: "All disputes arising out of or relating to the interpretation and application of this ADR Agreement or the employee's employment with Air Liquide or the termination of employment, including for example and without limitation, any claims for unfair competition, theft of trade secrets, wrongful termination, . . . or retaliation, shall be resolved through ADR, including binding arbitration if necessary." Conceding that the ADR agreement requires both parties to arbitrate their claims, Garrido argues that its mutuality is contradicted by a separate confidentiality agreement. Nothing in the confidentiality agreement, however, provides that Air Liquide may bring claims against employees in court instead of through arbitration. Nor does another document signed by Garrido relating to software piracy. In brief, if Air Liquide were to bring a claim against Garrido, the ADR agreement would govern.

Garrido also contends that the ADR agreement shortens the statute of limitations applicable to claims by employees, a condition that, if true, can result in a finding of substantive unconscionability. (*Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 117.) The ADR agreement, though, does no such thing. Instead, it allows an employee to present a written notice of dispute "within 180 days or the applicable statute of limitations period (whichever is greater)." This clause would never result in a shorter statute of limitations period. Garrido points

out that a post-notice procedure in the ADR agreement requires the noncomplaining party to respond within 20 business days to the notice of dispute, and that the complaining party then must reply by sending a "second notice" within five business days. But, by the time this second notice is due, the alternative dispute resolution process has already begun and so a failure to reply within five days would not impact the statute of limitations. Further, the ADR agreement provides for no penalty for a tardy second notice. Thus, this arbitration procedure does not affect the statute of limitations.

Garrido further argues that the ADR agreement contains excessive fee provisions. "[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Armendariz*, *supra*, 24 Cal.4th 83, 110-111.) The ADR agreement meets this standard. Air Liquide is to pay for fees and expenses of the arbitrator, except that, in an employee-initiated arbitration, the employee must "contribute a sum equal to the then-current filing fee in the applicable State or Federal Court for a complaint or first appearance, whichever is lower, toward the arbitrator's fee." This "contribution" to the arbitrator, offsetting some of the costs of arbitration, is similar to the expense an employee would pay to bring a court action, and it is worded to require an employee to pay

no more than he or she would in court.[3] Garrido also takes issue with the ADR agreement's requirement that the initial notice of dispute be delivered by hand or sent via facsimile or overnight delivery to Air Liquide. Again, this requirement contemplates no greater cost (and may be significantly cheaper) than equivalent expenses in a court action, where a process server is usually employed to effect service.

Garrido next characterizes the ADR agreement as "litigator friendly" because it allows both parties to bring motions as allowed by the FRCP. Garrido's characterization is incorrect. It should go without saying that a plaintiff can benefit from the ability to file a motion just as a defendant can. And Garrido would certainly not avoid motion practice by bringing his action in court rather than through arbitration.

Finally, Garrido argues that we should consider the ADR agreement's class waiver provision as a factor in assessing substantive unconscionability. He contends that, under *Sonic-Calabasas A, Inc. v.*

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[3] The two cases cited by Garrido pertaining to improper fee provisions, *Gutierrez* and *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1177, are distinguishable. In *Gutierrez*, the administrative fee to initiate an arbitration was a "prohibitively high" $8,000, much greater than the amount that would be required in court. (114 Cal.App.4th at pp. 90-91.) In *Ingle*, the employee was required to pay a fee directly to her employer. The court found that a "true filing fee" could be appropriate, but requiring employees to pay a fee to the very entity against which they sought redress could deter employees from initiating complaints. (328 F.3d at pp. 1177.)

Moreno (2013) 57 Cal.4th 1109 (*Sonic II*), a class action waiver cannot constitute the entire basis for finding an agreement unconscionable, but the court is required to consider the effects of a class action waiver in conjunction with other factors in determining whether an arbitration agreement is unconscionable. He further asserts that *Chavarria v. Ralphs Grocery Co.* (9th Cir. 2013) 733 F.3d 916 (*Chavarria*) held an arbitration agreement to be unconscionable because, among other issues, it contained a class action waiver.

Contrary to Garrido's analysis, neither *Sonic II* nor *Chavarria* relied on a class waiver to find an arbitration agreement unconscionable. In *Sonic II*, the emphasis was on the efficiencies provided by the "Berman" statutes (Lab. Code, §§ 98-98.8), which allow a labor commissioner to resolve wage claims in a speedy and informal manner. (57 Cal.4th at pp. 1128-1129.) Our Supreme Court held: "The fact that the FAA preempts *Sonic I*'s [*Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659] rule requiring arbitration of wage disputes to be preceded by a Berman hearing does not mean that a court applying the unconscionability analysis may not consider the value of benefits provided by the Berman statutes, which go well beyond the hearing itself." (*Sonic II*, *supra*, 57 Cal.4th 1109, 1149.) In *Chavarria*, the United States Court of Appeals for the Ninth Circuit found an arbitration policy unconscionable because of excessive administrative and filing costs imposed on employees, not because of a class action waiver. (733

F.3d at pp. 926-927.) The *Chavarria* court expressly noted that the United States Supreme Court, in *American Express Corp. v. Italian Colors Restaurant* (2013) ___ U.S. ___ [133 S.Ct. 2304], held that – although a class action waiver could result in higher costs for individual litigants – the waiver did not prevent plaintiffs from vindicating statutory rights because "'the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.'" (*Chavarria*, *supra*, 733 F.3d at pp. 926-927, citing *Italian Colors*, 133 S.Ct. at pp. 2310-2311.)

It is possible that, under appropriate circumstances, the effects of a class action waiver could still be properly considered when assessing the potential unconscionability of an arbitration agreement under the CAA.[4] This is not an issue we need decide here, however. The ADR agreement lacks any traditional traits of substantive unconscionability and presents only a minor level of procedural unconscionability. A finding of unconscionability, therefore, is unwarranted.

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[4] Garrido's respondent's brief offers no analysis of whether or when a class waiver could be considered under the CAA when analyzing unconscionability.

DISPOSITION

The order denying Air Liquide's motion to compel individual arbitration is reversed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J. HOFFSTADT, J.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MARIO GARRIDO, in his individual capacity, and on behalf of all others similarly situated, Plaintiff, vs. AMERICAN AIR LIQUIDE, INC, a Texas Corporation; and DOES 1-100, inclusive, Defendant.	Case No.: BC485942 ORDER DENYING DEFENDANT AMERICAN AIR LIQUIDE, INC.'S MOTION TO COMPEL INDIVIDUAL ARBITRATION (TAKEN UNDER SUBMISSION DECEMBER 13, 2013) (Filed Dec. 30, 2013)

I. Introduction

Plaintiff Mario Garrido filed this putative class action on June 5, 2012. Plaintiff alleges that he was employed by Defendant American Air Liquide, Inc. as a truck driver from June of 2009 through January 2011 and asserts individual and class action wage and hour claims for failure to provide meal periods, failure to provide accurate wage statements, failure to pay compensation at the time of termination, and a derivative claim for violation of the Unfair Competition Law ("UCL," Bus. & Prof. Code § 17200.) Defendant moves to compel individual arbitration pursuant to an Alternative Dispute Resolution Agreement (the "Agreement") that Plaintiff signed as a precondition of employment. (Decl. of Paul, Exh. A.) The agreement provides that:

> "All disputes arising out of or relating to the interpretation and application of this ADR Agreement or the employee's employment with Air Liquide or the termination of employment, including for example and without limitation, any claims for unfair competition, theft of trade secrets, wrongful termination, unlawful discrimination, sexual harassment or other unlawful harassment, or retaliation, shall be resolved through ADR, including binding arbitration if necessary."

(Decl. of Paul, Exh. A, ¶ 2.1.) The Agreement further specified that "[d]isputes within the scope of this Agreement shall include, but not be limited to . . . alleged violations of federal, state, and/or local constitutions, statutes, or regulations. . . ." (Decl. of Paul, Exh. A, ¶ 2.2.) The "ADR Agreement provides the exclusive means for formal resolution of all such disputes between an employee and Air Liquide and is binding upon both Air Liquide and the employee." (Decl. of Paul, Exh. A, ¶ 2.1.) In the event of an arbitration, the parties "will select the Arbitrator by mutual agreement. If the parties do not mutually agree on the selection of the Arbitrator, any party may seek appointment of the Arbitrator by a court of competent jurisdiction." (Decl. of Paul, Exh. A, ¶ 2.10.)

The Agreement also specifies that the "Agreement, any arbitration proceedings held pursuant to this Agreement, and any proceedings concerning arbitration under this agreement are subject to and governed by the Federal Arbitration Act, 9 U.S.C.

section 1, et seq." (Decl. of Paul, Exh. A, ¶ 2.10.) The Agreement further states that "the parties will have the right to conduct normal civil discovery and bring motions, as provided by the Federal Rules of Civil Procedure" except that "there is no right or authority for any dispute covered by this Agreement to be heard or arbitrated on a class or collective action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Air Liquide employees (or any of them), or of other persons similarly situated." (Decl. of Paul, Exh. A, ¶ 2.11.) In addition to waiving all class-action or representative proceedings, the agreement also waived both parties' rights to a trial by judge or by jury. (Decl. of Paul, Exh. A, ¶ 12.11.)

With respect to costs, the Agreement requires that each party bear their own litigation costs, but provides that Defendant will bear the majority of the costs of arbitration. Where Air Liquide initiates arbitration, it is to pay "the entirety of the arbitrator's fees, including court reporting fees, and all other costs of arbitration." (Decl. of Paul, Exh. A, ¶ 2.12.) However, the Agreement specifies that if Plaintiff initiates an arbitration, he must "contribute a sum equal to the then-current filing fee in the applicable State or Federal Court for a complaint or first appearance, whichever is lower, toward the arbitrator's fee. Air Liquide will pay the remaining fees and expenses, including court reporting fees and fees for the arbitrator. (Decl. of Paul, Exh. A, ¶ 2.12.) The

agreement also gives the arbitrator authority to provide a prevailing party all remedies available at law, including costs and attorneys' fees. (Decl. of Paul, Exh. A, ¶ 2.12.2.)

In addition to the arbitration agreement, Plaintiff and Defendant separately executed a confidentiality agreement as a precondition to Plaintiff's employment. That agreement provided that, in the event Plaintiff breached any of the protections of Defendant's trade secrets set forth in that agreement, Defendant would be "entitled to injunctive relief to enforce the terms of" the confidentiality agreement and nothing in the confidentiality agreement would "limit [Defendant's] ability or right to seek any and all other applicable remedies in equity or at law. . . ." (Decl. of Esensten, Exh. 9, ¶ 3.) Plaintiff also signed a "Policy Statement on Copying Software," in which he acknowledged that "[u]nder U.S. Copyright Law, illegal reproduction or software or documentation is subject to" civil and criminal penalties and that "[a]n infringing employee can be sued directly and be held personally liable for the damages. . . ." (Decl. of Esensten, Exh. 9, ¶ 5.)

II. Analysis

Defendant argues and Plaintiff does not dispute that Plaintiff signed the Agreement and that Plaintiff's wage and hour claims and his claim for unfair competition fall within the broad scope of arbitrable claims set forth in the agreement. (See Mtn., p. 3.)

Rather, Plaintiff makes three essential arguments in opposition: (1) the agreement is governed by the California Arbitration Act; (2) under the California Arbitration Act ("CAA"), Plaintiff's claims must be adjudicated in court rather than in arbitration; and (3) even if the Federal Arbitration Act ("FAA") applies, the Agreement is unenforceable under generally applicable California contract law and is, therefore, unenforceable under the FAA.

A. The FAA Applies by the Express Terms of the Agreement

The parties debate whether the instant agreement falls within the scope of the FAA or whether Plaintiff's employment as a truck driver falls within an exception to the FAA's application for "contracts of employment of seamen, railroad employees" or other transportation workers. (See Opp., pp. 4-7; Reply, pp. 1-5.) But this argument is largely irrelevant because, as Defendant rightly notes in its moving papers, the parties expressly agreed to apply the FAA. (See Mtn., p. 4 ["the Arbitration Agreement into which Garrido and Air Liquide entered expressly provides that it is governed by the FAA"].) The agreement clearly states that "any proceedings concerning arbitration under this agreement are subject to and governed by the Federal Arbitration Act, 9 U.S.C. section 1, et seq." (Decl. of Paul, Exh. A, ¶ 2.10.)

It is well settled that parties to an arbitration agreement may specify the law that will govern the

interpretation and application of the arbitration agreement. This is because arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, [citation], so too may they specify by contract the rules under which that arbitration will be conducted." (*Volt Info. Scis. v. Bd. of Trs.* (1988) 489 U.S. 468, 479 [applying CAA where FAA would apply to silent agreement because arbitration agreement expressly provided for application of CAA].) Irrespective of which law would govern the interpretation of a silent arbitration agreement, courts will apply the FAA where, as here, the parties include an unequivocal choice-of-law provision subjecting the agreement to the FAA. (See *Christensen v. Smith* (2009) 171 Cal.App.4th 931, 937-38 [applying the FAA because the agreement expressly provided: "Interpretation or this agreement to arbitrate shall be governed by the Federal Arbitration Act"].)

Whether Plaintiff is a "transportation worker" such that the FAA would not apply to a *silent* agreement is immaterial because the agreement is not silent. It expressly requires application of the FAA and that agreement is controlling. Accordingly, Plaintiff's additional arguments that the CAA demands that Plaintiff's claims be litigated in Court are inapposite.

B. The Class Action Waiver Constitutes an Unlawful Exculpatory Clause Under Gentry

"[T]he FAA was designed to promote arbitration." (*AT&T Mobility, LLC v. Concepcion* (2011) ___ U.S. ___ [131 S.Ct. 1740, 1749].) "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*Id.* [131 S.Ct. at 1748].) The FAA embodies "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." (*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24.) Nonetheless, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening" the FAA. (*Doctor's Assocs., Inc. v. Casarotto* (1996) 517 U.S. 681, 687.) Rather, the FAA only preempts state rules that uniquely disfavor arbitration agreements. (*Concepcion*, *supra*, 131 S.Ct. at 1747.)

Plaintiff argues that the Agreement constitutes an unlawful exculpatory clause waiving an unwaivable statutory right in violation of general California contract principles, citing *Gentry v. Superior Court* (2007) 42 Cal.4th 443. In *Gentry*, our Supreme Court held that "class arbitration waivers cannot, consistent with the strong public policy behind [California's unwaivable statutory labor rights], be used to weaken or undermine the private enforcement of [California's unwaivable wage and hour rights] by placing formidable practical obstacles in the way of employees'

prosecution of those claims." (*Id.* at 464.) To determine whether a particular class action waiver in an arbitration agreement serves to improperly exculpate an employer from an unwaivable statutory labor right under *Gentry*, courts must consider the following factors:

> "[1] the modest size of the potential individual recovery, [2] the potential for retaliation against members of the class, [3] the fact that absent members of the class may be ill informed about their rights, and [4] other real world obstacles to the vindication of class members' [statutory labor rights] through individual arbitration."

Under *Gentry*, If the trial court "concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.'" (*Id.* at 463 [quoting *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1077].)

In light of the United States Supreme Court's holding in *Concepcion*, numerous California and federal courts have called the holding in *Gentry* into serious question. Nevertheless, as one panel of our

Court of Appeal recently observed after reasoning that *Gentry* almost certainly cannot survive the Supreme Court's rationale in *Concepcion*, lower courts in "California are absolutely bound to follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the *same* question differently." (*Truly Nolen of North America v. Superior Court* (2012) 208 Cal.App.4th 487, 507.) *Concepcion* did not directly overrule *Gentry*, and the Court may not "disregard the California Supreme Court's decision [in *Gentry*] without specific guidance from our high court." (*Id.;* see also *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 516 ["Since it has not been expressly abrogated or overruled, Gentry appears to remain the binding law in California"].) Under *Gentry*, however, class action waivers in employment arbitration agreements are not invalid on their face and "will only be invalidated after the proper factual showing" with respect to the factors discussed above. (*Gentry*, *supra*, 42 Cal.4th at 466.) Nevertheless, under *Gentry*, that burden is substantially lighter in the context of class action waivers in employment agreements, and Plaintiff has met it.

Plaintiff's recovery is clearly "modest" under the first *Gentry* factor in that counsel estimates Plaintiff's individual recovery as approximately $11,117.75. (Opp., p. 10; Decl. of Esensten, ¶ 17.) Defendant does not dispute this calculation. Indeed, in *Gentry*, the Court noted with approval *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715 in which the

Court of Appeal observed that a potential award of $37,000 would likely be insufficient incentive for individuals to pursue their own wage and hour claims. (*Gentry, supra*, 42 Cal.4th at 458 [citing *Bell*, *supra*, 115 Cal.App.4th at 745].) The *Gentry* Court observed that wage and hour claims would almost always satisfy the "modest" recovery element of a *Gentry* factual analysis because wage and hour claims "usually involve[ ] workers at the lower end of the pay scale, since professional, executive, and administrative employees are generally exempt. . . ." (*Gentry*, *supra*, 42 Cal.4th at 457-58.) Indeed, the Supreme Court so held in *Gentry* despite the availability of an attorneys' fee award in arbitration. (*Id.* at 458-59.)

With respect to the second *Gentry* factor, the risk of retaliation, the Supreme Court again noted that a wage and hour action brought by lower-level, hourly employees will almost always run the risk of retaliation. As the High Court held in *Gentry* "retaining one's employment while bringing formal legal action against one's employer is not a viable option for many employees." (*Id.* at 459.) "The difficulty of suing a current employer is likely greater for employees further down on the corporate hierarchy." (*Id.* 459-60.) Indeed, the *Gentry* Court held that even where "there is only the plaintiff's suggestion of intimidation . . . the nature of the economic dependency involved in the employment relationship is inherently inhibiting." (*Id.* at 460.) While Defendant argues that

Plaintiff offers little more than a suggestion of possible retaliation,[1] the mere "suggestion of intimidation" is sufficient under *Gentry* in light of the nature of the employer-employee relationship. The *Gentry* Court so concluded despite the existence of anti-retaliation statutes and the availability of an administrative complaint procedure. (*Id.* at 461.)

In articulating the third *Gentry* factor – the risk that individual plaintiffs would not sue because they are unaware of their statutory wage and hour rights – the Supreme Court again emphasized that it would be a rare case when a wage and hour action would not satisfy this criteria. The High Court held in *Gentry* that it would "often be the case that the illegal employer conduct escapes the attention of employees. Some workers, particularly immigrants with limited English language skills, may be unfamiliar with the overtime laws. [Citation] Even English speaking or better educated employees may not be aware of the nuances of overtime laws with their sometimes complex classifications of exempt and nonexempt employees." (*Id.* at 461.) Here, Plaintiff declares that he was unaware of his statutory rights. (Decl. of

[1] Plaintiff declares that he would not have brought this lawsuit were he still employed at Air Liquide "due to [his] fear that Aire Liquide would have undoubtedly retaliated against me for doing so. Air Liquide consistently made truck drivers, including myself, feel as though our jobs were always in jeopardy." (Decl. of Garrido, ¶ 3.)

Garrido, ¶ 7.)[2] In fact, Plaintiff declares, because Defendant "prepared such tight delivery schedules that made it impossible for [him] to take [his] meal breaks, [he] was under the impression that [he] was not entitled to any off-duty meal and rest breaks." (Decl. of Garrido, ¶ 7.) And despite the fact that Plaintiff's supervisor reviewed all of Plaintiff's delivery logs, which indicated violations of his statutory rights, Plaintiff's supervisor never advised Plaintiff of his rights." (Decl. of Garrido, ¶ 7.) That is,

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[2] At the December 13, 2013 oral argument on this motion, Defendant objected for the first time that Plaintiff's declaration submitted in opposition was unsigned. The Court agreed that a declaration must be signed to be admissible (Code Civ. Proc. § 2015.5) and took the matter under submission granting Plaintiff leave to file a signed, and therefore legally effective, copy of the declaration. Plaintiff filed the signed declaration on December 16, 2013 and Defendant objects. Defendant's December 16, 2013 objections to the signed declaration are OVERRULED. Defendant's claims of untimeliness and prejudice are significantly undermined by the fact that Defendant never objected to the declaration as being unsigned in the six months between when Plaintiff filed the unsigned declaration in opposition on June 7, 2013 and the December 13, 2013 hearing. This is despite the fact that, as noted in the conclusion of this order, Defendant did object to other aspects of the unsigned Garrido declaration. Rather, Defendant addressed the substance of that declaration in reply and in Defendant's original set of objections. The newly filed signed declaration is identical in substance to the unsigned declaration, and Defendant has had a full opportunity to respond to the facts set forth in the signed declaration. The Court finds no prejudice in considering the late-filed signed declaration and exercises its discretion to do so. (Cal. Rules of Ct., Rule 3.1300(d).) All references to the Declaration of Garrido herein are to the signed declaration filed December 16, 2013.

the only evidence before the Court is that Plaintiff (and, by inference, fellow truck drivers with similar education, corporate policies, and work schedules) was not the sort of rare sophisticated employee who would be well aware of his statutory labor rights under the third *Gentry* factor.

The fourth aspect of the test announced in *Gentry* requires trial courts to consider whether "real world obstacles" (including, but not always limited to the first three *Gentry* factors) presented by a class action waiver would act to prevent the effective vindication of an employee's statutory wage and hour rights. However, as *Gentry* itself made clear, the presence of the first three factors in the context of a class action waiver will generally indicate a "de facto waiver" of unwaivable statutory wage and hour rights by making it extremely unlikely that individual employees would seek to vindicate their rights against their employer. (*Gentry*, *supra*, 42 Cal.4th at 457.) This is because, the *Gentry* Court held, "the requirement that numerous employees suffering from the same illegal practice each separately prove the employer's wrongdoing is an inefficiency that may substantially drive up the costs of arbitration and diminish the prospect that the overtime laws will be enforced." (*Id.* at 459.) Here, Plaintiff has offered evidence that the instant case involves precisely the sort of arbitration agreement with a class action waiver entered as a condition of employment by low-wage, limited-information employees in vulnerable, at-will employment environments that *Gentry* clearly held was unenforceable despite the application of the FAA.

Indeed, Defendant's primary argument in favor of arbitration with respect to *Gentry* is not that this case actually falls outside of the *Gentry* rule. Defendant merely argues that *Gentry* is no longer good law and that Plaintiff offers only argument, not evidence, in support of the *Gentry* factors. (Reply, pp. 6-8.) But as discussed above, irrespective of the Court's opinion as to whether *Gentry* was overruled by implication in *Concepcion*, absent a decision from the United States Supreme Court or the California Supreme Court directly overruling *Gentry*, the Court is bound to follow it. And unlike cases where a plaintiff failed to offer any evidence of any of the *Gentry* factors whatsoever (see, e.g., *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1132; *Kinecta Alternative Financial Solutions*, *supra*, 205 Cal.App.4th at 510), Plaintiff has offered evidence that recovery would be modest, that he feared retaliation, and that he was unaware of his statutory rights and believed that his company-imposed and supervisor-reviewed work schedules were compliant with the law.

C. The Supreme Court's Recent Decision in Sonic II Does not Change this Result

Shortly before this motion was previously set for hearing on October 25, 2013, the California Supreme Court rendered its opinion in *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic II*) (2013) 57 Cal.4th 1109. The Court asked the parties for supplemental briefing on the application of the holding in *Sonic II* to this case. Having reviewed the High Court's decision in *Sonic II*

and the parties' supplemental briefing, the Court concludes that *Sonic II* is inapplicable to the Court's analysis. In *Sonic II*, the Supreme Court addressed at length the impact of *Concepcion* on the doctrine of unconscionability in California. In contrast "'the rule of *Gentry*' is not a rule of unconscionability. Indeed, the absence of procedural unconscionability is not relevant to striking a class action waiver as violative of the rule of *Gently.*" (*Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 839.) "While, in certain circumstances, a class action waiver may be both unconscionable and violate the rule of *Gentry*, the Supreme Court has established two separate tests which should be considered separately." (*Id.* at 836-37.) To the extent that *Sonic II* discusses *Gentry* at all, it appears to have cited that decision with approval. (See *Sonic II*, *supra*, 57 Cal.4th at 1131, 1134, 1161, 1165.) But *Sonic II* limited its discussion to the separate question of unconscionability and did not overrule or abrogate the distinct rule announced in *Gentry.* Because the Court finds that the class action waiver in this case falls under *Gentry*'s definition of an unlawful exculpatory clause, the Court need not address whether the Agreement was also unconscionable, and *Sonic II* is inapplicable.

III. Conclusion

Gentry provides that lawful class action waivers in the wage and hour context are the exception, not the rule. And while many learned jurists have persuasively argued that *Gentry* cannot survive the

United States Supreme Court's decision in *Concepcion*, a majority of our Supreme Court has not yet joined that cadre. Unless and until it does, this Court is obligated to follow *Gentry*, and all the evidence before the Court demonstrates that this is precisely the sort of case the *Gentry* decision is intended to reach. Moreover, even assuming that the class action waiver was a severable provision (the Agreement does not include a severance clause), Defendant has moved exclusively for individual, not class arbitration. Because the class action waiver constitutes an unlawful exculpatory clause under the factors articulated in *Gentry*, the motion to compel individual arbitration must be DENIED. Because the agreement is unenforceable under *Gentry*, the Court need not determine whether it is also unconscionable.

Defendant's request for judicial notice is GRANTED. Defendant's objection no. 1 to the Declaration of Garrido (filed along with the reply) is SUSTAINED on the ground that it constitutes hearsay. Defendant's remaining objections to the Declaration of Garrido and Defendant's objections to the Declaration of Esensten are OVERRULED. Defendant's December 16, 2013 objections to the late-filed, signed declaration are OVERRULED.

Dated: 12/30/13 /s/ Lee Smalley Edmon
HON. LEE SMALLEY EDMON
JUDGE OF THE SUPERIOR COURT

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the County of LOS ANGELES, STATE OF CALIFORNIA. My business address is 5567 Reseda Boulevard, Suite 330, Tarzana, California 91356. I am over the age of eighteen years and am not a party to the within action;

On January 6, 2014, I served the following document(s) entitled **NOTICE OF RULING RE DEFENDANT'S MOTION TO COMPEL ARBITRATION** on ALL INTERESTED PARTIES in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Dominic J. Messiha, Esq. **LITTLER MENDELSON, P.C.** 2049 Century Park East, 5th Floor Los Angeles, CA 90067-3107 Telephone: (310) 553-0308 Facsimile: (310) 553-5583 Email: dmessiha@littler.com	Attorneys for Defendant Air Liquide Industrial U.S., LP
Nancy E. Pritikin, Esq. **LITTLER MENDELSON, P.C.** 650 California Street, 20th Floor San Francisco, CA 94108-2693 Telephone: (415) 433-1940 Facsimile (415) 399-8490 Email: nepritikin@littler.com	Attorneys for Defendant, Air Liquide Industrial U.S. LP

BY MAIL: By placing a true copy thereof in a sealed envelope addressed as above, and placing it for and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings and other matters for mailing with the United States Postal Service. The correspondence, pleadings and other matters are deposited with the United States Postal Service with postage thereon fully prepaid in Tarzana, California, on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY ELECTRONIC MAIL TRANSMISSION: By electronic mail transmission from jholtan@wccelaw.com on January 6, 2014, by transmitting a PDF format copy of such document(s) to each such person at the e-mail address listed below their address(es). The document(s) was/were transmitted by electronic transmission and such transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 6, 2014, at Tarzana, California.

/s/ Jennifer Holtan
Jennifer Holtan

Court of Appeal, Second Appellate District,
Division Two – No. B254490

S230997

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARIO GARRIDO, Plaintiff and Respondent,

v.

AIR LIQUIDE INDUSTRIAL U.S. LP,

Defendant and Appellant.

(Filed Feb. 3, 2016)

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

AIR LIQUIDE [LOGO]	ALTERNATIVE DISPUTE RESOLUTION	Document No.: HR-PPM-2018-Y Revision: 2 Effective Date: March 2, 2006 Page: Page 1 of 5 Serial No.:

DISCLAIMER

American Air Liquide Holdings, Inc. and its US subsidiaries ("Air Liquide") have drafted this document exclusively for their own use. This document is considered confidential and proprietary in nature. Without written permission of Air Liquide Management it shall not be distributed to or used by anyone other than Air Liquide personnel. Users of this document must ensure that they have the latest revision. Non-current versions of the document must be destroyed and must not be used.

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document, AIR LIQUIDE EXPRESSLY DISCLAIMS ALL WARRANTIES, INCLUDING, BUT NOT LIMITED TO, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

Air Liquide also disclaims all liability and responsibility for loss, damage or injury, however occurring, resulting from the use of this document or the information therein by any third party.

1.0 PURPOSE

1.1 This document outlines the Alternative Dispute Resolution ("ADR") Agreement between you and American Air Liquide Holdings, Inc. and its US subsidiaries (hereinafter collectively referred to as "Air Liquide").

2.0 INTRODUCTORY STATEMENT

2.1 All disputes arising out of or relating to the interpretation and application of this ADR Agreement or the employee's employment with Air Liquide or the termination of employment, including for example and without limitation, any claims for unfair competition, theft of trade secrets, wrongful termination, unlawful discrimination, sexual harassment or other unlawful harassment, or retaliation, shall be resolved through ADR, including binding arbitration if necessary. ADR has been instituted in order to

provide a neutral, faster and more cost efficient forum for Air Liquide and an employee who has a dispute as outlined in this Agreement. This ADR Agreement provides the exclusive means for formal resolution of all such disputes between an employee and Air Liquide and is binding upon both Air Liquide and the employee.

NOTE: THIS ADR AGREEMENT IS A WAIVER OF THE PARTIES' RIGHTS TO A CIVIL COURT ACTION.

2.2 Disputes within the scope of this Agreement shall include, but not be limited to, the following: alleged violations of federal, state and/or local constitutions, statutes or regulations, including, without limitation, any claims alleging any form of employment discrimination of harassment; claims based on any purported breach of contractual obligation, including breach of the covenant of good faith and fair dealing; and claims based on any purported breach of duty arising in tort, including violations of public policy. Disputes related to workers' compensation and unemployment insurance are not arbitrable hereunder. Claims for benefits covered by a separate benefit plan that provides for arbitration are not covered by this ADR Agreement. Charges that are filed with the U.S. Equal Employment Opportunity Commission ("EEOC") are not arbitrable under this Agreement while being processed. Nothing in this ADR Agreement shall be deemed to prevent an employee or

Air Liquide from filing a charge or other claim with the National Labor Relations Board. This Agreement does not supplant Air Liquide's discretion to evaluate, discipline or terminate its employees within the normal course of business, although disputes arising out of such actions may, as described herein, be subject to this Agreement.

2.3 "Employee" as used herein refers to a present or former employee of Air Liquide.

2.4 An employee who has a dispute with the Air Liquide must, within 180 days or the applicable statute of limitations period (whichever is greater), present a written notice to the Manager, Employee and Industrial Relations, setting forth the basis for his or her dispute. For this procedure; notices must be delivered by hand or sent via facsimile or overnight delivery service to:

2.4.1 Air Liquide USA LLC
Manager, Employee and
Industrial Relations
2700 Post Oak Blvd.
Houston, TX 77056
Fax (713) 624-8030

2.5 If Air Liquide has a dispute with an employee, written notice may be delivered by hand or sent via overnight delivery service to the employee's last known home address. Air Liquide must notify the employee within 180 days or the applicable statute of

limitations period (whichever is greater) of its claim.

2.6 **A telephone call does not constitute notice for purposes of invoking the ADR procedure. Time is of the essence for all steps of this procedure and all enunciated deadlines must be followed.**

2.7 Within 20 business days after receipt of the notice of dispute, the party responding to the notice of dispute will provide a written statement setting forth his/her/its position and the reasons supporting that position, as well as any other information which the responding party believes might be useful to the resolution of the dispute. If the party that provided the notice of dispute is not satisfied with the responding party's response, he/she/it must notify the responding party in writing of his or her intent to take the matter to the next step within five business days of receipt of the that [sic] response (the "second notice").

2.8 Within seven business days from the date of receipt of the complaining party's second notice, the employee and an Air Liquide representative will meet to discuss the issues in dispute and attempt to resolve the dispute in a good faith manner prior to bringing the matter to arbitration. Absent mutual Agreement between Air Liquide and the employee that the dispute has been satisfactorily resolved, the matter will be

deemed unresolved and will proceed to arbitration.

2.9 This Agreement does not prevent or excuse Air Liquide or any employee from satisfying any applicable statutory conditions precedent or jurisdictional prerequisites to pursuing their disputes by, for example, obtaining right to sue notices from federal, state, or local agencies. However, final and binding arbitration as described in this Agreement is the sole and exclusive remedy or formal method of resolving the dispute.

2.10 This Agreement, any arbitration proceedings held pursuant to this Agreement, and any proceedings concerning arbitration under this Agreement are subject to and governed by the Federal Arbitration Act, 9 U.S.C. section 1 et seq. The parties to any arbitration as described in this Agreement will select the Arbitrator by mutual agreement. If the parties do not mutually agree on the selection of the Arbitrator, any party may seek appointment of the Arbitrator by a court of competent jurisdiction.

2.11 During any arbitration proceedings held under or pursuant to this Agreement, the parties will have the right to conduct normal civil discovery and bring motions, as provided by the Federal Rules of Civil Procedure (as implemented by the local rules of the United States District Court for the federal judicial district of the geographic area in which the arbitration proceedings are pending) and determined or enforced by the

Arbitrator, prior to, during, and after the arbitration hearing or award. **However, there is no right or authority for any dispute covered by this Agreement to be heard or arbitrated on a class or collective action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Air Liquide employees (or any of them), or of other persons similarly situated.** Any action or proceeding brought against Air Liquide by any person (whether an employee bound by this Agreement or not) or entity in a representative capacity on behalf of or for the benefit of any employee bound by this Agreement is designated as a "Representative Action" in this Agreement. Any dispute of or by an employee for a remedy pursuant to or under the authority of the Representative Action is governed by and subject to this Agreement. Thus, even though some of the Federal Rules of Civil Procedure apply as set forth above, **there are no judge or jury trials and there are no class or collective actions or Representative Actions permitted under this Agreement**.

2.12 Prior to an arbitration initiated by an employee's notice of dispute, an employee will contribute a sum equal to the then-current filing fee in the applicable State or Federal Court for a complaint or first appearance, whichever is lower, toward the arbitrator's fee. Air Liquide will pay the remaining fees

and expenses, including court reporting fees and fees for the arbitrator. In an arbitration proceeding on Air Liquide's notice of dispute, Air Liquide will pay the entirety of the arbitrator's fees, including court reporting fees, and all other fees unique to arbitration. Each side will be responsible for expenses associated with its own witnesses, including travel and shall advance its own costs for witness fees, service and subpoena charges, copying and other incidental costs that each party would bear during the course of a civil lawsuit, subject to any remedies to which that party may later be entitled. Each side will pay its own costs for court reporter transcripts. A party may be represented by an attorney at his/her/its own expense, subject to any remedies to which that party may later be entitled. Employees who serve as witnesses will be compensated for time spent in such capacity at arbitration in accordance with applicable law.

2.12.1 **The arbitrator has the authority to determine whether a party has violated federal or state law, including statutory, common law or contractual rights.**

2.12.2 **The arbitrator has the authority to provide to a party who prevails in the arbitration <u>all</u> remedies and costs that are available under applicable law,**

including but not limited to legal and equitable relief, and arbitrator's and attorney's fees, but only if such remedies and costs would have been awardable in a court of law for the claim(s) upon which the party prevailed.

2.13 The arbitrator is required to issue a written opinion and award stating his or her essential findings and the conclusions upon which his or her award is based. The decision of the arbitrator will be final and binding on both Air Liquide and the employee.

2.14 Any questions or requests for information should be directed to the Manager, Employee and Industrial Relations.

2.15 This Agreement covers all non-union employees of Air Liquide, regardless of position within Air Liquide.

AGREEMENT TO BE BOUND BY ALTERNATIVE DISPUTE RESOLUTION

AGREEMENT

The terms of this Agreement are contractual in nature.

This Agreement applies to American Air Liquide Holdings, Inc. and its US subsidiaries (hereinafter collectively referred to as "Air Liquide").

In consideration for and as a material condition of employment with Air Liquide and in consideration for Air Liquide's return Agreement to be bound by the Alternative Dispute Resolution Agreement, the undersigned parties agree to be bound by the Air Liquide Alternative Dispute Resolution Agreement incorporated herein by reference. Both Air Liquide and the undersigned employee have received and read the Air Liquide Alternative Dispute Resolution Agreement. The undersigned employee and Air Liquide expressly acknowledge and agree that this Agreement is a waiver of all rights to a civil court action.

This Agreement is the full and complete Agreement of the parties relating to resolution of disputes as set

forth in the Air Liquide Alternative Dispute Resolution Agreement.

Mario Garrido	By: /s/ David Paul
Employee Name	
Mario Garrido	AIR LIQUIDE USA, LLC
Employee Signature	
6/15/09	6/15/09
Date	Date