

ENTERED

March 16, 2017

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EDISON ZORILLA, *et al*,

Plaintiffs,

VS.

UBER TECHNOLOGIES, INC.,

Defendant.

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CIVIL ACTION NO. 4:16-CV-615

ORDER

Before the Court is Defendant Uber Technologies, Inc.’s (“Uber”) Motion to Dismiss Plaintiffs’ First Amended Complaint (Doc. #18),¹ Plaintiffs’ Amended Response (Doc. #45), Uber’s Reply (Doc. #41), and Plaintiffs’ Sur-Reply (Doc. #59). In addition to the above documents, Uber has filed a Second, Third, Amended Third, Fourth, Fifth, Sixth, Seventh, and Eighth Notice of Supplemental Authority in Support of Motion to Dismiss (Docs. #46, 64, 65, 68, 69, 78, 79, & 89). Likewise, Plaintiffs have filed a Notice of Supplemental Authority (Doc. #62), and Uber filed a Response to this Supplement (Doc. #66). Having considered the arguments and the applicable law, the Court grants Uber’s Motion to Dismiss in favor of arbitration as to Plaintiffs Zorilla and Taibel.

I. Background

Uber is a technology company that offers a smartphone application connecting riders looking for transportation with available drivers, such as Plaintiffs. Plaintiff Zorilla worked for Uber as an UberX driver, and Plaintiff Taibel worked for Uber as an Uber Select driver. Plaintiff

¹ To note, per an agreement between the parties, the operative complaint as to Plaintiffs Edison Zorilla (“Zorilla”) and Morris Taibel (“Taibel”) is the First Amended Complaint. However, the operative complaint as to Plaintiff Castillo is the Second Amended Complaint. Accordingly, Uber’s Motion to Dismiss only addresses the claims made by Plaintiffs Zorilla and Taibel.

Zorrilla's Uber account was activated on October 7, 2015. Plaintiff Taibel's Uber account was activated on December 30, 2014. However, Plaintiffs could not access the UberX or Uber Select platforms unless they first electronically accepted the applicable usage agreement. After signing up, a potential driver must log in with a unique username and password to review the service agreement. To advance past the screen with the hyperlink to the agreement, drivers must confirm that they reviewed and accepted the agreement by clicking "YES, I AGREE." After clicking "Yes, I Agree," drivers were prompted to confirm their review and acceptance a second time. Plaintiff Zorrilla and Plaintiff Taibel reviewed and accepted the provisions set forth in the November 10, 2014 "Raiser Software License & Online Services Agreement" ("November 2014 Agreement") governing access to the UberX platform on the date they activated their Uber accounts.²

The November 2014 Agreement contains an arbitration agreement in which drivers and Uber/Raiser agree to arbitrate all disputes arising out of their relationship with Uber:

IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis pursuant to the terms of the Agreement unless you choose to opt out of the arbitration provision. This provision will preclude you from bringing any class, collective, or representative action against the Company or Uber . . .

...

WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT BUSINESS DECISION. IT IS YOUR DECISION TO MAKE, AND YOU SHOULD NOT RELY SOLELY UPON THE INFORMATION PROVIDED IN THIS AGREEMENT AS IT IS NOT INTENDED TO CONTAIN A COMPLETE EXPLANATION OF THE CONSEQUENCES OF ARBITRATION. YOU SHOULD TAKE REASONABLE STEPS TO CONDUCT FURTHER RESEARCH AND TO CONSULT WITH OTHERS . . .

...

This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. §

² Raiser is a wholly owned subsidiary of Uber.

1 et seq. (the "FAA") and evidences a transaction involving commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates. . . .

Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.

Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge.

Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company, including termination of the relationship.

. . .

Arbitration is not a mandatory condition of your contractual relationship with the Company. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision by notifying the Company in writing of your desire to opt out of this Arbitration Provision. . . Should you not opt out of this Arbitration Provision within the 30-day period, you and the Company shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of your choice concerning this Arbitration Provision.

. . .

This Arbitration Provision is the full and complete agreement relating to the formal resolution of disputes arising out of this Agreement. Except as stated in subsection v, above, in the event any portion of this Arbitration Provision is deemed unenforceable, the remainder of this Arbitration Provision will be enforceable.

Doc. #18, Ex. 1 at 27-32. On December 11, 2015, Uber issued an updated Technology Services Agreement containing a revised arbitration provision to its drivers. Both Plaintiffs accepted this

new agreement on December 11, 2015. However, on December 23, 2015, Judge Edward M. Chen of the Northern District of California, who is presiding over a class action against Uber in which all named Plaintiffs are putative class members, issued an injunction decreeing that the December 2015 Arbitration Provision “may not be enforced until” Uber further modified the arbitration provision, which has not been done. *See O’Connor v. Uber Techs., Inc.*, Case No. 3:13-cv-3826-EMC (N.D. Cal. Dec. 23, 2015), Dkt. 435 at 6-8. Although Uber has appealed that injunction, enforcement of the December 2015 version of the arbitration provision is enjoined, rendering the December 2015 arbitration provision a nullity (unless Uber’s appeal from the injunction succeeds). As the December 2015 Arbitration Provision is inoperative, the November 2014 Arbitration Provision remains in effect by virtue of the Survival Clause.³

Plaintiff Zorrilla filed this action against Uber, on behalf of himself and other Texas Uber drivers, asserting the following claims under California law: (1) unfair competition in violation of California Business and Professions Code § 17200, *et seq.*; (2) failure to reimburse business expenses and misclassification of employment in violation of California Labor Code § 2802; (3) unjust enrichment; (4) failure to remit gratuities in violation of California Labor Code § 351 and California Unfair Law, California Business and Professions Code § 17200; (5) tortious interference with contractual and advantageous relations under California common-law; and (6) breach of contract under California common-law. Doc. #1. On May 3, 2016, Zorrilla filed a First Amended Complaint adding Castillo and Taibel as Co-Plaintiffs. Doc. #15. There were no substantive changes in the amended complaint.

³ The Arbitration provision in the December 2015 agreement is substantially similar to the relevant portions of the November 2014 agreement, as acknowledged by the Plaintiffs in their response to Uber’s Motion to Dismiss. Doc. #45, at 9. Accordingly, the applicability of the December 2015 Agreement does not affect the reasoning laid out in this Order.

Defendant moves to compel individual arbitration based on the arbitration agreements that Plaintiffs Zorilla and Taibel electronically accepted before accessing the Uber platform. Defendant argues that the arbitration agreements are enforceable pursuant to the Federal Arbitration Act (“FAA”), that the claims brought here fall under the scope of those agreements, and that they must be dismissed in favor of arbitration. Plaintiffs concede that the arbitration agreements are governed by the FAA, but they argue that the agreements should not be enforced because the agreements, including the delegation provisions, are against public policy and unconscionable under California Law. Defendant counters that Texas law applies, and that the parties agreed to delegate the determination of enforceability of the arbitration agreements’ various terms to the arbitrator—not the court. Thus, according to Uber, this Court may only determine the enforceability of the delegation provisions under Texas law.

II. Legal Standards

The FAA declares written arbitration agreements in any contract involving commerce “valid, irrevocable, and enforceable,” unless the terms are unenforceable under general applicable contract law doctrines such as fraud, duress, or unconscionability. 9 U.S.C. § 2; *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). “The FAA thereby places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms.” *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (internal citations omitted). Parties to a valid arbitration agreement will be compelled to arbitrate claims that fall under the scope of the agreement unless some public policy or contract doctrine renders those claims nonarbitrable. *Id.* Importantly, parties may agree to commit those threshold determinations, such as whether an arbitration agreement is valid or enforceable, to an arbitrator. *Id.* A delegation provision is an agreement to arbitrate those

threshold issues of "arbitrability," such as whether the parties have agreed to arbitrate or whether the agreement covers a particular claim. *Id.* at 68-69. The delegation provision is an additional, antecedent agreement, and the FAA operates on delegation provisions as it does any other. *Id.* Indeed, if an arbitration agreement includes a valid delegation provision, the district court may not review challenges to other issues of arbitrability because they have been committed to an arbitrator. Unless a defendant challenges a delegation provision specifically, courts must treat it as valid and enforceable under the FAA. *See Rent-A-Center*, 561 U.S. at 72. "There is a strong presumption in favor of arbitration and the party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity." *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). Because the FAA operates on delegation provisions "as it does on any other," the same burden is on the party seeking to invalidate. *Rent-A-Center*, 561 U.S. at 68. A delegation provision is valid as long as the delegation is clear and unmistakable and it does not violate some other common law contract doctrine, such as unconscionability. *Id.* at 79; *see also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The validity of an arbitration agreement is a question of state law. *Bane One Acceptance Corp. v. Hill*, 367 F.3d 426, 431 (5th Cir. 2004).

III. Analysis

Plaintiffs do not dispute assent to the terms of the agreements or the validity of the agreement in its entirety. Doc. #45, at FN10. Plaintiffs argue only that "the Agreements' arbitration provisions, including the delegation clauses, are unenforceable." *Id.* However, if the delegation provision is valid, the determination of the enforceability of other provisions was delegated to an arbitrator, and this Court must dismiss under the FAA. *Rent-A-Center*, 561

U.S. at 72. Thus, the critical matter before this Court is the validity of the delegation provision itself. See *Rent-A-Center*, 561 at 63; see also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Bane One Acceptance Corp.*, 367 F.3d at 430 (5th Cir. 2004).

Plaintiffs argue that the Court should evaluate the provision under California law because of a choice-of-law provision in the November 2014 Agreement. Further, Plaintiffs assert that under California law the delegation provision is unenforceable because it is 1) not clear and unmistakable, and 2) unconscionable. Defendant counters by asserting that Texas law applies, and that the delegation provision is enforceable under Texas law because it 1) clearly and unmistakably grants issues of arbitrability to the arbitrator, and 2) is not unconscionable.

A. The Arbitration Agreement clearly and unmistakably delegates issues of arbitrability to the arbitrator.

A delegation provision that gives an arbitrator the authority to resolve disputes relating to the "enforceability" or "validity" of an arbitration agreement constitutes clear and unmistakable evidence that the parties intended to arbitrate arbitrability. See, e.g., *Rent-A-Center*, 561 U.S. at 71-72; *Aviles v. Russell Stover Candies, Inc.*, 559 Fed. Appx. 413, 414 (5th Cir. 2014); *WL. Doggett LLC v. Paychex, Inc.*, 92 F.Supp.3d 593, 597 (S.D. Tex. 2015). Defendant points out that the delegation provision in the November 2014 Agreement expressly applies to disputes arising out of or relating to "interpretation or application of this Arbitration Provision, including the enforceability, revocability, or validity of the Arbitration Provision or any portion of the Arbitration Provision." Doc. #18, at 19. Under the arbitration agreement, "[a]ll such matters shall be decided by an Arbitrator and not by a court or judge." *Id.* This is a clear and unmistakable delegation of the authority to determine issues of arbitrability to the arbitrator.

Plaintiffs argue that the delegation provision conflicts with other provisions in the Agreement that require disputes or actions in connection with the Agreement to be subject to the "exclusive jurisdiction of the state and federal courts" in San Francisco. Doc. #45, at 6. Plaintiffs rely on a California district court opinion—*Mohamed v. Uber Technologies, Inc.*, No. C-14-5200 EMC, 2015 WL 3749716 (N.D. Cal. June 9, 2015)—that found such language rendered the delegation provision unclear and mistakable. *Id.* However, as the Ninth Circuit stated when overruling this opinion, "[t]hese conflicts are artificial." *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016). To demonstrate, the November 2014 Agreement allowed drivers to opt out of the arbitration agreement. Doc. # 18, Ex. 1 at 31-32. Those that did not opt out were still able to file suit for claims that were not covered by the arbitration agreement or for "temporary or preliminary injunctive relief in connection with an arbitrable controversy." *Id.* at 30-32. Accordingly, it is apparent that the venue/forum selection provision was intended for those purposes, and do not render the express delegation of issues of arbitrability under the arbitration agreement unclear or mistakable.

B. The delegation provision is not unconscionable.

Plaintiffs also claim that the delegation provision is unenforceable because it is unconscionable.

1. Choice of Law

The validity of an arbitration agreement, including a delegation provision, is a question of state law. *Bane One Acceptance Corp.*, 367 F.3d at 431. Here, the parties dispute whether California law or Texas law applies. While the November 2014 Agreement has a general choice-of-law provision, it is not provided within the specific arbitration agreement

or delegation provision. Rather, the choice-of-law provision is a general term of the November 2014 Agreement, which plaintiffs had to accept by clicking "YES, I AGREE":

The interpretation of this Agreement shall be governed by California law, without regard to the choice or conflicts of law provisions of any jurisdiction, and any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Service or Software shall be subject to the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco, California.

Doc. #18, Ex. 1 at 26.

Plaintiffs argue that California law applies because the general choice-of-law provision should apply to the delegation provision. Doc. #45, at 7-9. Defendant argues that Texas law applies because the delegation provision must be severed from the arbitration agreement as a whole, and that the choice-of-law provision thus has no effect on the delegation provision. Doc. #41, at 6 (citing *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S.Ct. 500, 503 (2012)). Indeed, the Supreme Court has referred to delegation provisions as "additional, antecedent agreements[s] that [are] severable from the remainder of the arbitration agreement." *Rent-A-Center*, 561 U.S. at 70-71. This approach is further reflected in the November 2014 Agreement's own terms: "[t]his Arbitration Provision is the full and complete agreement relating to the formal resolution of disputes arising out of this Agreement." Doc. #18, Ex.1 at 32. If the arbitration agreement—which includes no choice-of-law provision—is separate from the rest of the November 2014 Agreement, and the delegation provision is antecedent to the arbitration agreement, then the delegation provision includes no choice-of-

law provision.⁴ Thus, the choice-of-law provision has no effect on this Court's determination of the enforceability of the delegation provision.

Federal courts must apply the forum state's choice of law rules. In the absence of an effective choice of law provision, § 188(1) of the Restatement (Second) of Conflicts of Laws ("Restatement") provides the general rule: "[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles listed in § 6." *Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 53 (Tex. 1991) (quoting § 188(1)). Where the contract was signed and performed by a plaintiff who lives in Texas, the laws of Texas apply. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d at 670, 678-79 (Tex. 1990). Here, Plaintiffs are Uber drivers who live in Texas, signed the November 2014 Agreement in Texas, and drive for Uber in Texas. In determining the validity of the only contract term at issue here (the delegation provision) Texas law applies.

2. Conscionability

Under Texas law, arbitration agreements may be *either* substantively or procedurally unconscionable, or both. *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499 (Tex. 2015) (citing *In re Halliburton*, 60 S.W.3d 566, 572 (Tex. 2002)). Unlike in California, a party need not establish both substantive and procedural unconscionability in order for the provision to be invalid under Texas state law.⁵ "Substantive unconscionability

⁴ That being said, even if the November 2014 Arbitration Agreement *did* include a choice of law provision, the delegation provision is similarly antecedent and severable. Accordingly, even if the arbitration agreement as a whole contained a choice of law provision, the delegation provision in the November 2014 Agreement does not.

⁵ Under California law, an arbitration agreement, like other contract clauses, is only

refers to the fairness of the arbitration provision itself, whereas procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision.” *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006).

i. The delegation provision is not substantively unconscionable.

Plaintiffs argue that the delegation provision is substantively unconscionable because it would subject plaintiffs to “hefty fees of a type they would not face in court” because the arbitration agreement requires cost to be shared “unless otherwise required by law.” Doc. #45, at 18. In Texas, an arbitration agreement may be substantively unconscionable if the existence of large arbitration costs could preclude a litigant from vindicating statutory rights at arbitration. *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 301 (5th Cir. 2004) (citing *Green Tree Fin. Corp.-Ala. V. Randolph*, 531 U.S. 79, 90 (2000)). A party seeking to invalidate an arbitration agreement bears the burden of showing the likelihood of incurring such prohibitive costs. *Green Tree*, 531 U.S. at 300.

Here, Plaintiffs’ claims are entirely speculative; they *might* be subjected to paying significant forum fees. However, the enforceability of fee-splitting, and the power of the arbitrator to award fees and damages are subject to limitation by the terms of the arbitration agreement and the applicable law governing the claims:

In all cases where required by law, the Company will pay the Arbitrator’s and arbitration fees. If under applicable law the Company is not required to pay all of

unenforceable if it is *both* procedurally and substantively unconscionable. *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1072 (9th Cir. 2007), overruled on other grounds by *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 933 (9th Cir. 2013). Because the Ninth Circuit opinion in *Mohomed* found that the contract at issue in that case—an Uber service contract with substantially the same terms as the contract at issue here—was not procedurally unconscionable, the Court held that the delegation provision at issue in that, and this, case is not unconscionable under California law. 848 F.3d 1201, 1209 (9th Cir. 2016). Thus, even if California law *did* apply, Plaintiffs’ arguments would fail.

the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned equally between the Parties or as otherwise required by applicable law. Any disputes in that regard will be resolved by the Arbitrator.

...

The Arbitrator may award any party any remedy to which that party is entitled under applicable law, but such remedies shall be limited to those that would be available to a party in his or her individual capacity in a court of law for the claims presented to and decided by the Arbitrator, and no remedies that otherwise would be available to an individual in a court of law will be forfeited by virtue of this Arbitration Provision.

Doc. #18, Ex. 1 at 31.

The interpretation of the arbitration agreement, and the determination of the applicable law—including which claims fall under the scope of the arbitration provision—was delegated to the arbitrator. This Court will not speculate as to what fees or awards plaintiffs will incur at arbitration. Indeed, plaintiffs may not incur any arbitration costs at all. Thus, the Plaintiffs have not satisfied their burden of establishing significantly greater cost than plaintiffs would incur in litigation. As such, the delegation provision is not substantively unconscionable.

ii. The delegation provision is not procedurally unconscionable.

Whether an agreement is procedurally unconscionable rests on whether there is unfair surprise or oppression. *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 679 (Tex. 2006). Here, Plaintiffs argue that the delegation provision is so buried within the arbitration agreement, and that the drivers were at such a disadvantaged bargaining position, that they either didn't know or were unconscionably pressured to sign the agreement. However, absent fraud, misrepresentation, or deceit, a party is bound by the terms of the contract he signed, regardless of whether he read it or believed the contract consisted of different terms. *In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005). Further, a contract term is not procedurally unconscionable just because one party may have a less advantageous bargaining position. *In re Palm Harbor*

Homes, 195 S.W.3d at 679. Indeed, the “only cases under Texas law in which an agreement was found procedurally unconscionable involve situations in which one of the parties appears incapable of understanding the agreement.” *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 2069, 1077 (5th Cir. 2002).

Here, Plaintiffs were under no pressure or obligation to even enter the arbitration agreement because the November 2014 Agreement contained an Opt-Out clause:

Arbitration is not a mandatory condition of your contractual relationship with the Company. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision by notifying the Company in writing of your desire to opt out of this Arbitration Provision, either by (1) sending, within 30 days of the date of this Agreement is executed by you, electronic mail to optout@uber.com . . . or (2) by sending a letter by U.S. Mail, or by any nationally recognized delivery service (e.g. UPS, Federal Express, etc.), or by hand delivery
...

Doc. #18, Ex. 1 at 21-32. Therefore, the delegation provision is not procedurally unconscionable.

iii. This Court may not decide whether the larger arbitration agreement violates California public Policy.

Finally, Plaintiffs argue that the delegation provision is unconscionable because the arbitration agreement contains non-severable waivers that prevent drivers from bringing claims under California laws. For the reasons discussed above, the interpretation of what claims fall under the arbitration agreement and whether these very terms of the arbitration agreement are enforceable was clearly and unmistakably delegated to arbitration. *See also Mohamed v. Uber Technologies, Inc.*, 2016 WL 4651409 (9th Cir. Sept. 7, 2016) (finding that the district court should not have reached the question of whether the arbitration agreements, or the terms within them, were enforceable because it had been delegated to the arbitrator). Thus, Plaintiffs challenge to the enforceability and severability of these provisions in the November 2014

Agreement fall to the arbitrator to decide. Therefore, the Court will issue no opinion on this challenge.

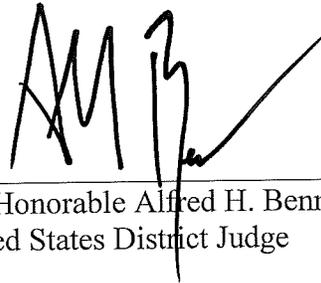
IV. Conclusion

For the reasons stated above, the parties entered into a valid and enforceable agreement to delegate questions of arbitrability to an arbitrator. The delegation provision is clear, unmistakable, and not unconscionable. Thus, it is enforceable, and Plaintiffs Zorilla and Taibel's claims are therefore dismissed, without prejudice, in favor of arbitration. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (instructing courts to dismiss litigation without prejudice when all of the issues raised must be submitted to arbitration).

It is so ORDERED.

MAR 16 2017

Date

A handwritten signature in black ink, appearing to read 'AMB', with a long horizontal stroke extending to the right.

The Honorable Alfred H. Bennett
United States District Judge