2d Civil No. B265723

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ADVANCED AIR MANAGEMENT, INC.,

Plaintiff and Respondent,

vs.

GULFSTREAM AEROSPACE CORPORATION,

Defendant and Appellant.

Appeal from the Los Angeles County Superior Court,
Case No. NC059702
The Honorable Ross M. Klein, Judge Presiding

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This appeal centers on the validity of an arbitration agreement between two sophisticated business entities, international charter-jet operator Advanced Air Management (AAM) and Gulfstream Aerospace Corporation's service facility. When AAM hired Gulfstream to inspect and service AAM's Gulfstream G-IV jet, AAM agreed to the written terms and conditions of service, which included a provision requiring the parties to arbitrate any dispute that arose out of the contract or the service visit. So, when AAM later sued Gulfstream for breach of contract and negligent jet maintenance, Gulfstream petitioned to compel arbitration of the dispute. AAM opposed, and the trial court refused to compel arbitration, agreeing with AAM's claim that the arbitration clause was unconscionable and therefore unenforceable.

The trial court erred. Because the AAM/Gulfstream contract was a transaction involving interstate commerce, the arbitration clause was governed by the Federal Arbitration Act, which embodies a "national policy favoring arbitration" (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 10) that the United States Supreme Court has zealously enforced over the last several decades. In concluding the arbitration clause was unenforceable, the trial court ignored the holdings of several of those controlling cases.

First, the arbitration clause here specifically incorporated the American Arbitration Association (AAA) rules which, in turn, provide that

the *arbitrator* must resolve any disputes about the arbitration provision's validity. The United States Supreme Court has expressly held that where, as here, an FAA-governed contract delegates the determination of the validity of the arbitration clause to the arbitrator, that delegation clause is both severable from the remainder of the agreement and is separately enforceable, absent a showing that the delegation provision is *itself* invalid. (*Rent-A-Center West, Inc. v. Jackson* (2010) 561 U.S. 63, 70-72 (*Jackson*).) Because AAM never even claimed—let alone proved—that the delegation provision here was unconscionable or otherwise invalid, the trial court was compelled by clear United States Supreme Court authority to order the dispute to arbitration so that the arbitrator could make that determination.

Second, even if the trial court had not erred in reserving to itself the question of the validity of the arbitration clause, its conclusion that the arbitration clause was unconscionable was wrong on the merits. That's because under the FAA as definitively interpreted by the United States Supreme Court, any challenge to the validity of an arbitration clause must be specifically directed to that clause itself, severed from the rest of the contract. (*Jackson*, *supra*, 561 U.S. at p. 71.) Because the trial court failed to find anything substantively unconscionable about the arbitration clause here (the trial court's determination of substantive unconscionability was based upon its conclusion that *other parts* of the AAM/Gulfstream contract were substantively unconscionable), its refusal to order the matter to arbitration was clear error.

In sum, the trial court was required to grant Gulfstream's petition to compel arbitration for two independent reasons—the question of the validity of the arbitration clause was for the arbitrator in the first instance, and in any event there was no showing that the arbitration clause was substantively unconscionable. For either or both reasons, the order refusing to compel arbitration must be reversed.

STATEMENT OF FACTS[1]

A. AAM Determines That Its Gulfstream G-IV Jet Requires A Mandatory Inspection.

AAM is a California air charter company that operates several Gulfstream jets. (Appellant's Appendix [AA], p. 8.) In 2012, AAM determined that one of its Gulfstream G-IV jets would soon complete 5,000 landings, and an FAA-mandated inspection would be needed. AAM hired Gulfstream to perform the inspection. (AA 9, 94.)

B. AAM Director Of Maintenance Scott Chikar Arranges For Gulfstream To Do The Inspection And Other Maintenance Services.

AAM's Director of Maintenance, Scott Chikar, concluded that in "conjunction with" the inspection, it would "be an appropriate time to

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[1] Consistent with the principles governing review of a denial of a motion to compel arbitration, we present the underlying facts as they are described in AAM's "complaint and the papers submitted on the motion to compel arbitration." (*Zamora v. Lehman* (2010) 186 Cal.App.4th 1, 6.) There appears to be no material dispute about those facts.

request Gulfstream to perform additional, specific maintenance" services on the jet. (AA 94.) AAM, Chikar, and Gulfstream had worked together numerous times before, when Gulfstream had performed maintenance on other AAM-operated jets. (AA 289-290, 318-348, 507.)

1. Chikar reviews and signs the Service Center Proposal.

During the first half of 2013, Chikar discussed the scope of the planned jet maintenance with Gulfstream, and Gulfstream sent Chikar multiple draft work proposals. (AA 94-95.) In June 2013, Chikar "review[ed]" a draft Service Center Proposal, decided he was "satisfied with" that document, and signed it on AAM's behalf. (AA 95.)

The signed Service Center Proposal detailed the "maintenance, interior refurbishment, avionics modification, and paint" work that Gulfstream would complete, and included a final section labeled "Proposal Summary." (AA 150, 95, 163-164.) The final paragraph of the Proposal Summary explained that the proposed work would be subject to Gulfstream's standard "work authorization" terms and conditions:

> This proposal (or estimate) expressly incorporates and *is subject to Gulfstream Aerospace Corporation's standard work authorization Terms and Conditions*. Your acceptance of all or any portion of this proposal (or estimate) confirms your agreement to accept those Standard Terms and Conditions.

(AA 164, italics added.) Chikar signed directly below the paragraph quoted above. (*Ibid.*)

2. Chikar signs the Work Authorization, which includes both the arbitration clause and the delegation provision.

A few months later, AAM delivered its jet to Gulfstream's Long Beach maintenance facility, and Chikar met multiple Gulfstream employees on site to discuss additional project details. (AA 96-97.) During those meetings, Chikar received and signed a two-page Work Authorization. (AA 97, 174-175, 20-21, see also AA 48, 50-51.) Chikar previously had received and signed numerous similar agreements, with identical terms and conditions, when Gulfstream had done maintenance on other AAM-operated jets. (AA 289-290, 318-348, 507.)

The Work Authorization's first page described the jet's engine details and flight hours; listed various Gulfstream employees assigned to the project; and described AAM and Chikar as the "Customer" and "Customer Contact," respectively. (AA 174.) A boxed statement in the middle of the first page explained that the terms and conditions described on the second page would "govern the relationship of the parties," stating in its entirety:

> I hereby authorize the above work to be performed and the acquisition of necessary materials for performing said work. It is *expressly understood that the terms and conditions on the reverse side of this order* shall govern the relationship of the parties hereto.

(*Ibid.*, italics added.) Chikar signed directly below this statement. (*Ibid.*)

The second page of the Work Authorization contained several numbered paragraphs, including paragraph 17, which was entitled "ARBITRATION." (AA 175; throughout this brief, we refer to paragraph 17 as the "arbitration clause.")[2]

The first sentence of the arbitration clause delegated "any controversy or claim arising out of this Agreement" and seeking less than $2 million to "one (1) arbitrator" for resolution "under the Commercial Arbitration Rules of the American Arbitration Association ('AAA') . . . ." (AA 175; throughout this brief, we refer to this provision as the "delegation provision.")

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[2] The arbitration clause stated, in its entirety:

> 17. ARBITRATION Any controversy or claim arising out of either this Agreement or Customer's service visit to Gulfstream shall be governed by the laws of the State of Georgia, without regard for rules concerning conflicts of law, and settled by one (1) arbitrator (except if the claim is in excess of $2 Million, then by three (3) neutral arbitrators) under the Commercial Arbitration Rules of the American Arbitration Association ('AAA') in the City where the work hereunder was performed. The parties shall use their best efforts to agree upon an arbitrator(s) within thirty (30) days after service of the claim, and if agreement is not reached by such date then either party may request the AAA to appoint an arbitrator(s) in accordance with its rules. The UN Convention on Contracts for the International Sale of Goods (frequently referred to as the "UNCISG") shall not apply.

(AA 175.)

Chikar again signed the Work Authorization, this time two paragraphs below the arbitration clause, at the bottom of the Work Authorization's second page. (AA 175, 97-98, 12, 51.)

C. The Jet Experiences Mechanical Difficulties.

Six months after Chikar signed the Work Authorization, Gulfstream finished the jet maintenance and returned the jet to AAM. (AA 10.) Soon thereafter, AAM dispatched the jet for a charter flight between Kazakhstan and Switzerland. (*Ibid.*)

During that flight, AAM alleges, "the flight crew received an urgent warning, in the cockpit, of low oil pressure in the right engine," and the jet made an emergency landing in Russia. (AA 10.) AAM alleges it then obtained a replacement plane for its charter passengers; sent a group of technicians to Russia to evaluate and repair the jet; and sent the jet to Gulfstream's maintenance facilities in Luton, England, and Long Beach for further repairs. (*Ibid.*; AA 99.)

D. AAM Files This Suit.

AAM sued Gulfstream for breach of contract and negligence. (AA 8, 11-12, 15-17.) AAM also sought "a declaration as to the validity" of the Work Authorization's provisions and claimed those provisions were unconscionable. (AA 12-14.)

E. Gulfstream Petitions To Compel Arbitration.

Gulfstream petitioned the trial court to compel arbitration; AAM opposed. (AA 38-39, 72-91.)

In its opposition, AAM acknowledged that Chikar had executed both the Service Center Proposal and the Work Authorization. (AA 77, 79, 95-97, 506-507 ["There is no dispute that the work authorization was executed by an authorized employee" of AAM].) But, AAM argued, the arbitration clause and other terms in the Work Authorization were unconscionable as a matter of California law. (AA 84-91.)

AAM's unconscionability arguments fell into three categories.

First, AAM attacked the arbitration clause itself. These arguments included claims that the clause was procedurally unconscionable because: (1) "Chikar was not aware of [its] existence" when he signed the Work Authorization; (2) the clause was "hidden" in "densely written language"; and (3) the arbitration clause was not attached to the Service Center Proposal. (AA 87-89.) And AAM argued the clause was substantively unconscionable because it selected Georgia law to govern the dispute, and applying Georgia law was "unexpected and unreasonable." (AA 89.)

AAM also challenged other, substantive terms in the Work Authorization beyond the arbitration clause. AAM claimed paragraph 8 of the Work Authorization was substantively unconscionable, because it (a) improperly limited Gulfstream's "liability for incidental and consequential damages," and (b) required AAM to "give up any claim for incidental and

consequential damages arising out of Gulfstream's negligence, but Gulfstream is not giving up any rights to pursue any of its claims against" AAM. (AA 89-90.) AAM further argued that paragraph 6.2 of the Work Authorization was substantively unconscionable, because it improperly limited Gulfstream's "obligation for any damages it cause[d] to merely repairing or replac[ing] any damaged or broken part." (*Ibid*.)

Finally, AAM challenged the Work Authorization in its entirety, claiming the entire document was a "preprinted form contract of adhesion," and Chikar and AAM did not conduct advanced negotiations regarding any of its terms. (AA 87-88.) Thus, AAM claimed, the entire Work Authorization, "including but not limited to the arbitration clause, should be deemed unenforceable." (AA 91; see also AA 86.)

F. The Trial Court Hears And Denies The Petition To Compel Arbitration.

The trial court issued a tentative ruling denying Gulfstream's petition and then entertained oral argument on the matter. (RT 1.) At the hearing, the court indicated that (1) it believed the terms in the Work Authorization were "procedurally unconscionable," and (2) a showing of procedural unconscionability was alone sufficient to defeat Gulfstream's petition to compel arbitration. (RT 1-2.) The court stated: "I focused on the procedural one, because I think that is determinative . . . . My gut feeling, although it wasn't in my written tentative, is that [the Work Authorization is] not substantively unconscionable." (RT 2-3.) The trial

court took the matter under submission and stated that it would "add more detail to the tentative you haven't seen." (RT 7.)

Six days later, the trial court entered a minute order denying the petition to compel arbitration. (AA 506-508.)

The order explained that there was no dispute between the parties regarding contract formation *ab initio* or the existence of the arbitration clause itself: "Gulfstream meets its initial burden of establishing a contract with an arbitration provision," and there is "no dispute that the [Work Authorization] was executed by an authorized employee of" AAM. (AA 506-507.) Accordingly, the court indicated that it would focus on the existence of "both procedural and substantive unconscionability" and framed the issue as whether AAM had met its "burden . . . to show both" elements. (AA 507.)

Portions of the order suggested that the trial court concluded the entire Work Authorization was procedurally unconscionable. In that regard, the court stated the "element of procedural unconscionability" was satisfied because there were "prolonged negotiations for the work Gulfstream was to perform" but "no mention of either arbitration *or* limitation of contractual liability." (AA 507, italics added.) The court also expressed its view that the Work Authorization's "provisions are in fine print, and . . . despite detailed negotiations there was no mention of or agreement to these additional terms"; the Work Authorization's title "does not signal that there are additional terms affecting" AAM's rights. (*Ibid.*)

Similarly, the beginning of the court's substantive-unconscionability analysis stated that "the terms on the Work Authorization [Agreement] are . . . substantively unconscionable," once again apparently referring to its provisions as a group. (AA 507-508.)

But other portions of the order focused on specific provisions within the Work Authorization. In particular, the court's substantive-unconscionability discussion indicated that the court determined the provision limiting consequential damages was unconscionable because it was "unilateral; Gulfstream was not similarly limited in the damages it could seek." (AA 507-508.) The penultimate paragraph of the order states: "The Court finds that the *terms Gulfstream seeks to enforce* were unconscionable, would not have been noticed under the circumstances set forth in the opposing evidence, is [*sic*] unfair and one-sided in effect." (AA 508, italics added.) Accordingly, Gulfstream's petition to compel arbitration was denied. (*Ibid.*.) Gulfstream appealed. (AA 510.)

STATEMENT OF APPEALABILITY

The trial court's June 29, 2015 order denying Gulfstream's petition to compel arbitration was immediately appealable. (Code Civ. Proc., § 1294, subd. (a); *Marenco v. DirecTV LLC* (2015) 233 Cal.App.4th 1409, 1415.) Gulfstream timely appealed on July 23, 2015. (AA 510.)

STANDARD OF REVIEW

Where, as here, the trial court's order denying "a petition to arbitrate presents a pure question of law," this Court reviews the order de novo.

(*Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534, 541, internal quotation marks omitted.)

ARGUMENT

I. BECAUSE THE DELEGATION PROVISION CLEARLY AND UNMISTAKABLY DELEGATES AAM'S UNCONSCIONABILITY CHALLENGES TO THE ARBITRATOR, THE TRIAL COURT HAD NO POWER TO RESOLVE THOSE CHALLENGES.

A. Because The AAM/Gulfstream Contract Involves Interstate Commerce, It Is Subject To The Federal Arbitration Act.

Before specifically addressing the trial court's errors in refusing to compel arbitration, it is first necessary to establish the legal framework within which the claims of error must be considered. As we explain, and as AAM apparently agrees, the contract at issue here is governed by the Federal Arbitration Act (FAA), and it is therefore subject to the interpretations of the FAA that have been articulated by the United States Supreme Court. (*Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42, 56 [in "construing and applying the [FAA], we are bound to follow opinions of the United States Supreme Court"].)

The FAA applies to any "contract that evidences a transaction involving interstate commerce." (*Brinkley v. Monterey Financial Services, Inc.* (2015) 242 Cal.App.4th 314, 326 (*Brinkley*), citing *Shepard v. Edward*

Mackay Enterprises, Inc. (2007) 148 Cal.App.4th 1092, 1101; *Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 173-174; *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 281 [FAA applies where "the 'transaction' in fact 'involv[es]' interstate commerce"].) That's exactly the type of contract at issue here. According to the complaint, AAM, a California corporation, "agreed in writing" to "utilize[] the" jet-maintenance services of Gulfstream, "a corporation organized and existing under the laws of several states with headquarters in Savannah, Georgia." (AA 8-9, 12, 14; see also AA 89.) And, according to the Service Center Proposal, AAM was required to send contract payments either to Gulfstream's address in Texas or to Gulfstream's bank in Illinois. (AA 150, 160.) AAM in fact made payment under the contract, sending Gulfstream a "substantial deposit payment" before delivering the jet. (AA 103, 160.)

These contractually-required transactions in interstate commerce make the FAA applicable to the AAM/Gulfstream contract. (See *Brinkley, supra*, 242 Cal.App.4th at p. 327 [contract between "Washington resident" and "Utah entity" that "set the terms of [resident's] purchase of services from" Utah entity "clearly evidence[d] an interstate transaction" subject to the FAA]; see also *Citizens Bank v. Alafabco, Inc.* (2003) 539 U.S. 52, 56-57 [FAA applied to loan contracts where debtor was "engaged in business throughout the southeastern United States using" loan funds].)

AAM agrees, acknowledging that the contract is subject to the FAA. (AA 81-82 [recognizing the FAA's application while arguing that the

"Federal Arbitration Act does not give Gulfstream the freedom" to draft unconscionable contract provisions].)

B. In An FAA-Subject Contract, When Contracting Parties Clearly And Unmistakably Delegate Clause-Validity Disputes (Like Unconscionability) To An Arbitrator, The Arbitrator Must Resolve Those Disputes.

Contracting parties may agree "to delegate to the arbitrator, instead of a court, questions regarding the enforceability" of the arbitration clause. (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 241 (*Tiri*); *Losey v. Prieto* (2013) 320 Ga.App. 390, 392 [739 S.E.2d 834, 836] (*Losey*) [affirming order compelling arbitration where parties "specifically agreed . . . to arbitrate any dispute arising out of the agreement, including the enforceability of the arbitration provision"].) And if an FAA-subject contract "clearly and unmistakably" delegates such questions to arbitration, they must be sent there for resolution. (*Rent-A-Center West, Inc. v. Jackson* (2010) 561 U.S. 63, 69-70 & fn. 1, 72-73 (*Jackson*), internal quotation marks and citations omitted; *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943-944 (*Kaplan*).) This "'clear and unmistakable' requirement" is an "interpretive rule" and a creature of the United States Supreme Court's FAA jurisprudence. (*Jackson*, *supra*, 561 U.S. at p. 69, fn. 1; *Kaplan*, *supra*, 514 U.S. at pp. 944-945; *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83; *AT&T Technologies, Inc. v. Communications Workers of America* (1986) 475 U.S. 643, 648.)

The Supreme Court has established a two-question framework for deciding whether the court or an arbitrator properly considers questions of arbitration-clause enforceability:

1. Does the challenged arbitration clause contain a provision that "clearly and unmistakably" delegates disputes regarding the clause's validity to an arbitrator?

2. If so, does the party opposing arbitration claim that "the delegation provision specifically" is unconscionable?

(See *Kaplan*, *supra*, 514 U.S. at p. 944; *Jackson*, *supra*, 561 U.S. at pp. 68-70 & fn. 1, 72-73.) If the answer to the first question is yes, and the answer to the second question is no, then the trial court must treat the delegation provision as valid, enforce it, and leave "for the arbitrator" any "challenge to the validity of" the remainder of the contract. (See *Jackson*, *supra*, 561 U.S. at pp. 70-72.)

As we explain below, here the answer to the first question is yes: The delegation provision in the AAM/Gulfstream contract clearly and unmistakably delegates disputes regarding the arbitration clause's validity to an arbitrator. And the answer to the second question is no: AAM did not specifically challenge the delegation provision as unconscionable. Nor can AAM do so now, for the first time on appeal.

C. The Delegation Provision Clearly And Unmistakably Delegates Questions Regarding The Enforceability Of The Arbitration Clause To The Arbitrator.

1. The delegation provision's incorporation of AAA Rules is a clear and unmistakable delegation.

One way the parties may make a "clear and unmistakable" delegation of arbitration-clause validity questions is by incorporating the American Arbitration Association (AAA) Rules in an arbitration clause. That's because those Rules expressly empower the arbitrator "to rule on . . . any objections with respect to the existence, scope or validity of the arbitration agreement." (AAA, Commercial Arbitration Rules and Mediation Procedures (amend. & eff. June 1, 2009) rule R-7(a) ["Rule R-7(a)"].)[3]

Indeed, numerous California courts, federal circuits, and state courts have applied *Kaplan* and *Jackson*'s "'clear and unmistakable' requirement" in the precise context presented here. (*Jackson*, *supra*, 561 U.S. at p. 69, fn. 1; *Kaplan*, *supra*, 514 U.S. at pp. 944-945.) They have specifically held that a "clear and unmistakable" delegation occurs whenever parties expressly incorporate the AAA Rules to govern their arbitration.

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[3] A complete copy of the AAA Rules is available at the following website: https://www.adr.org/aaa/faces/ShowContent?dID=20037&_afrLoop=64928862011414 9&_afrWindowMode=0&_afrWindowId=null

2. California decisions confirm that the delegation provision's incorporation of AAA Rules is a clear and unmistakable delegation.

California recognizes that "if the parties have agreed to arbitrate issues regarding the validity of the arbitration clause, a party that is claiming illegality can be compelled to arbitrate that defense." (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1288; see also *Hartley v. Superior Court* (2011) 196 Cal.App.4th 1249, 1254 ["contracting parties may reserve to the arbitrator the exclusive authority to determine gateway issues of arbitrability, such as unconscionability" if "there is clear and unmistakable evidence of such an agreement"].)

In *Greenspan v. Ladt, LLC* (2010) 185 Cal.App.4th 1413 (*Greenspan*), the Court of Appeal explained that whenever "parties explicitly incorporate *rules that empower an arbitrator to decide issues of arbitrability*, the incorporation serves as *clear and unmistakable evidence* of the parties' intent to delegate such issues to an arbitrator." (185 Cal.App.4th at p. 1442, italics added, internal quotation marks omitted, citing *Contec Corp. v. Remote Solution Co., Ltd.* (2d Cir. 2005) 398 F.3d 205, 208, and *Terminix Intern. Co., L.P. v. Palmer Ranch Ltd. Partnership* (11th Cir. 2005) 432 F.3d 1327 (*Terminix*).)

In *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547 (*Dream Theater*), the court was even more emphatic. There, the arbitration clause incorporated "the AAA Commercial Arbitration Rules,"

and the parties disagreed about whether their dispute fell within the scope of the arbitration clause. (124 Cal.App.4th at p. 549.) The court remarked that it "is difficult to imagine how parties could state any more comprehensively than they did . . . the intent to avoid litigation at every step of the dispute resolution process." (*Id.* at p. 557.) Because the language incorporated the AAA rules, which "specify that the arbitrator will decide disputes over the scope of the arbitration agreement," the clause was "clear and unmistakable evidence" that scope-related disputes had to be sent to arbitration. (*Ibid.*)

And in *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, the plaintiffs sued a mold-remediation company for professional negligence; the defendant petitioned to compel arbitration, citing the arbitration clause in its work authorization contract. (136 Cal.App.4th at pp. 1115-1116.) The plaintiffs contended that "two of their grievances" with the defendant fell outside the scope of the arbitration clause, but the Court of Appeal concluded the arbitrator had to resolve that question. (*Id.* at p. 1123.) "The contract mandates arbitration in accordance with the American Arbitration Association's Construction Industry Rules," and "Rule 8(a) of those rules specifies the 'arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.'" (*Ibid.*, italics omitted.) Therefore, by "incorporating rule 8(a) into their agreement, the parties clearly evidenced their intention to accord the arbitrator the authority to determine issues of arbitrability," and "any

issues concerning the scope of the arbitration clause should be determined by the arbitrator . . . . " (*Ibid.*)

Here, the AAM/Gulfstream contract's delegation provision expressly incorporated the AAA Commercial Arbitration Rules in their entirety; those rules give the arbitrator the right to determine the "validity of the" arbitration clause. (AA 175; Rule R-7(a).) Under the consistent reasoning of the California cases, the incorporation "clearly evidenced" that the parties intended for the arbitrator to determine all issues concerning the arbitration clause's validity. (See *Rodriguez, supra,* 136 Cal.App.4th at p. 1123.)

3. Other federal and state appellate decisions confirm that the delegation provision's incorporation of AAA Rules is a clear and unmistakable delegation.

Many other courts have reached exactly the same conclusion.

The clear majority rule, followed by numerous states and federal circuits, is that if: (a) the parties incorporate a set of arbitral rules in their arbitration clause; and (b) those rules empower an arbitrator to decide disputes regarding the scope, existence, or validity of the arbitration clause, then (c) the parties have made a "clear and unmistakable" delegation of such disputes to the arbitrator. (E.g., *Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125, 1130; *Awuah v. Coverall North America, Inc.* (1st Cir. 2009) 554 F.3d 7, 10; *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.* (5th Cir. 2012) 687 F.3d 671, 675; *Fallo v. High Tech*

Institute (8th Cir. 2009) 559 F.3d 874, 878; *Qualcomm Inc. v. Nokia Corp.* (Fed.Cir. 2006) 466 F.3d 1366, 1372-1373; *Contec Corp. v. Remote Solution Co., Ltd.* (2d Cir. 2005) 398 F.3d 205, 208-210; *Auto Owners Ins. Co. v. Blackmon Ins. Agency* (Ala. 2012) 99 So.3d 1193, 1197-1198; *HPD, LLC v. TETRA Technologies, Inc.* (2012) 2012 Ark. 408 [424 S.W.3d 304, 309-311]; *Ahluwalia v. QFA Royalties, LLC* (Colo.App. 2009) 226 P.3d 1093, 1098-1099; *James & Jackson, LLC v. Willie Gary, LLC* (Del. 2006) 906 A.2d 76, 80-81; *Bailey v. Ford Motor Co.* (Dec. 15, 2015, No. COA15-9) ___ N.C.App. ___ [2015 WL 8732296, *5-7]; *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's* (App.Div. 2009) 888 N.Y.S.2d 458, 459; *Mortimore v. Merge Technologies Inc.* (Ct.App. 2012) 344 Wis.2d 459 [824 N.W.2d 155, 161]; see also *Republic of Ecuador v. Chevron Corp.* (2d Cir. 2011) 638 F.3d 384, 394-395 [referencing incorporations of United Nations arbitral rules]; *Republic of Argentina v. BG Group PLC* (D.C. Cir. 2012) 665 F.3d 1363, 1370-1371 [same]; *Felts v. CLK Management, Inc.* (2011) 149 N.M. 681 [254 P.3d 124, 134] [incorporation of National Arbitration Forum Code of Procedure].)

Multiple federal circuits have applied the rule in the specific context presented here.

In *Awuah v. Coverall North America, Inc.* (1st Cir. 2009) 554 F.3d 7 (*Awuah*), for example, the contracts between the plaintiffs and the defendant contained arbitration clauses that incorporated "the then current [AAA] Rules" to govern the parties' arbitration. (554 F.3d at pp. 9, 11-12.) After the plaintiffs sued, the defendant moved to stay the proceedings

pending arbitration. (*Id.* at p. 9.) The plaintiffs opposed, claiming that the arbitration clauses "were unconscionable." (*Ibid.*) The *Awuah* court held those unconscionability challenges were for the arbitrator to resolve. (*Id.* at pp. 9, 11-12.) The *Awuah* court specifically focused on the language of AAA Rule R-7(a), which "says plainly that the arbitrator may 'rule on his or her own jurisdiction' including any objection to the 'existence, scope or validity of the arbitration agreement.'" (*Id.* at p. 11.) Thus, the rule's terms were "about as 'clear and unmistakable' as language can get . . . ." (*Ibid.*)

The Ninth Circuit recently reached the same conclusion in *Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125 (*Brennan*). There, the plaintiff and defendant were parties to an employment agreement containing an arbitration clause; the clause provided for "binding arbitration in accordance with the Rules of the American Arbitration Association." (*Brennan*, *supra*, 796 F.3d at pp. 1127-1128.) As in *Awuah*, the plaintiff sought to avoid arbitration by arguing that the arbitration clause was unconscionable and therefore invalid. (*Brennan, supra,* 796 F.3d at p. 1128.) And, as in *Awuah*, the court held that dispute was for the arbitrator to resolve. The parties' incorporation of the AAA Rules in the arbitration clause "'clearly and unmistakably' delegated the unconscionability determination to the arbitrator." (*Brennan, supra,* 796 F.3d at pp. 1130-1132.)

And, in *Terminix, supra,* the Eleventh Circuit reached the same result. There, the plaintiff and defendant executed multiple agreements, each of which directed that "'arbitration shall be conducted in accordance

with the Commercial Arbitration Rules then in force of the American Arbitration Association.'" (432 F.3d at pp. 1329, 1332.) When the defendant moved to compel arbitration, the plaintiff opposed, arguing that the arbitration clauses were illegal, one-sided, and therefore unenforceable. (*Id.* at p. 1329.) But the Eleventh Circuit held the plaintiff's challenges were clearly and unmistakably delegated to the *arbitrator* for resolution. (*Id.* at pp. 1332-1333.) The court explained that the parties had incorporated the AAA's Commercial Rules, and those rules, "in turn, provide[d] that '[t]he arbitrator shall have the power to rule on . . . any objections with respect to the . . . validity of the arbitration agreement." (*Id.* at p. 1332, second alteration in original.) "By incorporating the AAA Rules" into "their agreement, the parties *clearly and unmistakably* agreed that *the arbitrator* should decide whether the" arbitration clauses were valid. (*Ibid.*, italics added.)

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The clear bottom line is that where parties have incorporated the AAA Rules into an arbitration clause, they have "clearly and unmistakably" directed that the arbitrator shall resolve all challenges to the arbitration clause's validity. (See *Greenspan*, *supra*, 185 Cal.App.4th at p. 1442; *Rodriguez*, *supra*, 136 Cal.App.4th at p. 1123; *Brennan*, *supra*, 796 F.3d at pp. 1127-1128; *Awuah*, *supra*, 554 F.3d at pp. 9, 11-12; *Terminix*, *supra*, 432 F.3d at pp. 1332-1333.) Because the delegation provision in the AAM/Gulfstream contract incorporated the AAA Rules, it necessarily

directed that the arbitrator was to resolve all of AAM's challenges to the arbitration clause.

D. Because The Contract Delegated To The Arbitrator The Question Of The Validity Of The Arbitration Provision, And AAM Did Not Challenge The Delegation Provision, It Was Reversible Error For The Trial Court To Decide That Question.

Since the delegation provision clearly and unmistakably delegated any decision about the validity of the arbitration clause to the arbitrator, the trial court erred in deciding that issue, which could only be decided by the arbitrator.

The United States Supreme Court has explained that when contracting parties make a clear and unmistakable delegation of arbitration-clause-validity disputes to an arbitrator, the trial court has no authority to address those disputes—*unless* the party opposing arbitration first specifically claims that the delegation provision itself is invalid. (*Jackson*, *supra*, 561 U.S. at p. 72.) That didn't happen here.

In *Jackson*, *supra*, the parties agreed to arbitrate all disputes arising out of the plaintiff's employment with the defendant, and also agreed that "the Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, [and] enforceability . . . of this Agreement." (561 U.S. at pp. 65-66.) The defendant moved to compel arbitration and the plaintiff opposed, broadly claiming that the arbitration

agreement was unconscionable. (*Ibid.*) The Court held that type of broad-based challenge could not prevent the case from being sent to arbitration. (*Id.* at pp. 66, 70-72.)

The high court explained that the written provision the employer sought to "enforce is the delegation provision—the provision that gave the arbitrator 'exclusive authority to resolve any dispute relating to the . . . enforceability . . . of'" the arbitration agreement. (*Jackson*, *supra*, 561 U.S. at p. 71.) Unless the plaintiff "challenged the delegation provision specifically," the Court held, "we must treat it as valid" and "enforce it." (*Id.* at p. 72.) Because the plaintiff did not make any unconscionability claim "specific to the delegation provision," that provision had to be enforced. (*Id.* at pp. 72-73.; see also *Tiri*, *supra*, 226 Cal.App.4th at pp. 237-238, 247-250 [plaintiff sought to defeat petition to compel arbitration by arguing "that various provisions of the arbitration agreement" were "substantively unconscionable, but her arguments [were] not specific to the delegation" provision, which granted the arbitrator exclusive authority to determine the enforceability of the underlying arbitration agreement; following *Jackson*, court held delegation provision "was valid" and compelled arbitration].)

Here, AAM mounted no challenge whatsoever to the delegation provision. AAM never contended that arbitrating the validity of the arbitration clause, as required by the AAA Rules, would itself be overly harsh, one-sided, or otherwise unconscionable in any respect. (See *NEC Technologies, Inc. v. Nelson* (1996) 267 Ga. 390, 392, 394 & fn. 6 [478

S.E.2d 769, 772, 774 & fn. 6] (*Nelson*); *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910 (*Sanchez*).) AAM never contended that there were "fee-sharing and discovery procedures" that would make delegation of such disputes to the arbitrator unfair to the point of being unconscionable. (*Jackson*, *supra*, 561 U.S. at p. 74.) As *Jackson* makes clear, in the absence of such claims, the trial court was required to enforce the delegation provision and compel arbitration, where the validity of the arbitration clause could properly be determined. (See *id.* at p. 72; see also *Tiri*, *supra*, 226 Cal.App.4th at pp. 247-250; *Losey*, *supra*, 739 S.E.2d at pp. 835-836.)

E. AAM Has Forfeited Any Specific Challenge To The Delegation Provision.

Nor can AAM now attempt to specifically challenge the delegation provision for the first time on appeal. *Jackson*, *supra*, rejected that approach, too, concluding that when challenges to a delegation provision are not specifically raised below, they are forfeited. (561 U.S. at pp. 72, 74-76.)

As discussed above, the *Jackson* plaintiff sought to avoid arbitration by broadly claiming that the underlying arbitration agreement was unconscionable, and did not "make any arguments specific to the delegation provision" in the trial court. (561 U.S. at pp. 72, 74.) Nevertheless, on appeal he "made the contention, not mentioned below, that the delegation provision itself [was] substantively unconscionable."

(*Id.* at p. 75.) But the *Jackson* court held that challenge was "brought . . . too late, and we will not consider it." (*Id.* at pp. 75-76.) And *Jackson* specifically cited *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247 (*Pyett*), which holds that arguments that have "not been raised below" are "forfeited" and the Court "will not resurrect them." (*Pyett*, *supra*, 556 U.S. at p. 273, internal quotation marks omitted; *Jackson*, *supra*, 561 U.S. at pp. 75-76.)

The well-settled rule is that reviewing courts ignore "arguments, authority, and facts not presented and litigated in the trial court." (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 [reviewing court internal quotation marks omitted].) And *Jackson*, *supra*, applied that principle to the precise context presented here—where a party had an opportunity to, but did not, specifically challenge a delegation provision in the trial court. (561 U.S. at pp. 72, 74-76.) *Jackson* thus decisively prevents any newfound attack on the delegation provision that AAM might attempt to make.

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By its terms, the delegation provision clearly and unmistakably requires the arbitrator to resolve any issues concerning validity of the arbitration clause. Since AAM never specifically challenged the delegation provision as unconscionable, the trial court erred in failing to enforce the delegation provision and refer the case to arbitration. (*Jackson*, *supra*, 561 U.S. at p. 71.) The court's order must therefore be reversed.

II. IN ANY EVENT, THE TRIAL COURT ERRED IN ITS SUBSTANTIVE DETERMINATION THAT THE ARBITRATION CLAUSE IS UNCONSCIONABLE, SINCE AAM MADE NO SHOWING WHATSOEVER THAT THERE WAS ANYTHING SUBSTANTIVELY UNCONSCIONABLE ABOUT THE ARBITRATION CLAUSE ITSELF.

A. Since The Contract Is Governed By The Federal Arbitration Act, The Trial Court Was Required To Limit Its Determination Of Unconscionability To The Arbitration Clause Itself; The Question Whether Other Provisions Of The Contract, Or The Contract As A Whole, Were Unconscionable Is For The Arbitrator To Decide.

Even if the trial court had the authority to ignore the delegation provision and itself decide the conscionability of the arbitration clause (it didn't), the court still erred in its determination on the merits that the arbitration clause was unconscionable.

Under the FAA, where the validity of an arbitration clause is at issue, the arbitration clause must be severed from the remainder of the contract and considered by itself.

Section 2 of the FAA directs that:

> A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an

> agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . 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.)

The United States Supreme Court has consistently held that this language establishes a rule of arbitration-clause severability. As the Court has explained, the FAA directs that a "'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained." (*Jackson, supra*, 561 U.S. at pp. 70-71, italics in original.) The FAA therefore recognizes the independence of an arbitration provision from the contract in which it appears and, where the FAA applies, "an arbitration provision is *severable* from the remainder of the contract." (*Ibid.*, italics added, internal quotation marks omitted, citing *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445, 447 (*Buckeye*).)

Because an arbitration clause is severable from the contract's other provisions, challenges to other provisions are irrelevant to the issue of the validity of the arbitration clause. (See *Buckeye*, *supra*, 546 U.S. at pp. 445-446.) The Supreme Court has made this point crystal clear: "[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity" must be "considered by the arbitrator in the first instance," not the trial court. (*Ibid.*) Thus, a "party's challenge to another provision of the

contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." (*Jackson*, *supra*, 561 U.S. at p. 70.)

Or, as the Court explained in *Buckeye*, "[c]hallenges to the validity of arbitration agreements" on unconscionability grounds are divided into two types. (546 U.S. at p. 444.) The first type "challenges specifically the validity" of the arbitration clause itself. (*Ibid.*; see also *Jackson*, *supra*, 561 U.S. at p. 71.) The second type "challenges the contract as a whole," either "on a ground that directly affects the entire agreement" or on the ground that "the illegality of one of the contract's provisions renders the whole contract invalid." (*Buckeye*, *supra*, 546 U.S. at p. 444.) A trial court considering a petition to compel arbitration may consider the former type of challenge, but not the latter, because "only the first type of challenge" is "relevant to a court's determination whether the arbitration agreement at issue is enforceable." (*Jackson*, *supra*, 561 U.S. at pp. 70-71.)

Thus, any challenge to the validity of an arbitration provision in an FAA-governed contract must be "directed *specifically* to the agreement to arbitrate before the court will intervene" and consider it. (*Jackson*, *supra*, 561 U.S. at p. 71, italics added.) And that rule applies in both state and federal courts. (See Sections II.B.2 and II.B.3, *post*; *Buckeye*, *supra*, 546 U.S. at pp. 445-446 [rule that absent a challenge "to the arbitration clause itself, the issue of the contract's validity" must be "considered by the arbitrator in the first instance" applies "in state as well as federal courts"]; see also *Crawford v. Great American Cash Advance, Inc.* (2007) 284

Ga.App. 690, 692-693, 695 [644 S.E.2d 522, 525-527] [since "arbitration clause" was "not unconscionable," remaining "contention that the contracts are illegal in their entirety is an issue for the arbitrator"]; *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 774 [attacking "provisions that are located outside the arbitration clause and apply to the entire contract" held insufficient to defeat arbitration petition].)

B. When The Analysis Is Properly Confined To The Arbitration Clause, The Trial Court's Conclusion That Arbitration Was Not Compelled Because The Contract Was Unconscionable Was Clear Error.

As the above authorities make clear, the trial court was required to limit its analysis of the validity of the arbitration clause to those claims of unconscionability "directed specifically to the agreement to arbitrate." (*Jackson, supra,* 561 U.S. at pp. 70-71.)

But that's not what the trial court did. The trial court based its unconscionability analysis on its conclusion that *other* contract terms—specifically, the damage limitation provisions in paragraphs 6.2 and 8—were substantively unconscionable. In particular, the trial court held the arbitration clause unconscionable because AAM "has suffered significant consequential damages due to deficient work by Gulfstream[.] [T]he provision is unilateral; Gulfstream was not similarly limited in the damages it could seek." (AA 507-508.)

That was error. The non-arbitration provisions of the contract simply weren't relevant to the trial court's determination of whether the arbitration clause was invalid.

And when the arbitration clause itself is properly isolated and analyzed, its validity is clear.

1. Georgia law governs the conscionability of the arbitration clause.

The first step in analyzing the conscionability of the arbitration clause is choosing the substantive law of conscionability that applies to make that determination. As we explain, the parties unequivocally opted for Georgia law to apply (although, as we also explain, the result is the same if California law were applied).

Because "[t]here is no federal general common law under the FAA," courts apply "state-law contract principles" when interpreting arbitration agreements and addressing their conscionability. (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1466 (*Peleg*), citations and internal quotation marks omitted; *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900, 906; see also *Kaplan*, *supra*, 514 U.S. at p. 944 [when "deciding whether the parties agreed to arbitrate a certain matter" courts should "apply ordinary state-law principles that govern the formation of contracts"]; *Hotels Nevada, LLC v. Bridge Banc, LLC* (2005) 130 Cal.App.4th 1431, 1435 ["even when [FAA] applies, interpretation of the arbitration agreement is governed by state law principles"].)

In this Court, "California choice-of-law rules" govern which state's law applies. (*Peleg*, *supra*, 204 Cal.App.4th at pp. 1466-1467, citations and internal quotation marks omitted.) And, under California choice-of-law rules, Gulfstream's and AAM's contractual selection of Georgia law is enforced. (*Id.* at p. 1467 [under "California choice-of-law rules, Texas law governs" enforceability of arbitration clause because "choice-of-law clause adopts Texas law"]; see also *Harris v. Bingham McCutchen LLP* (2013) 214 Cal.App.4th 1399, 1404 (*Harris*) [California "strongly favors enforcement of choice-of-law provisions" and "courts have upheld application of other states' internal statutes, rules and laws to arbitration contracts"]. Thus, Georgia law should govern all issues regarding the conscionability of the contract's terms.

In the trial court, AAM claimed the contract's choice-of-law clause was unenforceable. (AA 82-89.) As we explain below, AAM is wrong. (See Section II.B.2, *post*.) But even if AAM were right, it wouldn't make any difference; both California and Georgia law render the same result, and under either state's law, Gulfstream's petition should have been granted.

2. The arbitration clause in the AAM/Gulfstream contract is not unconscionable under Georgia law.

Georgia employs a "procedural-substantive analysis of unconscionability" much like California's, which requires that a contract or contract provision be both procedurally *and* substantively unconscionable in order to be held invalid. (*Nelson*, *supra*, 478 S.E.2d at pp. 771-773 & fn.

6; *Clark v. Aaron's, Inc.* (N.D.Ga. 2012) 914 F.Supp.2d 1301, 1310.) Substantive unconscionability "looks to the contractual terms themselves," including their "commercial reasonableness," while procedural unconscionability "addresses the process of making the contract," "the conspicuousness . . . of the contract language," and the presence or absence of "meaningful choice." (*Nelson*, *supra*, 478 S.E.2d at pp. 771-773 & fn. 6.) In order for a provision to be unconscionable under Georgia law, the provision must be "abhorrent to good morals and conscience"—such as "no sane man not acting under a delusion would make and that no honest man would take advantage of." (*Id.* at p. 771, fn. 2, internal quotation marks and citation omitted; see also *ibid*. [provision must be "one where one of the parties takes a fraudulent advantage of another" (internal quotation marks omitted)].)

AAM's only argument that was both (a) "directed specifically to" the arbitration clause, and (b) focused on the element of substantive unconscionability, was the claim that the contract's provision for application of Georgia law was "unexpected and unreasonable." (*Jackson*, *supra*, 561 U.S. at p. 71; AA 13.)[4] AAM cited absolutely no authority for that position. And that's not surprising, because Georgia expressly validates and enforces contractual choice-of-law provisions, and holds that

[4] Note, however, that the purportedly "unexpected" nature of the arbitration clause seems to be a claim that it was inconspicuous or not the product of a "meaningful choice"; those concerns are relevant to *procedural*, not substantive, unconscionability. (*Nelson*, *supra*, 478 S.E.2d at pp. 771-772.)

to avoid them, a party must "point to any policy considerations" that would "foreclose the application of" the contractually-selected law. (*Scales v. Textron Financial Corp.* (2005) 276 Ga. App. 232, 233 [622 S.E.2d 903, 904-905].) But no such policy considerations militating against the application of Georgia law exist here. And under Georgia law, Gulfstream's connection to Georgia as a Georgia-based entity makes application of Georgia law perfectly appropriate. (Ga. Code Ann., § 11-1-301, subd. (a); *Results Oriented, Inc. v. Crawford* (2000) 245 Ga. App. 432, 437 [538 S.E.2d 73, 78] (*Results Oriented*); *Nelson, supra,* 478 S.E.2d at p. 773.)

Georgia expressly permits parties to choose which jurisdiction's law "will govern [their] transaction." (*Wallace v. Harrison* (1983) 166 Ga.App. 461 [304 S.E.2d 487, 489] (*Wallace*), citing former Ga. Code Ann., § 11-1-105(1); *Mills v. Berlex Laboratories, Inc.* (1999) 235 Ga.App. 873 [510 S.E.2d 621, 623, fn. 1], citing *Wallace, supra*.) So long as "a transaction bears a reasonable relation to" Georgia, the "parties may agree" to adopt Georgia law. (*CS-Lakeview at Gwinnett, Inc. v. Simon Property Group, Inc.* (2007) 283 Ga.App. 686 [642 S.E.2d 393, 396], internal quotation marks omitted; Ga. Code Ann., § 11-1-301, subd. (a); see also Editor's Notes, West's Ga. Code Ann., § 11-1-301 [section 11-1-301 is "substantively identical to" former section 11-1-105]; 2015 Georgia Laws Act 167, GA LEGIS 167 (2015) [amending Georgia Code section 11-1-105 and adding Georgia Code section 11-1-301].) And a "reasonable relation" to Georgia exists whenever the transaction "has a natural and vital

connection"to Georgia, and the parties, "act[ing] in good faith," express their "bona fide intention" to choose Georgia governing law. (*Seeman v. Philadelphia Warehouse Co.* (1927) 274 U.S. 403, 408 (*Seeman*), citing Wharton, Conflict of Laws § 210o; Editor's Notes, West's Ga. Code Ann., § 11-1-301 ["the test of 'reasonable relation'" for purposes of Georgia Code section 11-1-301, subdivision (a) "is similar to that laid down by the Supreme Court in *Seeman*"].)

Here, there's no doubt that Georgia has a "natural and vital connection" to the transaction: as AAM's complaint acknowledges, Gulfstream is headquartered in Savannah, Georgia. (*Seeman*, *supra*, 274 U.S. at p. 408; AA 8.) This strong jurisdictional tie between Georgia and Gulfstream is a vital connection that supports the choice of law. (*Harry S. Peterson Co., Inc. v. National Union Fire Ins. Co.* (1993) 209 Ga.App. 585, 588 [434 S.E.2d 778, 780-781] [where corporation "was doing substantial business in" Georgia, its contacts were "sufficiently substantial . . . as to permit Georgia to entertain the cause of action against it"; a "foreign corporation is present in any place where its officers or agents transact business in behalf of the corporation under authority conferred by it"].) Nor is there any suggestion or allegation of bad faith in selecting Georgia law to govern the Gulfstream/AAM contract. (*Seeman*, *supra*, 274 U.S. at p. 408.)

That being so, Georgia expressly holds the contract's choice of law provision to be conscionable. (Ga. Code Ann., § 11-1-301, subd. (a).) What "the Legislature allows cannot be contrary to public policy," and

"therefore, cannot be said, per se, to be unconscionable." (*Results Oriented, supra*, 538 S.E.2d at p. 78, internal citation and quotation marks omitted; cf. *Nelson, supra*, 478 S.E.2d at p. 773 ["exclusion of consequential property damages" was not evidence of substantive unconscionability because "the Legislature has allowed manufacturers to so exclude consequential property damages"].)

And since AAM's *only* basis for arguing the arbitration clause was substantively unconscionable was focused on the plainly conscionable choice of law provision, there is no basis whatsoever for concluding that arbitration agreement is unconscionable.

In sum, the arbitration clause here is not unconscionable; it certainly doesn't satisfy Georgia's "abhorrent to good morals and conscience" test. (*Nelson, supra*, 478 S.E.2d at p. 771, fn. 2, internal quotation marks omitted.)

3. The arbitration clause in the AAM/Gulfstream contract is not unconscionable under California law.

The result is the same under California law.

Under California law, AAM, as the challenging party, bore "the burden of proof" to affirmatively show the arbitration clause was unconscionable. (*Sanchez, supra*, 61 Cal.4th at p. 911.) In doing so, AAM was required to show some degree of substantive unconscionability. (*Id.* at p. 910.) And, to show a challenged provision is substantively

unconscionable, a challenger must demonstrate it is "so one-sided as to shock the conscience." (*Ibid.*, internal quotation marks omitted.) AAM did not meet that burden. It did not show that the arbitration clause itself was substantively unconscionable.

AAM did *assert* that the provision requiring the application of Georgia law was unreasonable, but "[s]imply saying something does not make it so." (AA 89; *Moriarty v. Laramar Management Corp.* (2014) 224 Cal.App.4th 125, 139.) AAM never cited any authority that would support the proposition that a choice-of-law clause applying the law of the state where one of the parties has its corporate headquarters is, without more, unconscionable.

In fact, the contractual adoption of Georgia law is fully consonant with California law. (*Harris*, *supra*, 214 Cal.App.4th at p. 1404 [California "strongly favors enforcement of choice-of-law provisions"].) In *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459 (*Nedlloyd*), the California Supreme Court explained that when deciding whether to enforce a contractual choice-of-law provision, courts must first "determine . . . whether the chosen state has a substantial relationship to the parties or their transaction." (3 Cal.4th at p. 466.) If the answer is yes, "the court must next determine whether the chosen state's law is contrary to a *fundamental* policy of California." (*Ibid.*, italics in original.) And if there is no fundamental contradiction, the court "*shall* enforce the parties' choice of law." (*Ibid.*, italics added.)

Here, there's obviously a "substantial relationship" between Georgia and the AAM/Gulfstream contract, because Georgia is Gulfstream's principal place of business. (*Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 258 ["Citibank's principal place of business is in New York. This fact alone is sufficient to establish a 'substantial relationship'" for purposes of *Nedlloyd* analysis]; *Hertz Corp v. Friend* (2010) 559 U.S. 77 [corporation's headquarters, from which it controls operations, is principal place of business]; see also *Peleg, supra,* 204 Cal.App.4th at pp. 1446-1447.) And AAM never even tried to suggest that applying Georgia law would contravene a fundamental California policy. (*Id.* at p. 1466.) In fact, AAM failed to provide a single argument on that issue, which is fatal to its position. (*Washington Mutual Bank, FA v. Superior Court* (24 Cal.4th 906, 917 [once a substantial relationship is shown, "the parties' choice generally will be enforced unless the other side can establish . . . that the chosen law is contrary to a fundamental policy of California"].)

Moreover, California's test of unconscionability is even more rigorous—it must be shown that the contract provision "shock[s] the conscience." (*Sanchez, supra,* 61 Cal.4th at pp. 910-911.) Thus, AAM would have to show that adopting Georgia law to resolve any dispute here gives the arbitration clause "a substantial degree of unfairness *beyond a simple old-fashioned bad bargain*." (*Sanchez, supra*, 61 Cal.4th at pp. 910-911, italics in original, internal quotation marks omitted.) AAM hasn't made that showing—it hasn't even shown that Georgia and California law

differ in any material way. Certainly there is nothing shocking to the conscience about the adoption of Georgia law under the circumstances present here. Since that was the only basis for AAM's claim that the agreement was substantively unconscionable, that claim must fail under California law.

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In sum, AAM never offered any reason why the arbitration clause *itself* could possibly be deemed substantively unconscionable, under either Georgia or California law. (*Nelson*, *supra*, 478 S.E.2d at pp. 771-773; *Sanchez*, *supra*, 61 Cal.4th at p. 910.) That's because there isn't one. There's nothing conscience-shocking about a simple, straightforward arbitration clause, much less anything "morally abhorrent" that would justify a finding of unconscionability under Georgia law.

The trial court erred in ruling otherwise, and therefore the order refusing to compel arbitration must be reversed.

CONCLUSION

Neither the delegation provision nor the arbitration clause is unconscionable; both must be enforced. When the trial court lumped other contract terms into the unconscionability analysis, it erred.

This Court must reverse with directions to enter an order granting Gulfstream's petition and compelling arbitration.

DATED: February 19, 2016

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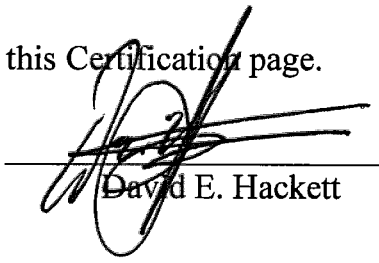
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to California Rules of Court, rule 8.520(c)(1), that this **APPELLANT'S OPENING BRIEF** contains 8,794 words, not including the tables of contents and authorities, the caption page, the signature blocks, or this Certification page.

Dated: February 19, 2016



David E. Hackett

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On February 19, 2016, I served the foregoing document described as: **APPELLANT'S OPENING BRIEF** on the parties in this action by serving:

Keith Anthony Lovendosky Bailey & Partners 2800 28th Street, Suite 200 Santa Monica, California 90405 **Attorneys for Plaintiff and Respondent, ADVANCED AIR MANAGEMENT, INC.**	Los Angeles Superior Court, South District Governor George Deukmejian Courthouse Clerk of the Court 275 Magnolia Long Beach, CA 90802

CALIFORNIA SUPREME COURT
[Electronic Service under Rule 8.212(c)(2)]

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Executed on **February 19, 2016**, at Los Angeles, California.

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

Violetta Price