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 REPLY BRIEF

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INTRODUCTION

As Gulfstream explained both in the trial court and in its opening brief, for purposes of Gulfstream's petition for arbitration, the contract between Gulfstream and Advanced Air Management, Inc. (AAM) has *two* important terms: (1) an arbitration clause; and (2) a delegation provision, under which any dispute about the arbitration clause's validity must be heard by an arbitrator in the first instance. To defeat the operation of the delegation provision (and thus have its present unconscionability challenge heard in court), AAM had the burden to *specifically* challenge that provision as unconscionable. (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 72.) AAM didn't challenge the delegation provision below, and it hasn't done so in its respondent's brief. This Court must therefore treat the delegation provision "as valid," enforce it, and reverse the trial court's refusal to send this dispute to arbitration. (*Ibid.*)

In an effort to mask its inability to contest the delegation provision on substantive unconscionability grounds, AAM postulates a number of supposed barriers to enforcement of the delegation provision, none of which has merit:

First, AAM claims for the first time that the signed Work Authorization containing the delegation provision somehow wasn't "assented to" by AAM. This argument was never raised below and therefore has been forfeited. Moreover, it is directly contrary to AAM's pleadings, which make clear that "an agent" for AAM "signed the Work

Authorization Form on behalf of AAM," thereby objectively manifesting its assent to the terms of the Work Authorization. The argument is also contrary to the trial court's factual finding that the Work Authorization constituted a binding contract. And it is directly contrary to AAM's entire theory for seeking to invalidate the arbitration provision on unconscionability grounds, which necessarily *presumes* the existence of a valid and binding contract but argues that such contract should not be enforced. AAM's "assent" argument therefore should be rejected outright.

Second, AAM acknowledges that an unconscionability challenge must be submitted to the arbitrator in the first instance where the parties "clearly and unmistakably" delegate the question of arbitrability to the arbitrator, and that parties may make such a clear and unmistakable delegation by incorporating AAA Commercial Arbitration Rules. But AAM argues that there could be no such "clear and unmistakable" delegation here because there are supposedly "vast differences" between the Service Center Proposal and the Work Authorization, and that the former purportedly contradicts the latter regarding whether the parties' disputes must be arbitrated.

This argument is entirely without merit because the Service Center Proposal and the Work Authorization are part of the same agreement (not two separate contracts), and the terms of these two documents are in no way contradictory. The Service Center Proposal includes no term authorizing AAM to bring claims in court or purporting to reserve the question of arbitrability for the court. To the contrary, the Service Center

Proposal "expressly incorporates" Gulfstream's "standard work authorization Terms and Conditions," and those standard terms include the arbitration clause and delegation provision at issue here.

Thus, under well-settled law, the Work Authorization's incorporation of the AAA Rules constitutes a "clear and unmistakable" delegation of the question of arbitrability to the arbitrator, and AAM's assertion that the delegation is defeated by the existence of the Service Center Proposal is without merit.

Third, AAM argues that Gulfstream was required to invoke the delegation provision in its initial petition to compel arbitration, but Gulfstream's petition was fully compliant with California's procedures for compelling arbitration. Gulfstream was not required to anticipate in its initial petition every possible claim or theory that AAM might advance in opposition. Thus, in response to AAM's argument in its opposition that the agreement was unconscionable and hence not arbitrable, Gulfstream properly argued in its reply brief that the trial court should submit the question of arbitrability to the arbitrator in the first instance. The trial court erred by not doing so.

Moreover, entirely aside from the enforceability of the delegation provision, the trial court's order determining the arbitration clause to be unconscionable must be reversed. AAM apparently concedes that the trial court erred in looking to provisions in the contract outside of the arbitration clause itself in evaluating whether the agreement to arbitrate was

unconscionable. But AAM argues that the trial court's order was nevertheless proper because the inclusion of a Georgia choice of law clause in the arbitration provision renders the arbitration clause substantively unconscionable.

This argument is completely without merit because the application of Georgia law to a dispute between two parties, one of whom is headquartered in Savannah, Georgia, is completely proper under both California's and Georgia's choice of law rules. And in any event, regardless of how a court might ultimately decide the choice of law question, the issue is not whether Georgia or California law should apply to this dispute, but rather whether the parties' application of Georgia law renders the arbitration clause so one-sided that it is "abhorrent to good morals and conscience." (*Hall v. Wingate* (1924) 159 Ga. 630 [126 S.E. 796, 813].) Because there is no material inconsistency between California and Georgia law (and because even if there were it would not render the contract unconscionable) AAM cannot come close to meeting its burden on substantive unconscionability.

For these and other reasons, the trial court clearly erred in refusing to compel arbitration. Its order must be reversed.

ARGUMENT

I. THE EXPRESSLY INCORPORATED AND SEPARATELY SIGNED WORK AUTHORIZATION, WHICH INCLUDES THE ARBITRATION CLAUSE AND DELEGATION PROVISION, IS PART OF THE AAM/GULFSTREAM CONTRACT; AAM CANNOT AVOID ARBITRATION VIA ITS NEWLY-MINTED, FACT-BOUND CLAIM THAT IT DID NOT AGREE TO THE WORK AUTHORIZATION AT ALL.

A. AAM's Newfound Claim That There Was No "Mutual Assent" To The Work Authorization Lacks Merit.

1. The no-assent claim was never raised below and is therefore waived.

Although the proceedings below and Gulfstream's opening brief focused on the issue of conscionability, AAM now attempts to short-circuit the entire issue by arguing that the signed Work Authorization (including the arbitration clause and delegation provision) wasn't even a part of the AAM/Gulfstream contract. According to AAM, the Work Authorization isn't actually binding, because there supposedly was "no meeting of the minds, or mutual assent" to its terms. (Respondent's Brief [RB], pp. 11, 34 [Work Authorization "does not govern the present dispute between the parties"].) The argument lacks merit for numerous reasons.

First, AAM never even hinted in the trial court that the Work Authorization was not an agreed-upon part of the parties' contract. AAM's

complaint specifically alleged that "an agent for the plaintiff" signed the Work Authorization, and AAM attached a partial copy of that document as Exhibit 1. (Appellant's Appendix [AA], pp. 12-14, 20-21.) AAM's opposition to Gulfstream's arbitration petition similarly acknowledged that its maintenance director Scott Chikar "signed the Work Authorization Form on behalf of AAM." (AA 79.) Nowhere—either in the complaint, the opposition, or at the hearing below—did AAM ever suggest that there was no meeting of the minds regarding the Work Authorization's terms, or that the Work Authorization wasn't fully part of the AAM/Gulfstream contract.

The failure to raise this issue in the trial court—which, as we explain below (section I, A, 3, *post*), is plainly a factual one—is fatal to its consideration for the first time on appeal. This Court should refuse to consider the argument on that basis alone. (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 (*Newton*) [reviewing court ignores "arguments, authority, and facts not presented and litigated in the trial court," internal quotation marks omitted].)

Recognizing that this is a new argument that was never raised below, AAM makes a number of confusing and self-contradictory claims seeking to avoid forfeiture.

For example, in an effort to show it preserved the issue, AAM asserts that paragraphs 21 and 29 of the complaint alleged that the Work Authorization is "not binding upon" AAM. (RB 20.) But those paragraphs don't actually say that. Paragraph 21 claimed the Work Authorization was

"not the result of any discussion or negotiation," but it didn't assert anywhere that the Work Authorization was not a binding contract. (AA 12.) Paragraph 29 stated AAM's position that the Work Authorization did "not apply to the oil change" maintenance because that maintenance was purportedly completed under "a separate request or work order," but it certainly never asserted the Work Authorization wasn't an enforceable binding contract or part of the AAM/Gulfstream agreement. (AA 14.)

Further, in a different portion of its brief, AAM concedes that its complaint *did* "allege[] that the provisions in the [Work Authorization] are binding upon it." (RB 11.) That admission alone dooms AAM's new argument that the Work Authorization isn't binding. (See *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1515, fn. 19 (*Brandwein*) [admissions in pleadings and briefs are binding]; *Casey v. Overhead Door Corp.* (1999) 74 Cal.App.4th 112, 123-124, disapproved on a different ground in *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481, fn. 1 [admission by counsel that plaintiffs could not prove up a tort cause of action is binding on appeal].)

The bottom line is that before its respondent's brief, AAM had *never* argued that the Work Authorization was not binding or that its terms were not actually part of the AAM/Gulfstream contract. That omission is fatal now. (*Newton*, *supra*, 110 Cal.App.4th at p. 11.)

2. AAM's unconscionability challenge necessarily assumed that the Work Authorization terms are part of the parties' agreement.

In addition to the fact that the issue was forfeited, there is another reason the newfound issue must fail: The claim stands in direct contravention of AAM's entire premise for opposing Gulfstream's petition to compel arbitration on unconscionability grounds. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 407, p. 466 [where parties assume "that a particular issue is controlling . . . neither party can change this theory for purposes of review on appeal"].)

In its trial court opposition to Gulfstream's arbitration request, AAM made its theory very clear: The entire "Work Authorization Form, [i]ncluding the Arbitration Clause" and the liability limitation terms, was unconscionable under California law. (AA 87, 89; see also AA 84-91.) AAM, of course, makes the same arguments in its respondent's brief. (RB 38-59.)

But under that same California law, the claim that the Work Authorization is unconscionable *presumes* that the terms therein are otherwise binding between AAM and Gulfstream. "The doctrine of unconscionability is a defense to the enforcement of a contract or a term thereof," and "no such defense arises *without a contract*." (*Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1049 (*Benco*), italics added.) Put another way, a claim

that certain terms are unconscionable "presupposes an existing contract" regarding those terms. (*Ibid.*)

AAM has long maintained that the entire Work Authorization is unconscionable, and thus necessarily conceded that its terms are part and parcel of the contract with Gulfstream. (*Benco*, *supra*, 89 Cal.App.4th at p. 1049.) AAM "is not permitted to change theories on appeal." (*County of Kern v. Jadwin* (2011) 197 Cal.App.4th 65, 70, fn. 4.)

3. Substantial evidence supports the trial court's express finding that there is a "contract with an arbitration provision" here.

And even if AAM's deviation from its theory of the case below didn't decisively defeat its appellate no-assent theory, the trial court's order certainly does.

In ruling on Gulfstream's arbitration petition, the trial court expressly found that "Gulfstream meets its initial burden of *establishing a contract with an arbitration provision.* There is no dispute that the [Work Authorization] was executed by an authorized employee" of AAM. (AA 506-507, italics added.) That factual determination can't be disturbed now.

It's well-recognized that in "ruling on a petition to compel arbitration, the trial court may consider evidence on factual issues," and must "examine and, to a limited extent, construe the underlying agreement." (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 652-653; *Green v. Mt. Diablo Hospital*

Dist. (1989) 207 Cal.App.3d 63, 69 (*Green*), internal quotation marks omitted.) "The standard on appeal is whether there is substantial evidence to support the trial court's finding." (*Green*, *supra*, 207 Cal.App.3d at p. 69.)

Here, the evidence regarding the Work Authorization's existence and prima facie validity was undisputed. Gulfstream presented a copy of the Work Authorization (which included the arbitration clause and delegation provision) with its initial petition. (AA 48, 50-51.) In its opposition and accompanying affidavits, AAM didn't dispute the existence and authenticity of that document, and Chikar himself acknowledged that (a) he was AAM's Director of Maintenance; and (b) he signed the Work Authorization. (AA 79, 93, 97.) AAM never contended that Chikar was somehow fooled into signing the Work Authorization (precisely the same contract he had agreed to by signing on the several other occasions Gulfstream had done maintenance on AAM jets). Since there was no *evidence* indicating that the Work Authorization was invalid, and since the face of the document shows *two* Chikar signatures and *three* sets of Chikar initials in various places (AA 97, 174-175), the trial court was well-justified in finding that there was "a contract" between Gulfstream and AAM "with an arbitration provision." (AA 506-507.) That finding cannot be disturbed now.

4. Even if it were appropriate for this Court to consider AAM's no-assent argument *de novo*, it would still fail.

a. The Service Center Proposal plainly incorporated the Work Authorization's terms by reference.

And even if this Court were to independently assess whether the Work Authorization was part of the AAM/Gulfstream contract, the result wouldn't change. That's because the Service Center Proposal—which even AAM still concedes "is a contract" between the parties (RB 11)—explicitly incorporates all of the Work Authorization's terms by reference (AA 164).

(1) Incorporation by reference under Georgia law.

Under Georgia law, the validity of incorporation by reference is well-established. "Where a writing refers to another document, that other document, or as much of it as is referred to, is to be interpreted as part of the writing. [¶] It is not important in what language reference is made; it is certainly enough if a plain reference is made by a document signed by the party to be charged, whatever its nature, to any other writing." (*Consolidated Freightways Corp. of Delaware v. Synchroflo, Inc.* (1982) 164 Ga.App. 275 [294 S.E.2d 643, 645] (*Consolidated Freightways*), internal quotation marks and citations omitted, citing 4 Williston on Contracts (3d ed.) §§ 628, 581, pp. 901, 136.) In general, incorporation by

reference is "effective to accomplish its intended purpose" where "the provision to which reference is made has a reasonably clear and ascertainable meaning." (*Consolidated Freightways, supra*, 294 S.E.2d at p. 645, internal quotation marks omitted.)

Here, the Service Center Proposal's final paragraph—the last paragraph of text above Chikar's signature—incorporated 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.)

On this record, there's no doubt that the term "standard work authorization Terms and Conditions" has a "reasonably clear and ascertainable meaning." (*Consolidated Freightways, supra*, 294 S.E.2d at p. 645.) It's obviously a reference to Gulfstream's standardized set of maintenance terms that was later signed by Chikar and which: (a) was titled "Work Authorization Agreement Terms and Conditions"; and (b) was consistently used on AAM jet maintenance projects well before AAM retained Gulfstream on this specific project. (AA 174-175, 319-320, 322-323, 325-326, 328-329, 331-332). These very same standard "Work Authorization Agreement Terms and Conditions" were made available to (and agreed to in writing by) Chikar on multiple occasions before he signed

the Service Center Proposal. (AA 319-320, 322-323, 325-326, 328-329, 331-332.)

AAM apparently seeks to avoid the incorporation-by-reference doctrine by asserting that Chikar "had every reasonable right to believe that Gulfstream's 'standard work authorization Terms and Conditions' were already set forth in the June 27, 2013 contract." (RB 52.) But Chikar submitted a 19-paragraph affidavit in support of AAM's opposition to Gulfstream's petition to compel arbitration, and nowhere in that affidavit does Chikar even refer to this provision, much less claim that he understood the reference to Gulfstream's "standard work authorization Terms and Conditions" to refer to the terms in the Service Center Proposal itself. AAM's ipse dixit argument should therefore be ignored. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*) ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].)

And in any event, Chikar's unexpressed beliefs or understandings about the Service Center Proposal have no relevance here—the Service Center Proposal's *language* is what matters. (*Stearns Bank, N.A. v. Dozetos* (2014) 328 Ga.App. 106 [761 S.E.2d 520, 523] (*Stearns*) [courts give effect to contract language, not "subjective and unexpressed intentions and understandings of one party"].)[1] That language plainly states that the

[1] See also *Merced County Sheriff's Employee's Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 672 ["mutual assent is gathered from the

Service Center Proposal "incorporates" Gulfstream's "standard work authorization Terms and Conditions." (AA 164.)

And that language indisputably supports the trial court's conclusion that the Work Authorization was part of the AAM/Gulfstream agreement. The term "incorporate" means to "make the terms of another" document a "part of a document by specific reference." (Black's Law Dict. (9th ed. 2009), p. 834, col.2; Dictionary.com, "incorporate" <http://www.dictionary.com/browse/incorporate?s=t> [as of July 6, 2016] [defining "incorporate" as "to take in or include as a part or parts"].) Thus, the Service Center Proposal couldn't possibly have been incorporating its *own* terms and conditions. AAM's position would effectively deny any meaning to the term "incorporates," in contravention of basic contract-interpretation principles. (See *Myers v. Texaco Refining & Marketing, Inc.* (1992) 205 Ga.App. 292 [422 S.E.2d 216, 219] ["Georgia law requires us to give meaning to every term" of a contract "rather than construe any term as meaningless"]; *Cole v. Low* (1927) 81 Cal.App. 633, 637 [contract "shall be so construed as to give force and effect . . . to every word in it"].)

The plain reality is that: (a) the Service Center Proposal refers to and incorporates Gulfstream's "standard work authorization Terms and Conditions" (AA 164); and (b) the clear target of that reference is the standardized set of terms embodied in the Work Authorization. That being

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reasonable meaning of words," not the parties' "unexpressed intentions or understanding"].)

so, all the Work Authorization terms (including the arbitration clause and delegation provision) must "be interpreted as part of" the Service Center Proposal. (*Consolidated Freightways*, *supra*, 294 S.E.2d at p. 645.) Since AAM acknowledges the Service Center Proposal *is* valid and binding (RB 11), it can't tenably claim the Work Authorization expressly incorporated into it (and subsequently executed by Chikar) was somehow not agreed to by the parties.

(2) Incorporation by reference under California law.

The result is the same under California law. "The phrase 'incorporation by reference' is almost universally understood" to mean "the inclusion, within a body of a document, of text which, although physically separate from the document, becomes as much a *part* of the document as if it had been typed in directly." (*Republic Bank v. Marine Nat. Bank* (1996) 45 Cal.App.4th 919, 922 (*Republic Bank*), original italics.) A "secondary document becomes part of a contract as though recited verbatim when it is incorporated into the contract by reference provided that the terms of the incorporated document are readily available to the other party." (*Id.* at p. 923, internal quotation marks omitted.)

Here, of course, since Chikar previously had agreed to the identical "standard work authorization Terms and Conditions" referenced in the Service Center Proposal on *numerous* occasions in 2012 and 2013 (AA 319-320, 322-323, 325-326, 328-329, 331-332), he had no reason to refer to

them again. But even if he were not already aware of them (or could not have easily reviewed them by referring to AAM's records of previous maintenance agreements with Gulfstream), there is substantial evidence to support the trial court's implicit finding that they were "readily available" to Chikar and AAM. (AA 164; *Republic Bank*, *supra*, 45 Cal.App.4th at p. 923.)

Chikar himself acknowledged that he engaged in a lengthy "negotiation process" regarding the Service Center Proposal; that he received "several drafts" of that contract; and that Gulfstream made "changes" and "modifications" to those drafts until he was "satisfied with [the] proposal." (AA 94-95.) Each of the draft proposals included the same provision "incorporat[ing]" Gulfstream's "standard work authorization Terms and Conditions" to govern the parties' relationships as the final Service Center Proposal does. (Compare AA 120 and AA 140 with AA 164.) Since AAM acknowledges that the negotiations proceeded over "numerous months" (RB 9) and it's clear that Chikar made numerous detailed requests during the negotiations (AA 94-95), there's no basis for doubt that he and AAM had both the time and the ability to either (a) request a copy of Gulfstream's standard terms, or (b) otherwise inquire further into the details of those terms. Not only did Gulfstream never make a secret of those terms, it had no reason to do so, since it was aware that Chikar had agreed to them on a number of previous occasions.

Thus, regardless whether Georgia or California law applies, it's clear that the Work Authorization's terms, including the arbitration clause and delegation provision, were part of the overall AAM/Gulfstream contract.

b. AAM separately and specifically manifested its assent to all of the Work Authorization terms.

There's yet another problem with AAM's no-mutual-assent theory: AAM's agent Chikar actually *signed* the Work Authorization in two separate places. (AA 174-175.) Under the objective theory of contract formation (to which both Georgia and California subscribe), that objective manifestation of assent fully binds AAM to the Work Authorization's terms.

In Georgia, courts determine whether there was mutual assent to the terms of a contract by applying "an objective theory of intent whereby one party's intention is deemed to be that meaning a reasonable man . . . would ascribe to the first party's manifestations of assent." (*Turner Broadcasting System, Inc. v. McDavid* (2010) 303 Ga.App. 593 [693 S.E.2d 873, 878].) And signing a writing *is* an objective manifestation of intent to be bound by its terms. (See *Joseph Goldsmith & Co. v. M. Marcus & Bro.* (1910) 7 Ga.App. 849 [68 S.E. 462, 463 ["proof of the signature supplies proof of assent"]; *Dowis v. Lindgren* (1974) 132 Ga.App. 793 [209 S.E.2d 233, 234] [signature under the word "Accepted" was "an assent to the terms" of the contract]; *Russell v. Smith* (1948) 77 Ga.App. 70 [47 S.E.2d 772, 773]

["The affixing of their signatures to the instrument by the parties shows their mutual assent to its terms and provisions."].) California law is in full accord. (*Roth v. Malson* (1998) 67 Cal.App.4th 552, 557 ["Contract formation is governed by objective manifestations" and the "test is what the outward manifestations of consent would lead a reasonable person to believe," internal quotation marks omitted]; *Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1027 ["a signature on a written contract is an objective manifestation of assent to the terms set forth there"]; *Money Store Investment Corp. v. Southern Cal. Bank* (2002) 98 Cal.App.4th 722, 728 [where bank's "employee signed [an] acknowledgment and acceptance" of escrow instructions, bank "objectively exhibited" consent to those instructions].)

Here, there are no ifs, ands, or buts about it. Chikar signed the Work Authorization *twice*. (RB 11.) On the first page, his signature appears directly underneath the printed phrase, "It is expressly understood that the terms and conditions on the reverse side of this order shall govern the relationship of the parties hereto." (AA 174.) On the second page, which is titled "Work Authorization Agreement Terms and Conditions," his signature appears again, next to the words, "Customer Acknowledgement." (AA 175.) These signatures speak for themselves. They objectively manifest AAM's consent to the Work Authorization's terms.

c. AAM's unexpressed beliefs about the Work Authorization have no relevance here.

AAM's efforts to escape this reality lack merit.

According to AAM's respondent's brief, Chikar "did not believe" the Work Authorization "was anything other than a document acknowledging" the transfer of AAM's jet to Gulfstream; AAM "believed an agreement already existed" before Chikar signed the form; and Chikar "did not regard" the Work Authorization as part of the AAM/Gulfstream contract. (RB 16, 29.) Even if they were credible, these claims are beside the point. Chikar's unexpressed beliefs (which were never made known to Gulfstream before, or contemporaneously with, Chikar's execution of the Work Authorization upon delivery of the jet to Gulfstream for repair and maintenance) simply *are not relevant* under the objective theory of contract formation. (*Stearns*, *supra,* 761 S.E.2d at p. 523 [courts give effect to contract language, not "subjective and unexpressed intentions and understandings of one party"]; *Merced County Sheriff's Employee's Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 672 ["mutual assent is gathered from the reasonable meaning of words and the acts of the parties," not their "unexpressed intentions or understanding"].)

d. Gulfstream was not required to ensure that Chikar read and understood the Work Authorization.

AAM's contentions that "Chikar was not asked to read the" Work Authorization, and "it was never explained to" him that the document was a contract, don't make any difference, either. (RB 16; AA 97.) Under Georgia law, if "one who can read signs a contract without reading it, he is bound by its terms, unless he can show" that his failure to read was the result of an emergency, that his counterparty prevented him from reading it, or that he relied on a fiduciary relationship with his counterparty. (*Bumgarner v. Green* (1997) 227 Ga.App. 156 [489 S.E.2d 43, 47].) Even where one party affirmatively *misrepresents* the terms contained in a written contract, the subscribing party who fails to read the writing is still bound to the written terms. (*Riker v. McKneely* (1980) 153 Ga.App. 773 [266 S.E.2d 553, 553-554] [adjuster assured claimant that "release covered only property damage" but written terms were for general release; claimant held bound to written terms, since she "could have" read them but did not do so]; *Morrison v. Roberts* (1942) 195 Ga. 45 [23 S.E.2d 164, 165-166 [teacher could not reform or cancel contract that she signed but only "half-way read" by claiming real estate agent misrepresented payment terms]; *Wright v. Safari Club Intern., Inc.* (2013) 322 Ga.App. 486 [745 S.E.2d 730, 736] ["One who can read, must read, for he is bound by his contracts."; where party "did not read" agreement but "neither presented a reason why he could not have requested to read it nor evidence that he

would have been prevented from reading it," he was "bound by its contents"].)

Similar principles apply in California. "[A] party is bound by provisions in an agreement which he signs, even though he has not read them and signs unaware of their existence." (*N.A.M.E.S. v. Singer* (1979) 90 Cal.App.3d 653, 656.) And a contracting party is under "no obligation" to call contract terms to his counter-party's attention. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 914 (*Sanchez*).) "[E]ven when a customer is assured it is not necessary to read a standard form contract . . . it is generally unreasonable, in reliance on such assurances, to neglect to read a written contract before signing it." (*Id.* at p. 915.) This is particularly true with respect to agreements between sophisticated businesses in arm's-length commercial transactions. (See *Parr v. Superior Court* (1983) 139 Cal.App.3d 440, 445-446 ["experienced and sophisticated businessman" conducted business "over some five months" pursuant to contract but sought relief from contract's arbitration clause because he "did not read" it; Court of Appeal refused to "relieve [him] of his contractual responsibilities"; "he certainly has not claimed to be unfamiliar with the English language nor the desirability of reading and understanding a contract before entering into one"].)

Thus, Gulfstream was under no obligation to tell Chikar to read the Work Authorization or explain it to him; Chikar's signatures bind AAM regardless of whether he read the document or not. AAM does not claim there was some sort of emergency or that Gulfstream prevented Chikar

from reading the Work Authorization's terms. Chikar objectively manifested assent to the Work Authorization's terms (including the arbitration clause and delegation provision), and those terms are absolutely part of the AAM/Gulfstream contract.

e. AAM's primary authority further establishes that the Work Authorization is binding on AAM.

AAM also cites *Benco*, *supra*, 89 Cal.App.4th 1042, in support of its claim that although it "may have signed" the Work Authorization, the terms aren't actually binding. (RB 11.) In fact, *Benco* supports Gulfstream.

In *Benco*, a general contractor's employee arranged to rent a crane and signed a form document entitled "Work Authorization and Contract"; the form included broad provisions by which the contractor would indemnify the crane rental company against crane-related injuries. (89 Cal.App.4th at pp. 1046-1048.) After an employee was injured and sued, the crane rental company filed indemnity claims against the contractor, citing the form's indemnity provisions. (*Id.* at p. 1048.) The trial court found there was no mutual assent to the form's terms, but the Court of Appeal disagreed. (*Id.* at pp. 1048-1049.)

The Court noted that "ordinarily one who signs an instrument which on its face is a contract is deemed to assent to all its terms." (*Benco*, *supra*, 89 Cal.App.4th at p. 1049.) Although there was a limited exception where "the writing does not appear to be a contract and the terms are not called to

the attention of the recipient," that exception did not apply, and the contractor was bound to the form's terms. (*Id.* at pp. 1049-1050.) And the Court explained why: The "document in question is entitled Work Authorization and Contract" and its "clause immediately above the customer's signature states, 'This is a contract which includes all terms and conditions stated on the reverse side . . . .' The reverse side contains 10 numbered paragraphs, including the indemnification clause." (*Id.* at pp. 1049-1050.) That being so, the document "'clearly' indicated on its face that it was a contract." (*Id.* at p. 1050.) The Court also noted that over "their lengthy history of doing business together . . . the parties had used the Work Authorization and Contract dozens of times, and [the contractor] had ample opportunity to examine the back side of the form." (*Ibid.*)

The facts here are a carbon copy of those in *Benco*. The document at issue is entitled "Work Authorization Form" and its second page includes the heading "Work Authorization *Agreement* Terms and Conditions," thus clearly indicating it is a contract. (AA 174-175, italics added; *Benco*, *supra*, 89 Cal.App.4th at p. 1050.) The clause immediately above Chikar's signature advises that "the terms and conditions on the reverse side of this order shall govern the relationship of the parties hereto"; that, too, indicates that the Work Authorization is a contract. (AA 174; *Benco*, *supra*, 89 Cal.App.4th at p. 1050.) The reverse side of the document contains numerous numbered paragraphs, further demonstrating its contractual nature. (AA 175.) And AAM and Gulfstream had used similar forms containing the same terms many times during the preceding two years.

(AA 319-320, 322-323, 325-326, 328-329, 331-332; compare *Benco, supra,* 89 Cal.App.4th at p. 1050; see also *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1124 (*Rodriguez*) [agreement titled "Work Proposal and Authorization" which was signed "underneath a line stating 'Accepted by Client,'" had numerous labeled provisions, and included statement that the "Terms and conditions on the reverse side of this Proposal are incorporated herein by reference" was a contract].)

Thus, there is absolutely no doubt that the Work Authorization is part of the AAM/Gulfstream contract. AAM makes no valid argument to the contrary.

B. AAM's Claim That The Service Center Proposal And Work Authorization Contradict One Another Lacks Merit.

AAM also claims that there are "contradictions inherent between" the Service Center Proposal and the Work Authorization, because the Service Center Proposal "permits either party to initiate court proceedings" but the Work Authorization "require[s] arbitration of disputes." (RB 29, 34.) According to AAM, the two documents "diverge significantly over scope of remedy, applicable law, and access to arbitration" and there are "ambiguities" created by these differences. (RB 30-31.) Not so.

There isn't a single word, anywhere in the Service Center Proposal, that permits the parties to initiate court proceedings to enforce it. There

isn't a single word about remedies. And there isn't a single term, anywhere in the Service Center Proposal, that provides for a particular choice of law.

The Service Center Proposal and Work Authorization are *in no way* contradictory. The Service Center's terms simply do not directly address (a) arbitration or judicial enforcement of the contract, (b) remedies, or (c) choice of law. The Work Authorization (which is expressly incorporated by reference) adds those *additional terms* to the AAM/Gulfstream contract, and makes clear that disputes will be settled by an arbitrator under American Arbitration Association (AAA) rules. (AA 174-175.) But no contradiction results simply by its supplementation of the Service Center Proposal on matters as to which that document is silent, particularly where the Service Center Proposal expressly incorporates the Work Authorization terms and conditions on its face. (See *Ansley v. Ansley* (2010) 307 Ga.App. 388 [705 S.E.2d 289, 294] [agreement to make a will devising shares of stock displayed a "lack of inconsistency" with a written shareholders' agreement; "the alleged obligation to devise . . . is a matter on which the [written agreement] is silent"]; *Stockburger v. Dolan* (1939) 14 Cal.2d 313, 317 [supplementary "understanding that [a] lessee should procure a zone variance does not contradict the written contract" between lessors and lessee, "which is silent upon this point"].)

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There's no real doubt about it: all of the terms in the Work Authorization, including the arbitration clause and delegation provision, are

part of the AAM/Gulfstream contract. AAM's own unconscionability challenge *necessarily* presumes that those terms are part of the deal, and the factual record bears out the same point. And there is no inconsistency between the terms of the Service Center Proposal and the Work Authorization. AAM's newly-formulated "no assent" argument is meritless.

II. THE DELEGATION PROVISION CLEARLY AND UNMISTAKABLY DELEGATES AAM'S UNCONSCIONABILITY CHALLENGES TO THE ARBITRATOR, AND AAM MAKES NO VALID ARGUMENT TO THE CONTRARY.

Gulfstream's opening brief established that under the delegation provision in the AAM/Gulfstream contract, AAM's challenge to the conscionability of the arbitration clause must be referred to the arbitrator; therefore, the trial court had no power to address that challenge. (Appellant's Opening Brief [AOB], pp. 21-35.)

Gulfstream's argument is based on five propositions:

(1) The AAM/Gulfstream contract is subject to the Federal Arbitration Act (FAA) (AOB 21-22);

(2) In an FAA-subject contract, the parties may "clearly and unmistakably" delegate "questions regarding the enforceability" of an arbitration clause to an arbitrator, and if they do so, courts must enforce their choice (AOB 23-24);

(3) One way the parties may make a clear and unmistakable delegation is by incorporating the AAA Rules, which empower the arbitrator "to rule on . . . any objections with respect to the existence, scope or validity of the arbitration agreement" (AOB 25-31, citing AAA, Commercial Arbitration Rules and Mediation Procedures (amend. & eff. June 1, 2009) rule R-7(a) [hereafter "AAA Rules"]);

(4) The AAM/Gulfstream contract's delegation provision incorporates the AAA rules and therefore clearly and unmistakably delegates the clause-validity challenge to the arbitrator (AOB 31-32); and

(5) Since AAM never "challenged the delegation provision specifically," that provision must be enforced (AOB 32-35, citing *Rent-A-Center West, Inc. v. Jackson* (2010) 561 U.S. 63, 72) (*Jackson*); *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 237-238, 247-250 (*Tiri*)).

In its respondent's brief, AAM does not challenge the first three propositions.[2] And as we now explain, its various attempts to challenge the fourth and fifth fail.

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[2] Indeed, AAM acknowledges the binding United States Supreme Court cases setting forth the delegation rules. (RB 30-34, citing *Jackson, supra*; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395; *AT & T Technologies, Inc. v. Communications Workers of America* (1986) 475 U.S. 643, 649.)

A. The AAM/Gulfstream Contract Clearly And Unmistakably Delegated AAM'sArbitration Clause-Validity Challenge To The Arbitrator

1. AAM's claim that the AAM/Gulfstream contract is ambiguous regarding delegation contradicts the record.

AAM claims that there has been no "clear and unmistakable" delegation of arbitration-clause-validity disputes here, because the AAM/Gulfstream contract is purportedly ambiguous. (RB 34, 37.) AAM doesn't suggest the wording of the delegation provision itself is ambiguous, though—it just argues that "there are vast differences between" the Service Center Proposal and Work Authorization because the Service Center Proposal "permits either party to initiate court proceedings" and the Work Authorization "attempts to require arbitration of disputes." (RB 34, 12 [claiming Service Center Proposal "permits the parties to pursue claims in court" but Work Authorization "purportedly requires arbitration"]; see also *id.* at p. 31 [alleging the writings "diverge significantly over scope of remedy, applicable law, and access to arbitration"].) But as discussed above, that claim simply contradicts the record. (See pp. 37-39, *ante*.) The Service Center Proposal says nothing about court proceedings, arbitration, scope of remedy, or applicable law, but rather incorporates by reference the the Work Authorization's *additional* terms, including the arbitration clause and delegation provision. The Service Center Proposal and Work Authorization are clearly part of the same contract, and the terms and

conditions in the Work Authorization do not in any way contradict the initial Service Center Proposal.

Greenspan v. LADT, LLC (2010) 185 Cal.App.4th 1413 (*Greenspan*), establishes that whenever "parties explicitly incorporate *rules that empower an arbitrator* to decide issues of arbitrability," that incorporation *is* "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; see also *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 549, 557 (*Dream Theater*) [arbitration clause incorporating AAA rules was "clear and unmistakable evidence" that disputes regarding arbitration-clause scope had to be sent to arbitration]; *Rodriguez*, *supra*, 136 Cal.App.4th at p. 1123 [incorporation of AAA Construction Industry Rules "clearly evidenced" parties' intent to "accord the arbitrator the authority to determine issues of arbitrability" because those rules gave the arbitrator "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"].)[3]

And that's exactly what happened here. The delegation provision refers "any controversy or claim arising out of this Agreement or Customer's service visit to Gulfstream" 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.) Those

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[3] AAM notably fails to even address, much less challenge, *Greenspan*.

rules direct the arbitrator to decide the validity of the arbitration clause. (AAA Rules, Rule R-7(a); AOB 25 & fn. 3.)

No other term in the Service Center Proposal or the Work Authorization creates even a hint of ambiguity about the meaning of that provision.[4] And that being so, the delegation provision *is* "clear and unmistakable evidence" of the parties' intent to delegate AAM's arbitration-clause-validity challenge to the arbitrator. (*Greenspan*, *supra*, 185 Cal.App.4th at p. 1442.)

2. AAM does not persuasively distinguish any of the authorities upon which Gulfstream relied.

AAM also attempts to distinguish Gulfstream's numerous authorities holding that where parties incorporate AAA Rules to govern their arbitration, they also "clearly and unmistakably" delegate disputes regarding the validity of their arbitration clause to the arbitrator. (See AOB 25-32, and authorities cited therein.) None of these attempts is successful.

AAM points out that in *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, the Supreme Court held there was no evidence of the parties' clear and unmistakable intent to arbitrate where one party "had not

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[4] Indeed, the Work Authorization itself leaves no room for any ambiguity or doubt. Paragraph 1 of the Work Authorization specifically states that its terms comprise "the parties' entire agreement concerning the Work and replace[] prior verbal or written agreements with respect thereto." (AA 175.) The Work Authorization thus clearly expresses the parties' intent that its terms (including the arbitration clause and delegation provision) shall govern and control their future relationship.

signed" the underlying arbitration agreement. (514 U.S. at pp. 938, 942, 946; RB 34-35.) But there's no doubt that Chikar signed the Work Authorization here, and there's no serious doubt that AAM is therefore bound by its terms and the Service Center Proposal's terms.

AAM explains that in *Rodriguez*, *supra*, nothing suggested the "parties had not clearly and unmistakably agreed to have an arbitrator determine the scope of the arbitration clause." (RB 36.) That's true (136 Cal.App.4th at p. 1123), but it mirrors the situation here, where the delegation provision's incorporation of AAA Rules *is* clear and unmistakable evidence that the parties delegated the arbitration-clause-validity dispute to the arbitrator. (*Greenspan*, *supra*, 185 Cal.App.4th at pp. 1442.) There's nothing in the AAM/Gulfstream contract to the contrary.

Losey v. Prieto (2013) 320 Ga.App. 390 [739 S.E.2d 834], did indeed involve a party who did "not dispute" that he had entered into an agreement with an arbitration provision. (739 S.E.2d at p. 836; RB 36-37.) But that's no different from the situation here. AAM has already acknowledged that it did "allege[] that the provisions" in the Work Authorization "are binding upon it," and those provisions include the delegation provision. (RB 11.) And AAM has attacked the unconscionability of the Work Authorization, thus necessarily conceding that it is binding. (*Benco*, *supra*, 89 Cal.App.4th at p. 1049.) AAM may

assert that it never agreed to the Work Authorization terms, but the law and the evidentiary record fully defeat that assertion.[5]

Tiri, *supra*, 226 Cal.App.4th 231, reasoned that a delegation provision's language "must be clear and unmistakable," and it "must not be revocable" as unconscionable. (226 Cal.App.4th at p. 242.) The same is true here. The delegation provision's incorporation of AAA rules is clear and unmistakable language that sends AAM's unconscionability challenge to the arbitrator. And as we discuss below (pp. 55-56, *post*), AAM does not claim the delegation provision *itself* is unconscionable.

In *Bruni v. Didion* (2008) 160 Cal.App.4th 1272 (*Bruni*), the court observed that it at "first glance," it appears "hopelessly circular" that parties can choose to arbitrate the issue of whether they are "bound by the arbitration clause." (160 Cal.App.4th at p. 1287; RB 41-42.) But *Bruni* went on to state (in a sentence AAM does not cite) that the United States Supreme Court "resolved this conundrum—and resolved in favor of the separate enforceability of arbitration provisions." (160 Cal.App.4th at p. 1287, internal quotation marks omitted.) Thus, if a party is claiming "illegality" in "defense to enforcement of the arbitration clause," then "the court must enforce the 'arbitrability' portion of the arbitration clause by compelling the parties to submit that defense to arbitration." (*Ibid.*)

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[5] AAM recites the facts of *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, and *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, but does not explain how or why they defeat Gulfstream's claims or assist AAM's claims here.

So, too, here. AAM is claiming the arbitration clause is unconscionable and therefore illegal; the trial court was required to compel "the parties to submit that" unconscionability "defense to arbitration." (*Bruni*, *supra*, 160 Cal.App.4th at p. 1287.)

AAM recites the underlying facts and holding of *Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125 (*Brennan*), but does not directly respond to Gulfstream's discussion of that case in its opening brief. (AOB 30.) To recap, in *Brennan*, the parties' employment agreement included 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.) The plaintiff attempted to challenge the arbitration clause as unconscionable, but the court delegated that dispute to the arbitrator. (*Id.* at p. 1128.) The parties' incorporation of the AAA Rules in the arbitration clause "'clearly and unmistakably' delegated the unconscionability determination to the arbitrator." (*Id.* at pp. 1130-1132.)

Once again, that's exactly what happened here. The delegation provision specifically refers to the AAA Rules (AA 175), and the same result—delegation of the unconscionability dispute to the arbitrator—must ensue (*Brennan*, *supra*, 796 F.3d at pp. 1130-1132).

Merkin v. Vonage America, Inc. (9th Cir., Feb. 2, 2016, No. 14-55397) 2016 WL 775620 (*Merkin*), is both infirm and irrelevant. (RB 43.) First, the Ninth Circuit's initial memorandum disposition in *Merkin* (from

which Judge Wardlaw apparently dissented) has been superseded. (See *Merkin*, 2016 WL 775620.) The revised memorandum disposition held that one provision in a contract was substantively unconscionable and could be severed, but as AAM concedes, "the severability of a void paragraph is not at issue in this matter." (*Merkin v. Vonage America, Inc.* (9th Cir. 2016) ___ F.Appx. ___, 2016 WL 2343240, at p. *1; RB 43-44.)

And AAM never persuasively distinguishes any of Gulfstream's out-of-state authorities, either. (RB 44-51.) The respondent's brief recites the facts and results in these cases, but it provides no explanation regarding how they could possibly defeat the clear language of the delegation provision and its incorporation of AAA Rules. Indeed, and to the contrary, *all* of these authorities stand for the proposition 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." (AOB 28-29, citing, inter alia, *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; *Mortimore v. Merge Technologies Inc.* (Ct.App. 2012) 344 Wis.2d 459 [824 N.W.2d 155, 161]; *Republic of Ecuador v. Chevron Corp.* (2d Cir. 2011) 638 F.3d 384, 394-395.) The respondent's brief says nothing different.

B. AAM Did Not Challenge The Delegation Provision And Its Failure To Do So Cannot Be Excused.

AAM does not dispute that it failed to specifically challenge the delegation provision below, as it is required to do under well-established United States Supreme Court precedent. (*Jackson*, *supra*, 561 U.S. at pp. 71-73 [to defeat operation of delegation provision, opponent must challenge "the delegation provision specifically," not the arbitration agreement].) However, AAM seeks to excuse its failure by arguing that: (a) Gulfstream acquiesced in the trial court's power to decide the conscionability of the arbitration clause; and (b) Gulfstream failed to raise the delegation provision in its initial petition. (RB 30, 24-25, 21.) Neither of these arguments have merit. AAM has waived its right to challenge the delegation provision, and this Court must therefore treat the delegation provision "as valid" and "enforce it." (*Jackson*, *supra*, 561 U.S. at p. 72; see also AOB 34-35.)

1. Gulfstream never "acquiesced" to the trial court's power to decide the conscionability of the arbitration clause.

AAM claims that Gulfstream "acquiesced to the trial court's power" to decide unconscionability because it "contest[e]d the issue of unconscionability before the trial court." (RB 30.) Not so.

Gulfstream specifically urged the trial court to enforce the delegation provision and send AAM's unconscionability challenge to the arbitrator "in the first instance." (AA 274.) Gulfstream referenced the AAA rules and the delegation provision in detail. (AA 274-275.) That was more than enough to preserve the argument for review, and in no way constitutes "acquiescence" on the issue. (See *Glaser, Weil, Fink, Jacobs & Shapiro, LLP v. Goff* (2011) 194 Cal.App.4th 423, 445 ["advocating an opposing position before the ruling is sufficient" to preserve issue for review].)

It's true that Gulfstream *also* argued that, even if the trial court were inclined not to enforce the delegation provision (and thus decide the unconscionability claim itself), there was still nothing unconscionable about the arbitration clause. (AA 275-281.) But that was just an alternative argument, aimed at making the best of any adverse ruling on the delegation-provision issue. It didn't waive Gulfstream's primary argument that the question of arbitrability should have been submitted to the arbitrator in the first instance. (Cf. *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213 [no waiver where a party "submits to the authority of an

erroneous, adverse ruling after making appropriate" arguments and "endeavor[s] to make the best of a bad situation for which he was not responsible," internal quotation marks omitted].)

2. AAM's claim that Gulfstream failed to properly invoke the delegation provision lacks merit.

a. In its petition, Gulfstream properly invoked its rights to arbitration of the "entire case."

AAM also claims that Gulfstream never properly invoked the delegation provision. According to AAM, it was "incumbent upon" Gulfstream to raise the delegation provision in its "moving papers or in its petition to compel arbitration." (RB 24-25, 21.)

But the argument ignores that fact that Gulfstream's initial petition *did* urge the court to submit AAM's unconscionability claims to arbitration—completely in line with the delegation provision. Gulfstream's petition specifically requested an order "compelling [AAM] to submit the claims raised in *AAM's Complaint* to binding arbitration." (AA 39, italics added.) And one of the "claims raised" in AAM's complaint was that the arbitration clause was unconscionable. (AA 39; see also AA 14 [¶¶ 28-29] [describing clause directing "arbitration governed by the laws of the State of Georgia" and arguing that the "requirement to pursue arbitration [was] void on the grounds of unconscionability"].) Thus, Gulfstream's petition *did* argue that AAM's arbitration-clause-validity challenge had to be submitted to arbitration from the very beginning of the process.

Moreover, Gulfstream's petition went on to quote the delegation provision *in full* as a basis for an order compelling arbitration. (AA 39 [¶ 3].) And Gulfstream further argued that the "*entire case* should be submitted to binding arbitration." (AA 39, italics added.) "Entire case" means "entire case"—and plainly encompasses arbitration of any dispute about the underlying validity of the arbitration clause.

b. Gulfstream's papers below were fully consonant with the requirements of Code of Civil Procedure section 1281.2.

In any event, Gulfstream's petition was fully in line with the procedures for compelling arbitration that are established in Code of Civil Procedure section 1281.2.

When a party seeks to compel arbitration, it must provide "prima facie evidence of a written agreement to arbitrate the controversy" between the parties. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*); Code Civ. Proc., § 1281.2; Cal. Rules of Court, rule 3.1330.) The petitioner need not "provide the court with anything more than a copy [of the agreement] or a recitation of its terms" and need "only allege the *existence* of an agreement and support the allegation." (*Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219 (*Condee*), original italics, construing former Cal. Rules of Court, rule 371; see also Cal. Rules of Court, rule 3.1330, comment [noting renumbering of rule 371 as rule 3.1330]; Judicial Council

of California, Amendments to the California Rules of Court (Oct. 27, 2015), p. 40 [amending rule 3.1330 without substantive change].) Nothing more is required to trigger the trial court's duty to consider whether it must compel arbitration. (*Condee*, *supra*, 88 Cal.App.4th at p. 219 ["what the rule does not say is significant" and it requires nothing "more than a copy or recitation" of the agreement].)

Once the petition is filed, the opposing party may raise "a defense to enforcement" and must prove "its existence by a preponderance of the evidence." (*Rosenthal*, *supra*, 14 Cal.4th at p. 413.) And the petitioner may then file a reply in support of its petition. (Code Civ. Proc., § 1290.2 [petition to compel arbitration shall be heard "in the manner . . . provided by law for the making and hearing of motions"]; Cal. Rules of Court, rules 3.1330 [referencing "[m]otion concerning arbitration"], 3.1113 ["reply or closing memorandum" permitted]; Code Civ. Proc., § 1005, subd. (b) ["reply papers" shall be served "at least five court days before the hearing"].)

That's what happened here. Gulfstream petitioned to compel arbitration and quoted the arbitration clause and the delegation provision in its petition. (AA 39.) At that point, Gulfstream had done everything that was required to begin the process. (*Condee*, *supra*, 88 Cal.App.4th at p. 219.) AAM opposed and argued that the arbitration clause was unconscionable. (AA 81-91.) Gulfstream replied *to that argument* by pointing out that, whatever its merits, it was for the arbitrator to address in the first instance. (AA 272-275.) There was nothing wrong with using the

reply brief to respond to the unconscionability argument that *AAM* advanced, and to highlight the contractual language—quoted verbatim in Gulfstream's initial petition—that prevented the trial court from even reaching AAM's argument.

Gulfstream was not required to anticipate every possible claim or theory that AAM might advance in an opposition without ever seeing that opposition. (*Federal Home Loan Bank of San Francisco v. Countrywide Financial Corp.* (2013) 214 Cal.App.4th 1520, 1530 (*Countrywide*).) In *Countrywide*, a bank sued a seller of mortgage-backed securities for violations of securities law. (214 Cal.App.4th at pp. 1524-1525.) The seller demurred, arguing that the bank was "impermissibly seeking to relitigate" a claim that had already been dismissed with prejudice in a prior action. (*Id.* at p. 1525, internal quotation marks omitted.) The bank opposed, asserting that its claim in its present action "was different from the claims" it had previously dismissed. (*Ibid.*, internal quotation marks omitted.) The seller "responded to [the argument] in its reply," arguing that the bank "could have raised" its present claim during its prior suit, but did not. (*Id.* at pp. 1529-1530.) On appeal, the bank argued that the seller's argument "should have been raised in [the] demurrer." (*Ibid.*, internal quotation marks omitted.) The Court of Appeal disagreed: "[W]e see no reason why [the seller] was required to raise this argument in its demurrer. The bank made the argument in its opposition to the demurrer, and [the seller] responded to it in its reply." (*Id.* at p. 1530.)

Blatt v. Farley (1990) 226 Cal.App.3d 621 (*Blatt*), and *Hartley v. Superior Court* (2011) 196 Cal.App.4th 1249 (*Hartley*), do not help AAM. (RB 24, 42.) *Blatt* involved a party "rais[ing] a new theory" involving "factual questions and lacking legal authority" for the first time in his reply brief on appeal. (226 Cal.App.3d at p. 627.) *Blatt* did not address, or consider, a substantive response, interposed in trial-court reply papers, to evidence and legal arguments raised in opposition to an arbitration petition. And in *Hartley*, the petitioner's initial briefing in support of its petition "argued the merits of [the plaintiff's] unconscionability claim, raising at least an inference that it agreed the matter was for the court's decision"; only later did it contend "the issue of arbitrability was for the arbitrator's decision" in its reply brief. (*Hartley*, *supra*, 196 Cal.App.4th at p. 1259.) Gulfstream didn't engage in any such bait-and-switch here; its initial briefing simply argued that (a) the AAM/Gulfstream contract included the arbitration clause; and (b) AAM's claims were therefore subject to arbitration. (AA 42-46.)

Indeed, *Hartley* holds that "the claimant" seeking arbitration "must bear the burden" to show a "clear demonstration of" the parties' intent to delegate "the question of [] arbitrability" to the arbitrator. (196 Cal.App.4th at p. 1259.) The petitioner in *Hartley* didn't meet that burden because the underlying contracts were ambiguous about whether or not the parties had clearly chosen not to resolve their disputes in court. (*Id.* at pp. 1260, 1257-1258.) But Gulfstream has plainly met that burden here, because the unambiguous delegation provision clearly and unmistakably

sends the arbitration-clause validity dispute to the arbitrator. (*Greenspan*, *supra*, 185 Cal.App.4th at p. 1442; AA 175.)

Jackson, *supra*, and *Dream Theater*, *supra*, don't assist AAM. (RB 27-28.) Neither case stands for the proposition that Gulfstream was required to "invoke" the delegation provision arguments on an anticipatory basis "as part of its initial petition." (RB 28.)

Accordingly, AAM cannot excuse its failure to challenge the delegation provision below by claiming that it was actually Gulfstream's obligation to respond to AAM's potential defense in its initial petition. The simple truth is that AAM forfeited its unconscionability challenge to the delegation provision.

c. In any event, AAM still has not specifically challenged the delegation provision as unconscionable; therefore, it must be enforced.

At the end of AAM's discussion regarding why it should be excused from failing to challenge the delegation provision below, one would have expected to find an argument in which AAM specifically challenged the delegation provision and addressed why that provision *itself* is either procedurally or substantively unconscionable. That's what binding and controlling Supreme Court precedent requires AAM to do. (AOB 33, citing *Jackson*, *supra*, 561 U.S. at pp. 71-73 [to defeat operation of delegation provision, opponent must challenge "the delegation provision specifically,"

not the arbitration agreement]; *Tiri*, *supra*, 226 Cal.App.4th at pp. 237-238, 247-250 [challenging "arbitration agreement" without making claims "specific to the delegation" provision; court held delegation provision "was valid"].)

But AAM doesn't mount any such challenge. Its unconscionability discussion focuses exclusively on the arbitration clause as a whole; it never expressly mentions, and never specifically targets, the delegation provision. (RB 51-59.)[6] That being so, this Court must treat the delegation provision "as valid" and "enforce it." (*Jackson*, *supra*, 561 U.S. at p. 72.)

C. AAM's Claim That The Unconscionability Of The Arbitration Clause "Does Not Arise Out Of The Dispute Between The Parties" Is Absurd.

AAM also asserts, again without citation to the record or authority, that "the unconscionability of the arbitration clause and its delegation of arbitrability does not arise out of the dispute between the parties." (RB 37.)

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[6] And AAM couldn't prevail on any such challenge, anyway. There's certainly nothing unfair, conscience-shocking, or abhorrent to good morals about a delegation provision providing for an American Arbitration Association Arbitrator to hear the unconscionability dispute. (See *NEC Technologies, Inc. v. Nelson* (1996) 267 Ga. 390 [478 S.E.2d 769, 771, fn. 2]; *Sanchez*, *supra*, 61 Cal.4th at p. 911.) AAA arbitrators are required to be "impartial and independent" and perform their duties "with diligence and in good faith." (AAA Rules, rule R-17(a) <https://www.adr.org/aaa/faces/ShowContent;jsessionid=BkiEzMKF_06dheLNrf1x_UW2BICoNHgQ0NvL_7zbdZUx8kSCUTR4!280627727?dID=20037&_afrLoop=209810566277072&_afrWindowMode=0&_afrWindowId=null>.)

But that's absurd. AAM itself pled that the arbitration clause was unconscionable in its complaint. (AA 14, 12-17.) By joining that cause of action to its other causes of action, AAM represented that the unconscionability dispute that's at issue here (and that must be resolved by the arbitrator in the first instance) relates to the underlying dispute over jet maintenance.

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Ultimately, nothing in the respondent's brief changes reality. AAM has not specifically challenged the delegation provision. AAM hasn't claimed that provision is substantively or procedurally unconscionable. The delegation provision is clear; it is not contradicted by anything in the Service Center Proposal or anything else in the AAM/Gulfstream contract; and AAM has had ample opportunity to explain some reason why it should not be enforced. Since that hasn't happened, the delegation provision must be enforced, and AAM's challenge to the arbitration clause's validity must be sent to arbitration. The trial court's failure to do so was error.

III. THE TRIAL COURT ERRED IN ITS SUBSTANTIVE DETERMINATION THAT THE ARBITRATION CLAUSE IS UNCONSCIONABLE, AND AAM MAKES NO VALID ARGUMENT TO THE CONTRARY.

And even if the trial court had been empowered to address the arbitration clause's conscionability (it wasn't), it still erred in holding that clause unconscionable.

A. AAM Apparently Concedes That The Proper Focus Of The Conscionability Analysis Is The Arbitration Clause Itself.

In its opening brief, Gulfstream explained that under the FAA, "the arbitration clause must be severed from the remainder of the contract" and its conscionability must be analyzed without regard to other provisions therein. (AOB 36-39, citing 9 U.S.C. § 2; *Jackson*, *supra*, 561 U.S. at pp. 70-71; *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445, 447 (*Buckeye*); *Crawford v. Great American Cash Advance, Inc.* (2007) 284 Ga.App. 690, 692-693, 695 [644 S.E.2d 522, 525-527]; *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 774.) AAM apparently concedes that is so, as its respondent's brief no longer presses the claim that other Work Authorization terms were supposedly unconscionable (AA 86-90), and instead focuses on the conscionability of the arbitration clause by itself (RB 51-59). That's certainly the correct approach, but the result AAM urges is wrong. As we explain below, the arbitration clause is neither substantively nor procedurally unconscionable. (See pp. 66-73, *post*.)

B. AAM Wrongly Argues That California Law Governs The Conscionability Of The Arbitration Clause.

One of AAM's efforts to avoid that conclusion is to claim that California, rather than Georgia, law governs the conscionability analysis. AAM is wrong.

Gulfstream's opening brief explained in detail that because "[t]here is no federal general common law under the FAA," courts apply state-law principles to the unconscionability analysis. (AOB 40-41; see also *Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1466 (*Peleg*); *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900, 906.) Therefore, "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 those rules both respect and enforce Gulfstream's and AAM's contractual selection of *Georgia* law. (*Id.* at p. 1467 ["Texas law governs" enforceability of arbitration clause with Texas choice-of-law clause]; *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"].)

1. Georgia has a substantial relationship to the AAM/Gulfstream contract because Gulfstream is headquartered there.

AAM apparently agrees with the first two of these propositions; it doesn't challenge them in any way. AAM argues, though, that under the governing California choice-of-law rules, the parties' choice of Georgia law *shouldn't* be enforced, because there is supposedly no "substantial relationship" between Georgia and the AAM/Gulfstream contract. (RB 57-58, citing *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 466 (*Nedlloyd*).) Nonsense.

Gulfstream already anticipated, and refuted, this argument in the opening brief. (AOB 47.) There's *absolutely* a "substantial relationship" between Georgia and the AAM/Gulfstream contract, because Gulfstream's headquarters are located in Georgia. (*Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 258 (*Hughes*) ["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].)

AAM's assertions that "there is no reasonable basis for Georgia law to apply" because Gulfstream maintains California facilities, has California employees, and is a "multinational corporation" are pure ipse dixit and can be ignored on that basis alone. (RB 58-59; *Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.) But even if considered, none of them refutes the simple truth that Gulfstream is headquartered in Georgia. That alone creates a substantial relationship with Georgia for *Nedlloyd* purposes. (*Hughes*, *supra*, 120 Cal.App.4th at p. 258.) AAM is bound to accept that fact, since AAM *pled* that fact in its own complaint. (AA 8 [Gulfstream has "headquarters in Savannah, Georgia"]; *Brandwein*, *supra*, 218 Cal.App.4th at p. 1515, fn. 19 [admissions in pleadings are binding].)

2. AAM has forfeited its arguments regarding Georgia law contradicting California's "fundamental policy" and provides no authority to support its "fundamental policy" claim.

AAM then falls back on a claim that even if Georgia does have a "substantial relationship" to the AAM/Gulfstream contract, California law should still apply, because applying Georgia law would be "contrary to [a] fundamental policy of California." (RB 59.) According to AAM, "Georgia's definition of unconscionability is stricter than California's, and it more readily enforces exculpatory clauses to contracts"; AAM claims that California, on the other hand, is fundamentally opposed to applying these purportedly-stricter rules. (RB 58-59.)

At the outset, AAM has forfeited the "fundamental policy" argument by failing to raise it before the trial court. If AAM wanted to argue that Georgia law contradicted California's fundamental policy, it could have, and should have, done so below. Instead, AAM merely asserted that the "proposed application of Georgia law" was "unexpected and unreasonable." (AA 89.) That's not enough to preserve the newfound "fundamental policy" argument, and this Court can and should ignore it. (*Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 73 [reviewing court "ignore[s] arguments, authority, and facts not presented and litigated in the trial court"].)

Nor does AAM cite any authority whatsoever for its claim that "California has a decided interest in" applying its own "unconscionability and exculpatory clause laws to parties transacting business in California." (RB 59.) That also dooms the argument. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785 [argument asserted without "citations to authority" is waived].)

But AAM's failure to cite authority is not surprising, because we also have found no authority for the bold assertion that California views its unconscionability and exculpatory-clause principles so highly that it would apply them in derogation of the parties' freedom of contract. Quite the contrary, "choice of law provisions are usually respected by California courts." (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 494; see also *Harris*, *supra*, 214 Cal.App.4th at p. 1404 [California "strongly favors enforcement of choice-of-law provisions"].)

3. In any event, AAM's very premise is incorrect—there is no material difference between Georgia and California law regarding unconscionability or enforcement of exculpatory clauses.

But there's a more fundamental problem with AAM's argument. There simply is no material discontinuity between Georgia and California law on the issues AAM has raised.

First, AAM's claim that California's "definition of unconscionability is not nearly as strict" as Georgia's does not withstand scrutiny. (RB 54.) As AAM acknowledges, Georgia holds that an unconscionable contract is

"such an agreement as no sane man not acting under a delusion would make, and that no honest man would take advantage of." (*R.L. Kimsey Cotton Company, Inc. v. Ferguson* (1975) 233 Ga. 962 [214 S.E.2d 360, 363] (*Kimsey*); RB 53.) California does not differ; in fact, it has applied that very same principle. (*California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 214 [unconscionable contract is one that "no man in his senses and not under delusion would make on the one hand," and that "no honest and fair man would accept on the other," internal quotation marks and alterations omitted]; *Herbert v. Lankershim* (1937) 9 Cal.2d 409, 484 [same].)

Both states have cited and applied the "exceedingly-one-sided" formulation of substantive unconscionability, too. (*Zepp v. Mayor & Council of Athens* (1986) 180 Ga.App. 72 [348 S.E.2d 673, 678] ["clauses involved are so one-sided as to be unconscionable"; *Sanchez, supra*, 61 Cal.4th at p. 910 [acknowledging "so one-sided as to shock the conscience" formulation, internal quotation marks omitted].)

And Georgia's "*abhorrent* to good morals and *conscience*" formulation finds its match in California's well-recognized "*shock* the *conscience*" standard. (*Hall v. Wingate* (1924) 159 Ga. 630 [126 S.E. 796, 813] (*Hall*), italics added; *Sanchez, supra*, 61 Cal.4th at pp. 910-911, italics added.)[7]

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[7] AAM points out that *Sanchez, supra*, held there was no material difference between the "shock the conscience," "overly harsh," and "unduly

Second, there's no material difference between California and Georgia regarding exculpatory-clause enforcement. California holds that a contract by which a party exempts himself from his own negligence "is valid unless it is prohibited by statute or impairs the public interest." (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 637.) And Georgia similarly holds that exculpatory clauses are generally valid, but may be held void where they are against public policy. (E.g. *Camp v. Aetna Ins. Co.* (1930) 170 Ga. 46 [152 S.E. 41, 43] [contract is generally valid, unless it contradicts statute, is "contrary to good morals," or is "an illegal or immoral agreement"]; *Stockbridge Dental Group, P.C. v. Freeman* (2012) 316 Ga.App. 274 [728 S.E.2d 871, 872] (*Stockbridge*) [exculpatory clause in dental treatment agreement was "void as against public policy"].)

AAM claims that Georgia courts "exercise extreme caution" in invalidating exculpatory clauses, and "a contract cannot be said to be contrary to public policy unless Georgia's General Assembly declares it to

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oppressive" formulations of the substantive unconscionability standard, and AAM seems to imply that *Sanchez* was thereby watering down California's substantive unconscionability standard to be less "strict." (61 Cal.4th at p. 911; RB 54.) But that's not what happened in *Sanchez*. The court instead reaffirmed the vitality of the "'shock the conscience'" standard, reasoning that it was not a "different standard in practice than other formulations" and all the formulations "capture[d] the notion that unconscionability requires a substantial degree of unfairness *beyond 'a simple old-fashioned bad bargain*.'" (61 Cal.4th at p. 911, original italics; underline added.) Thus, far from watering down the "shocks the conscience" standard, the court was clarifying that the other formulations were just as high, strong, and demanding as "shocks the conscience." (*Ibid.*)

be so" or it is otherwise immoral. (RB 55.) According to AAM, California views exculpatory clauses with "far greater skepticism" and there have been a number of cases in which California has invalidated such clauses in contracts with common carriers, hospitals, and mechanics. (RB 56.) But Georgia views such clauses with the same healthy degree of skepticism as California does; it has similarly invalidated them in a variety of settings; and it has done so without regard to whether the legislature had expressly prohibited a particular type of exculpatory clause. (*Stockbridge*, *supra*, 728 S.E.2d at p. 872; *Country Club Apts. v. Scott* (1980) 154 Ga.App. 217 [267 S.E.2d 811, 814] [landlord's warranty against latent defects existing at beginning of lease was nullified despite being only "analogous" to statutory prohibitions on exculpatory clauses in maintenance and repair contracts]; *Ellerman v. Atlanta Am. Motor Hotel Corp.* (1972) 126 Ga.App. 194 [191 S.E.2d 295, 296] [holding limitations on innkeeper's liability void as against public policy without referencing statutory prohibitions against such clauses]; *Bishop v. Act-O-Lane Gas Serv. Co.* (1954) 91 Ga.App. 154 [85 S.E.2d 169, 176-177] [gas company's exculpatory clause invalidated without mention of statutory prohibition on clause].)

AAM also harps on California's fidelity to the factors in *Tunkl v. Regents of the University of California* (1963) 60 Cal.2d 92 (*Tunkl*). (RB 56-57.) But it omits to mention that the Georgia Court of Appeals cited *Tunkl* as a "leading case" and analyzed its factors in detail when invalidating a dentist's exculpatory clause. (*Porubiansky v. Emory University* (1980) 156 Ga.App. 602 [275 S.E.2d 163, 167-169], aff'd, 248

Ga. 391 [282 S.E.2d 903] (*Porubiansky*).) Georgia courts have continued to cite, and rely on, *Porubiansky*'s holding. (*Stockbridge, supra*, 728 S.E.2d at pp. 872-873.) Thus, nothing suggests that Georgia law is hostile to, or in any way out of step with, *Tunkl*.

In sum, Georgia law is not contrary to California's "fundamental policy." Rather, Georgia law is consistent with California law, and there's no basis for controverting the parties' choice of Georgia law here.

C. The Arbitration Clause Is Not Unconscionable.

Since the contractual choice of law must be upheld, the arbitration clause's conscionability must be analyzed under Georgia law. Under that law, the arbitration clause is neither substantively nor procedurally unconscionable.

1. The arbitration clause is not substantively unconscionable.

Once AAM finally directly addresses the arbitration clause's substantive unconscionability, it has virtually nothing to say. (RB 53-59.) AAM asserts that "Georgia [l]aw [u]nfairly [f]avors Gulfstream" and "the Georgia standard for unconscionability is unreasonably favorable to Gulfstream," but that's it. (RB 53, 55.)

Yet again, no authority is provided to explain why the arbitration clause's mere choice of law is either (a) "abhorrent to good morals and conscience" or (b) such as "no sane man" would accept, so as to justify a substantive-unconscionability finding under Georgia law. (*Hall*, *supra*, 126

S.E. at p. 813; *Kimsey, supra*, 214 S.E.2d at p. 363; see also *NEC Technologies, Inc. v. Nelson* (1996) 267 Ga. 390 [478 S.E.2d 769, 771, fn. 2] (*Nelson*).) Nor is any authority cited to explain why applying Georgia law to this dispute involving a Georgia-based corporation would "shock the conscience" and permit a finding of substantive unconscionability under California law. (*Sanchez, supra*, 61 Cal.4th at pp. 910-911.)

And as Gulfstream's opening brief explained, there simply *isn't* anything substantively unconscionable about the choice of Georgia law here. (AOB 41-48.) Georgia's legislature expressly permits contracting parties to choose law from a jurisdiction with a "reasonable relation" to their contract. (*Id.* at pp. 43-44.) Georgia plainly has such a relation here, because Gulfstream is headquartered there. (*Id*. at p. 44.) And what the legislature has expressly permitted cannot be substantively unconscionable. (*Id.* at pp. 44-45, citing *Results Oriented, Inc. v. Crawford* (2000) 245 Ga.App. 432 [538 S.E.2d 73, 78]; *Nelson, supra*, 478 S.E.2d at p. 773.)

And there's no substantive unconscionability under California law, either. AAM is the challenging party. AAM bears the "the burden of proof" to *show* the arbitration clause is substantively unconscionable. (*Sanchez, supra*, 61 Cal.4th at pp. 910-911.) AAM must *show* that applying Georgia law involves "a substantial degree of unfairness beyond a simple old-fashioned bad bargain." (AOB 47, citing *Sanchez, supra*, 61 Cal.4th at p. 911.) AAM hasn't satisfied that "rigorous and demanding" test. (*Id.* at p. 912.) It hasn't shown a material difference between Georgia and California law (see pp. 62-66, *ante*), and it hasn't offered anything else

(beyond mere assertions) to explain why applying Georgia law is substantively unconscionable.

And even if there were some difference between Georgia and California law, that couldn't possibly amount to a "substantial degree of unfairness" so as to "shock the conscience." (*Sanchez*, *supra*, 61 Cal.4th at pp. 910-911.) Georgia law is the end-product of a representative democracy and an independent judiciary that is constitutionally required to respect due process and fundamental fairness. Whatever slim distinctions might exist between Georgia and California jurisprudence, there is certainly nothing "substantial[ly] . . . unfair[]" about applying Georgia law to this dispute involving a Georgia-based corporation. (*Ibid.*)

2. The absence of substantive unconscionability is alone dispositive of AAM's unconscionability claims.

Because the arbitration clause is not substantively unconscionable, that alone defeats AAM's unconscionability challenge. As the opening brief explained (and AAM does not dispute), both Georgia and California law require that a contract or term be both substantively *and* procedurally unconscionable in order to be invalidated. (*Nelson*, *supra*, 478 S.E.2d at pp. 771-773 & fn. 6 [most courts "require a certain quantum of procedural plus a certain quantum of substantive unconscionability"]; *Sanchez*, *supra*, 61 Cal.4th at p. 910 ["procedural and substantive unconscionability must both be present" to find a clause unconscionable, internal alterations

omitted]; AOB 41-42, 45-46.) The lack of substantive unconscionability effectively ends the inquiry, and the arbitration clause must be enforced. Accordingly, the Court need not even reach the issue of procedural unconscionability.

3. The arbitration clause is not procedurally unconscionable.

But even so, the arbitration clause is not procedurally unconscionable, either.

AAM's claims of procedural unconscionability are premised on the view that Chikar supposedly had limited time to review or negotiate the Work Authorization's terms in September 2013. The argument is fundamentally incorrect—nobody pressured Chikar to do anything; Chikar had freely agreed to sign similar forms in the past; and nothing suggests any Gulfstream employee prevented him from taking all the time he needed to review the Work Authorization (even though he now apparently claims that he chose not to do so).[8]

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[8] Nor can it tenably be claimed that the Work Authorization's choice of Georgia law or AAA arbitration procedures was somehow surprising to AAM. AAM had previously executed both (1) *numerous* other form containing the same Georgia choice of law and AAA arbitration provisions (AA 319-320, 322-323, 325-326, 328-329, 331-332); and (2) a "Preferred Provider Agreement" that also selected Georgia governing law and mandated AAA arbitration (AA 290, 341-348, 345).

But the entire focus on the September 2013 meeting is a smoke screen. Chikar and AAM actually had *ample* time to review and negotiate the terms of the AAM/Gulfstream contract. The record reflects that:

(1) Chikar had acknowledged and executed Gulfstream's standard terms and conditions—the same terms appearing in the Work Authorization—on multiple occasions prior to the maintenance visit at issue here (AA 319-320, 322-323, 325-326, 328-329, 331-332);

(2) Chikar received draft proposals for the maintenance from Gulfstream, all of which indicated that they were subject to Gulfstream's "standard work authorization Terms and Conditions" (AA 94-95; AA 120; AA 140.)

(3) Chikar and AAM's president, James Seagrim, reviewed the terms of these proposals (AA 95);

(4) Chikar proposed, and Gulfstream made, numerous changes to the proposals during the negotiation process (AA 95); and

(5) After months of negotiation, Chikar decided that he was "satisfied with" the Service Center Proposal and signed it, directly under the clause stating that it "incorporate[d] . . . 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 95, AA 164.)

Thus, there's nothing procedurally unconscionable about the AAM/Gulfstream contract. The Service Center Proposal (which expressly incorporated the standard terms and conditions appearing on the Work Authorization) was the subject of lengthy negotiation. It was an arm's length deal negotiated between two sophisticated parties—Gulfstream and a charter-jet operator with international operations. (See *Interstate Sec. Police, Inc. v. Citizens and Southern Emory Bank* (1976) 237 Ga. 37 [226 S.E.2d 583, 584 ["negotiated arm's length business transaction between sophisticated commercial parties" was not "unconscionable"]; AA 8.) If AAM and Chikar had wanted to inquire into the "terms and conditions" (AA 120, 140, 164), review them in detail, or negotiate them, *nothing* prevented them from doing so in the multiple months it took to negotiate the Service Center Proposal. They had the ability and the sophistication to negotiate chapter and verse of the deal (and in many other respects they did so). (*Nelson, supra*, 478 S.E.2d at p. 771-772 [procedural unconscionability considers "business acumen and experience" as well as "relative bargaining power" of parties].) And, since AAM is a worldwide charter jet operator with numerous planes (AA 8), it cannot tenably be claimed that it lacked a "meaningful choice" when contracting for jet maintenance (*Nelson, supra*, 478 S.E.2d at p. 772).

Nor can the Service Center Proposal and Work Authorization be deemed "adhesion contract[s]," as AAM claims. (RB 11, 29-30.) Under

Georgia law, an adhesion contract is "a standardized contract offered on a 'take it or leave it' basis and under such conditions that a *consumer*" must acquiesce in it in order to obtain the desired product or service. (*Walton Elec. Membership Corp. v. Snyder* (1997) 226 Ga.App. 673 [487 S.E.2d 613, 617, fn. 6], italics added; *Realty Lenders, Inc. v. Levine* (2007) 286 Ga.App. 326 [649 S.E.2d 333, 336] [same].) There's no "consumer"—within the ordinary meaning of that word—here. Instead, this was an arm's-length negotiation of a $1.5 million contract between an international charter jet operator and an aircraft repair facility.

And yet again, the procedural-unconscionability result would be no different under California law. A "private business transaction between equally matched parties," which is negotiated over time and involves a "sophisticated corporate" entity that "could have employed any of a number of" different service providers, is not procedurally unconscionable. (*Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1420-1421, discussing corporate client's agreement with law firm.) And a party cannot claim a contract is a contract of adhesion where it "had the opportunity to negotiate and simply failed to do so." (*Spinello v. Amblin Entertainment* (1994) 29 Cal.App.4th 1390, 1397.) When the Service Center Proposal was "submitted to" Chikar and AAM, they "could have sought deletion or modification" of the standard terms and conditions, including the arbitration clause, but they just didn't. (*Ibid.*) That doesn't make Gulfstream's standard terms, as reflected in the Work

Authorization and incorporated by reference into the Service Center Proposal, procedurally unconscionable.

CONCLUSION

The delegation provision is fully valid and enforceable, and AAM has presented no valid challenge to it. Accordingly, AAM's entire unconscionability challenge must be heard by the arbitrator in the first instance.

There's nothing conscience-shocking or "morally abhorrent" about a simple, straightforward arbitration clause, and that clause should also have been enforced under both Georgia and California law.

The trial court erred—both in diverting its attention from the arbitration clause and delegation provision alone, and in its unconscionability analysis. This Court must reverse with directions to enter an order granting Gulfstream's petition and compelling arbitration.

DATED: July 11, 2016

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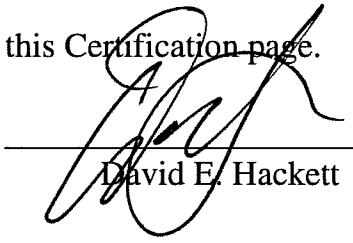
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to California Rules of Court, rule 8.520(c)(1), that this **APPELLANT'S REPLY BRIEF** contains 13,522 words, not including the tables of contents and authorities, the caption page, the signature blocks, or this Certification page.

Dated: July 11, 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 July 11, 2016, I served the foregoing document described as: **APPELLANT'S REPLY BRIEF** on the parties in this action by serving:

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Attorneys for Plaintiff and Respondent, ADVANCED AIR MANAGEMENT, INC.

Los Angeles Superior Court, South District
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CALIFORNIA SUPREME COURT
[Electronic Service under Rule 8.212(c)(2)]

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Executed on **July 11, 2016**, at Los Angeles, California.

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

Rebecca E. Nieto