LEONARD CARDER, LLP
Attn: Tosdal, Sara B.
1330 Broadway
Suite 1450
Oakland, CA 94612

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Attn: Luster, Julia A
400 South Hope Street
Suite 1200
Los Angeles, CA 90071

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Ali Plaintiff/Petitioner(s) VS. Daylight Transport, LLC Defendant/Respondent(s) (Abbreviated Title)	No. RG18915217 Order Petition to Compel Arbitration (Motion) Denied

The Petition to Compel Arbitration (Motion) filed for Daylight Transport, LLC was set for hearing on 02/15/2019 at 10:00 AM in Department 21 before the Honorable Winifred Y. Smith. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The Motion of Daylight Transportation to Compel Arbitration of the individual claim of plaintiffs Sabid Ali and Eric Bland is DENIED. The Motion of Daylight Transportation to stay the claims of the State of California's Labor Workforce Development Agency ("LWDA") under PAGA is DENIED.

The First Amended Complaint filed 11/26/18 by Plaintiffs Ali and Bland asserts claims for minimum wages, reimbursement of expenses (Labor Code 2802), unlawful deductions, meal periods (Wage Order 9, para 11, Labor Code 226.7, 512), rest periods (Wage Order 9, para 12, Labor Code 226.7, 512), accurate wages statements, and waiting time penalties (Labor Code 201-203), and claims under the UCL. The First Amended Complaint also asserts a PAGA claim on behalf of the LWDA for penalties (Labor Code 2699).

EXISTENCE OF ARBITRATION AGREEMENT

Daylight asserts that Ali and Bland signed Independent Contractor Agreements. (McCarthy Dec, Exh C and D.) The Agreements at section 6.02 had arbitration clauses.

Daylight asserts that the arbitration clauses state that arbitration is governed "under the Federal Arbitration Act." (Opening Brief at 9:24-25.) The court did not find that language in section 6.02 (Arbitration) or section 7.02 (choice of law).

APPLICABILITY OF FEDERAL ARBITRATION ACT

The FAA applies when the parties' agreement to arbitrate is set forth as a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce." (9 USCA 2.) Daylight asserts that it is in the interstate shipping business and moves freight that originates out of state and/or has a final destination that is out of state. (McCarthy Dec., para 6, 18, 20.) Daylight has met its burden of demonstrating that the Independent Contractor Agreements are contracts evidencing a

transaction involving commerce.

The FAA has an exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Section 1 exemption is "afforded a narrow construction." (Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 118.)

The phrase "contracts of employment" includes agreements by independent contractors to perform work. (New Prime Inc. v. Oliveira (2019) 139 S.Ct. 532.)

The phrase "class of workers" means that the court's focus is on the class of workers and not on the individual experience of the plaintiffs.

The exemption applies to workers "engaged in foreign or interstate commerce." In Circuit City, the Court stated that "The plain meaning of the words "engaged in commerce" is narrower than the more open-ended formulations "affecting commerce" and "involving commerce."" The Court then cited Gulf Oil Corp. v. Copp Paving Co., Inc (1974) 419 US 186, 195, for the proposition that the phrase "engaged in commerce" "appears to denote only persons or activities within the flow of interstate commerce." Similarly, U. S. v. American Bldg. Maintenance Industries (1975) 422 U.S. 271, 283, states, "we hold that the phrase 'engaged in commerce' as used in [section] 7 of the Clayton Act means engaged in the flow of interstate commerce."

A person can be "engaged in foreign or interstate commerce" even if she or he does not cross the state. In Palcko v. Airborne Express, Inc. (3rd Cir., 2004) 372 F.3d 588, 592-594, the court held that a manager who was responsible for "monitoring and improving the performance of drivers under [her] supervision to insure [sic] timely and efficient delivery of packages" was exempt. The court stated, "Such direct supervision of package shipments makes Palcko's work "so closely related [to interstate and foreign commerce] as to be in practical effect part of it."

Plaintiffs assert that the Independent Contractor Agreements are "contracts of employment of [a] class of workers engaged in foreign or interstate commerce." Daylight's evidence demonstrates that the class of drivers that includes plaintiffs delivered interstate freight. (McCarthy Dec., para 6, 18(b), 20(a); Exh A.) Daylight instructed plaintiff Bland to get an interstate drivers' license. (Bland Dec., para 10.) Plaintiffs have met their burden of demonstrating that the FAA does not apply to the Independent Contractor Agreements.

ENFORCEABILITY OF ARBITRATION AGREEMENT

The court applies the same standards for determining whether a contract is unconscionable without regard to whether the contract is for employment, consumer, or commercial matters. In all situations the court examines procedural and substantive unconscionability. (Walnut Producers of California v. Diamond Foods, Inc. (2010) 187 Cal.App.4th 634.)
Plaintiffs argue that the Agreement is procedurally unconscionable. Accepting Daylight's premise that the plaintiffs are independent contractor and not employees, the court finds procedural unconscionability. Daylight was in a superior bargaining position and presented the contracts on a take it or leave it basis.

Assuming that the plaintiffs were employees, the Court of Appeal has concluded that take it or leave it employer arbitration agreements are procedurally unconscionable. (See, e.g., Baxter v. Genworth North America Corp. (2017) 16 Cal.App.5th 713, 723-724 [arbitration agreement held procedurally unconscionable where employer presented arbitration agreement on a take-it-or-leave-it basis and agreement was required as a condition of continued employment]; Fitz v. NCR Corp. (2004) 118 Cal.App.4th 702, 722 [same].)

"'[A] finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided.' " (Baltazar v. Forever 21, Inc. (2016) 62 Cal.4th 1237, 1244.)

Plaintiffs argue that the Agreement is substantively unconscionable. The Agreement has a 120 day statute of limitations. This is substantially shorter than the statutory limits and is unconscionable. (Penilla v. Westmont Corp. (2016) 3 Cal.App.5th 205, 222; Martinez v. Master Protection Corp. (2004) 118 Cal.App.4th 107, 117.)

The Agreement at 6.02(c) permits Daylight to seek a provisional remedy from the court but precludes plaintiffs from equivalent access. This is one sided and supports a finding of unconscionability. (Samaniego v. Empire Today LLC (2012) 205 Cal.App.4th 1138, 1147-1148.)

In reply, Daylight asserts that under CCP 1281.8(b) both sides can seek a provisional remedy. (Reply at 9:16-20.) A contract clause that is unenforceable because it is contrary to a statute does not become less unconscionable because it is unenforceable. To the contrary, the unenfocrceability confirms the unconscionability. This case is distinct from Baltazar v. Forever 21, Inc. (2016) 62 Cal.4th 1237, 1247, where the court held that a bi-lateral clause that repeated CCP 1281.8(b) was not unconscionable merely because employers might be more likely to seek provisional relief.

The Agreement also requires that plaintiffs and Daylight split the cost of arbitration. This is unconscionable because a cost greater than the filing fees associated with litigation deters claims.

The Motion of Daylight to compel arbitration is DENIED. The court will not sever the identified unconscionable provisions

STAY OF THE PAGA CLAIM

Having denied the motion to compel arbitration, there is no basis to stay the PAGA claim.

Dated: 03/01/2019

Facsimile

Judge Winifred Y. Smith