



KeyCite Yellow Flag - Negative Treatment

Distinguished by [International Franchise Association v. California](#), S.D.Cal., January 12, 2022

384 F.Supp.3d 1124

United States District Court, N.D. California.

John FLEMING, Plaintiff,

v.

MATCO TOOLS CORPORATION, et al., Defendants.

Case No. 19-cv-00463-WHO

|
Signed 05/03/2019

Synopsis

Background: Distributor brought putative class action against mechanic's tools manufacturer, asserting that he and putative class members were misclassified as independent contractors, rather than employees, in efforts by manufacturer to avoid duties and obligations owed to employees under California's Labor Code. Manufacturer moved to dismiss or transfer pursuant to forum selection clause contained in parties' agreement.

Holdings: The District Court, William H. Orrick, J., held that:

^[1] Federal Arbitration Act (FAA) did not preempt application of California statute invalidating forum selection clauses in franchise agreements for franchises located in California;

^[2] dormant Commerce Clause did not preclude application of California law to prevent manufacturer from compelling arbitration in Ohio;

^[3] private interest factors favored denial of motion to transfer venue; and

^[4] public interest factors favored denial of motion to transfer venue.

Motion denied.

Procedural Posture(s): Motion to Dismiss for Forum Non Conveniens; Motion to Transfer Venue Pursuant to Forum Selection Clause.

West Headnotes (17)

^[1] **Contracts** Agreement as to place of bringing suit; forum selection clauses

Forum selection clauses are presumptively valid, and honored absent some compelling and countervailing reason.

[More cases on this issue](#)

^[2] **Contracts** Presumptions and burden of proof

Party challenging a forum selection clause bears a heavy burden of proof and must clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or over-reaching.

^[3] **Contracts** Agreement as to place of bringing suit; forum selection clauses

A forum selection clause may be unreasonable and thus unenforceable if: (1) the inclusion of the clause in the agreement was the product of fraud or overreaching; (2) the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; or (3) enforcement would contravene a strong public policy of the forum in which suit is brought.

[More cases on this issue](#)

^[4] **Contracts** Legal remedies and proceedings
Federal Courts Parties' choice of forum; forum-shopping

Appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens.

^[5] **Contracts** Legal remedies and proceedings
Federal Courts Burden placed on court and

public

Federal Courts → Public and private interests; balancing interests

When a motion to dismiss is based on a forum selection clause, rather than solely on the doctrine of forum non conveniens, the court may only weigh the public interest factors, which may include administrative difficulties flowing from court congestion, the local interest in having localized controversies decided at home, and the interest in having the trial of a diversity case in a forum that is at home with the law.

[6] **Contracts** → Legal remedies and proceedings
Federal Courts → Presumptions and burden of proof

When a case concerns an enforcement of a forum selection clause, change of venue statute provides a mechanism for its enforcement and proper application of that statute requires that forum-selection clause be given controlling weight in all but the most exceptional cases; plaintiff bears the burden of showing these exceptional circumstances that make transfer inappropriate. 28 U.S.C.A. § 1404(a).

[7] **Contracts** → Agreement as to place of bringing suit; forum selection clauses

A forum selection clause that requires a California franchisee to resolve claims related to the franchise agreement in a non-California court directly contravenes strong public policy, expressed in statute voiding any clause in a franchise agreement limiting venue to a non-California forum for claims arising under or relating to a franchise located in California, and is unenforceable.

2 Cases that cite this headnote
More cases on this issue

[8] **Labor and Employment** → Actions

California's Private Attorney General Act (PAGA) authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code

violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state. West's Ann. Cal. Lab. Code § 2698 et seq.

[9] **Labor and Employment** → Actions

California's Private Attorney General Act (PAGA) was enacted to (i) provide civil penalties for violations of parts of the labor code that had previously only carried criminal penalties, and (ii) to make up for the shortage of government enforcement resources to combat violations of the labor code. 28 U.S.C.A. § 1404(a).

[10] **Alternative Dispute Resolution** → Preemption
Federal Preemption → Alternative dispute resolution

Arbitration provision in distributor's distributorship agreement with mechanic's tools manufacturer was null and void, in light of agreement's severability clause and pre-dispute waiver of distributor's right to bring representative California Private Attorneys General Act (PAGA) claims, and thus, Federal Arbitration Act (FAA) did not preempt California statute voiding any clause in a franchise agreement limiting venue to a non-California forum for claims arising under or relating to a franchise located in California, and forum selection clause in the agreement had no effect; waiver of PAGA claims was void as contrary to public policy, and severability clause stated that arbitration clause, which contained the PAGA waiver, would be null and void if provision prohibiting PAGA arbitration was deemed invalid. Cal. Bus. & Prof. Code § 20040.5; Cal. Labor Code § 2698 et seq.f.

3 Cases that cite this headnote
More cases on this issue

[11] **Alternative Dispute Resolution** → Forum selection

Commerce → Remedies and proceedings in general

Contracts → Agreement as to place of bringing suit; forum selection clauses

Federal Courts → Contracts; insurance; sales

Dormant Commerce Clause did not preclude application of California statute voiding any clause in a franchise agreement limiting venue to a non-California forum for claims arising under or relating to a franchise located in California to prevent mechanic's tools manufacturer from compelling arbitration of California-based distributor's labor law claims in Ohio pursuant to forum selection clause in parties' distributorship agreement, since there was no reason to believe that a federal court sitting in California could not apply California or Ohio law without prejudicing manufacturer. U.S. Const. art. 1, § 8, cl. 3; Cal. Bus. & Prof. Code § 20040.5.

2 Cases that cite this headnote

[More cases on this issue](#)

[12] **Federal Courts** → Convenience of parties and witnesses; location of evidence

Federal Courts → Public and private interests; balancing interests

In assessing a motion to transfer for convenience of parties and witnesses or in the interest of justice, the court considers public factors, which go to the interests of justice, and private factors, which go to the convenience of the parties and witnesses. 28 U.S.C.A. § 1404(a).

1 Case that cites this headnote

[13] **Federal Courts** → Convenience of parties and witnesses; location of evidence

Federal Courts → Public and private interests; balancing interests

Factors relating to the parties' private interests, for purposes of motion to change venue for the convenience of parties and witnesses or in the interest of justice, include relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses, possibility of view of premises, if view would be appropriate to the action, and all other practical problems that make trial of a case easy, expeditious and inexpensive. 28 U.S.C.A. §

1404(a).

1 Case that cites this headnote

[14] **Federal Courts** → Contracts; insurance; sales

Private interest factors favored denial of mechanic's tools manufacturer's motion to transfer venue from California to Ohio, pursuant to forum selection clause in parties' distributorship agreement, for distributor's class action alleging that manufacturer violated California Labor Laws by misclassifying him as an independent contractor, rather than an employee; distributorship agreement was presented to distributor in California, claims were brought pursuant to California law, courts in California were more familiar with California law than Ohio courts, action arose based on conduct in California, majority of witnesses were located in California, and it would be significantly more expensive for distributor to represent interest of California-based distributors in Ohio. 28 U.S.C.A. § 1404(a).

2 Cases that cite this headnote

[More cases on this issue](#)

[15] **Federal Courts** → Burden placed on court and public

Federal Courts → Conflict of laws

Federal Courts → Public and private interests; balancing interests

Public interest factors considered for motion to change venue for the convenience of parties and witnesses or in the interest of justice include the administrative difficulties flowing from court congestion, the local interest in having localized controversies decided at home, the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law, and the unfairness of burdening citizens in an unrelated forum with jury duty. 28 U.S.C.A. § 1404(a).

[16] **Federal Courts** → In general; convenience,

[fairness, and interest of justice](#)

Re: Dkt. Nos. 16, 25

When considering courts' familiarity with law for purposes of motion to transfer venue, familiarity with law can be neutral factor because federal judges routinely apply the law of a state other than the state in which they sit. 28 U.S.C.A. § 1404(a).

[2 Cases that cite this headnote](#)

[17] [Federal Courts](#)  [Contracts; insurance; sales](#)

Public interest factors favored denial of mechanic's tools manufacturer's motion to transfer venue, from California to Ohio pursuant to forum selection clause in parties' distributorship agreement, for distributor's class action alleging that manufacturer violated California Labor Laws by misclassifying him as an independent contractor, rather than an employee; public interest in adjudicating local controversies was with California court, as manufacturer presented the distributorship agreement in California, distributor worked solely in California, manufacturer employed over a 100 other drivers in California, while distributor and other putative plaintiffs had no connection to Ohio. 28 U.S.C.A. § 1404(a).

[More cases on this issue](#)

Attorneys and Law Firms

*1127 [Valerie Jean Brender](#), [Dylan Thomas Cowart](#), [Peter Scott Rukin](#), [Jessica Lee Riggin](#), [Rukin Hyland & Riggins LLP](#), Oakland, CA, for Plaintiff.

[Christian Joseph Rowley](#), [Eric Michael Lloyd](#), [Matthew A. Goodin](#), [Seyfarth Shaw LLP](#), San Francisco, CA, for Defendants.

ORDER DENYING MOTION TO DISMISS OR TRANSFER VENUE; DENYING MOTION TO FILE SUR-REPLY

[William H. Orrick](#), United States District Judge

Plaintiff John Fleming brings suit on behalf of himself and a putative class of other distributors that he asserts were misclassified as independent contractors, rather than employees, by defendants Matco Tools Corporation, NMTC, Inc., d/b/a Matco Tools, and Fortive Corporation (collectively "Matco"). Complaint ("Compl.") at ¶¶ 1,5 [Dkt. No. 1]. Matco moves to dismiss or transfer this case pursuant to a forum selection clause contained in an agreement between it and Fleming. There is a state statute that would invalidate the forum selection clause contained in the agreement, but Matco argues that I must enforce the forum selection clause because the statute is preempted by the Federal Arbitration Act ("FAA"). Fleming responds that the FAA does not apply because the arbitration agreement is void by its own terms and that I must apply the *1128 state statute invalidating the forum selection clause. I agree with Fleming and will deny Matco's motion to dismiss or transfer.

BACKGROUND

Matco manufactures and distributes mechanic's tools and service equipment. *Id.* at ¶ 6. It relies on distributors to make sales and service calls to existing and prospective customers through mobile distributorship stores. *Id.* Fleming was a distributor for Matco from July of 2012 through December of 2018. *Id.* at ¶ 9. He claims that, by allegedly misclassifying him and similarly situated distributors as independent contractors, Matco has sought to avoid various duties and obligations owed to employees under California's Labor Code and Industrial Welfare Commission wage orders, including: the duty to indemnify employees for all expenses and losses necessarily incurred in connection with their employment; the duty to pay overtime compensation for hours worked in excess of eight hours in a day or forty hours a week; the duty to provide off-duty meal periods; the duty to authorize and permit paid rest periods; the duty to furnish accurate wage statements; the duty to pay employees all wages owed upon termination; and unlawful collection and receipt of earned wages. *Id.* at ¶ 6.

According to Matco, Fleming entered into two distributorship agreements with it in July 2012 and October 2013.¹ Declaration of Mike Swanson at ¶¶ 4, 5 [Dkt. No. 16-1]. The July 2012 distributorship agreement was amended in October 2013 and November 2016. *Id.* The October 2013 distributorship agreement was terminated in September 2015. *Id.* at ¶ 5. For the purposes of this motion, both the July 2012 agreement and October 2013 are functionally the same and will be collectively referred to as the “Distribution Agreement.” The Distribution Agreement contains a forum selection clause which states:

Unless this requirement is prohibited by law, all arbitration hearings must and will take place exclusively in Summit or Cuyahoga County, Ohio. All court actions, mediations or other hearings or proceedings initiated by either party against the other party must and will be venued exclusively in Summit or Cuyahoga County, Ohio. Matco (including its employees, agents, officers or directors and its parent, subsidiary or affiliated companies) and the Distributor (including where applicable the Distributor's Spouse, immediate family members, owners, heirs, executors, successors, assigns, shareholders, partners, and guarantors) do hereby agree and submit to personal jurisdiction in Summit or Cuyahoga County, Ohio in connection with any Arbitration hearings, court hearings or other hearings, including any lawsuit challenging the arbitration provisions of this Agreement or the decision of the arbitrator, and do hereby waive any rights to contest venue and jurisdiction in Summit or Cuyahoga County, Ohio and any claims that venue and jurisdiction are invalid. In the event the law of the jurisdictions in which Distributor operates the Distributorship require that arbitration proceedings be conducted in that state, the Arbitration hearings under this Agreement shall be conducted in the state which the principal office of the Distributorship is located, and in the city closest to the Distributorship in which the American Arbitration Association has an office. Notwithstanding this Article, any actions brought by either party to enforce the decision of the

arbitrator may be venued in any court of competent jurisdiction.

***1129** July 2012 Distributorship Agreement at ¶ 12.10 [Dkt. No. 16-2]; October 2012 Distributorship Agreement at ¶ 12.10 [Dkt. No. 16-4].

Matco moves to dismiss the complaint or, in the alternative, to transfer this case to the Northern District of Ohio in light of the above forum selection clause and the arbitration clause contained in the Distribution Agreement. Motion to Dismiss (“Mot.”) [Dkt. No. 16]. If this case is transferred, Matco will move to compel arbitration once the matter is lodged in the Northern District of Ohio. *Id.*

LEGAL STANDARD

[1] [2] [3] Forum selection clauses are “presumptively valid,” and “honored” “absent some compelling and countervailing reason.” *Murphy v. Schneider Nat'l Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004). “The party challenging the clause bears a heavy burden of proof and must clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.” *Id.* at 1140 (internal quotation marks and citation omitted). A forum selection clause may be unreasonable if: (1) “the inclusion of the clause in the agreement was the product of fraud or overreaching”; (2) “the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced”; or (3) “enforcement would contravene a strong public policy of the forum in which suit is brought.” *Id.*

[4] [5] “[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens.” *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 60, 134 S.Ct. 568, 187 L.Ed.2d 487 (2013). When a motion to dismiss is based on a forum selection clause, rather than solely on the doctrine of forum non conveniens, the Supreme Court has held that a district court cannot consider the “private interest” factors, such as the plaintiff's choice of forum and the convenience of parties and witnesses. *See id.* at 62–64, 134 S.Ct. 568. Instead, the court may only weigh the “public interest” factors, which “may include the administrative difficulties flowing from

court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law.” *Id.* at 62 n.6, 134 S.Ct. 568.

^[6]“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” 28 U.S.C. § 1404(a). When a case concerns an enforcement of a forum selection clause, section 1404(a) provides a mechanism for its enforcement and “a proper application of § 1404(a) requires that a forum-selection clause be given controlling weight in all but the most exceptional cases.” *Marine*, 571 U.S. at 59-60, 134 S.Ct. 568 (internal quotation marks omitted). Plaintiff bears the burden of showing these exceptional circumstances that make transfer inappropriate. *Id.* at 64, 134 S.Ct. 568. Plaintiff must show either that the forum selection clause is not valid or that the public interest factors recognized under section 1404(a) make transfer inappropriate. *Id.* at 64, 134 S.Ct. 568; see also *Bayol v. Zipcar, Inc.*, No. 14-cv-02483-TEH, 2014 WL 4793935, at *1 (N.D. Cal. Sept. 25, 2014).

DISCUSSION

I. THE APPLICABILITY OF CALIFORNIA BUSINESS AND PROFESSIONS CODE § 20040.5 AND THE FEDERAL ARBITRATION ACT

^[7]The success of Matco's motion to dismiss or transfer this case depends on *1130 the applicability of California Business and Professions Code § 20040.5. The statute makes void any “provision in a franchise agreement restricting venue to a forum outside this state ... with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state.” Cal. Bus. & Prof. Code § 20040.5. The Ninth Circuit has held that it “expresses a strong public policy of the State of California to protect California franchisees from the expense, inconvenience, and possible prejudice of litigating in a non-California venue.” *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). A forum selection clause “that requires a California franchisee to resolve claims related to

the franchise agreement in a non-California court[.]” such as the one here, “directly contravenes this strong public policy and is unenforceable under the directives of *Bremen*.” *Id.* (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)).

Matco argues that California Business and Professions Code § 20040.5 does not apply because the Distribution Agreement contains a valid arbitration provision and, as a result, the state statute is preempted by the FAA. Mot. at 10-11 (citing *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir. 2001)).² In *Bradley*, the Ninth Circuit analyzed the Supreme Court's decisions in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) and *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), as well as the language of 9 U.S.C. § 2, to determine that “a state law that invalidates arbitration provisions is not preempted by the FAA only if the law is ‘generally applicable,’ or applies to ‘any contract.’ ” *Id.* at 890 (quoting *Doctor's Assocs.*, 517 U.S. at 687, 116 S.Ct. 1652; 9 U.S.C. § 2). The court reasoned that Section 20040.5 was preempted by the FAA because it “applies only to forum selection clauses and only to franchise agreements” and “therefore [Section 20040.5] does not apply to ‘any contract.’ ” *Id.* This led the Ninth Circuit to reverse the district court's order compelling the parties to participate in private arbitration in California, rather than in Utah, as dictated by the franchise agreement's forum selection clause. *Id.* Matco contends that I should follow *Bradley* and find that Section 20040.5 is preempted here by the FAA and that I must enforce the forum selection clause.

Matco is correct in stating that, typically, forum selection clauses are considered prima facie valid and courts are not to consider other parts of the contract, or the validity of a contract as a whole, when ruling on a motion to transfer or dismiss. Defendants' Reply in Support of Motion to Dismiss, or, in the Alternative, Transfer Venue to the U.S. District Court for the Northern District of Ohio (“Reply”) at 1-3 [Dkt. No. 22]. But, as Fleming argues, this is not a typical situation. The only reason that the forum selection clause would not be invalidated by Section 20040.5 is the preemptive effect of the Distribution Agreement's arbitration provision. Plaintiff's Opposition to Defendants' Motion to *1131 Dismiss (“Oppo.”) at 4-6 [Dkt. No. 21]. But because the arbitration provision is invalid, Fleming contends,

Bradley is not controlling and the arbitration provision in the Distribution Agreement cannot serve as a predicate to evade the reach of Section 20040.5. *Id.* He insists that I must go beyond the terms of the forum selection clause itself and first evaluate the validity of the arbitration provision. *Id.*

I agree with Fleming that in order to rule on Matco's motion, I must make a threshold determination on the validity of the arbitration provision to determine if it preempts Section 20040.5. The analysis required here is less straightforward than in the typical motion to dismiss or transfer because the only reason that a directly on point state statute does not invalidate the Distribution Agreement's forum selection clause is the preemptive effect of an allegedly invalid arbitration provision. Put differently, but for the existence of the arbitration provision, Section 20040.5 would apply and the forum selection clause would be void. This motion hinges on the preemptive effect of the arbitration provision and I cannot turn a blind eye toward questions of its validity.

Matco's cited authority to the contrary does not apply because none of the cases involve similar state statutes or the preemptive effects of arbitration agreements under the FAA. Instead, each stands for the uncontroversial proposition that generally it is inappropriate to analyze the validity of the contract as a whole when determining the applicability of a forum selection clause. *Id.* (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (holding that federal courts may consider claim of fraud in the inducement of the arbitration clause itself but not fraud in the inducement of a contract generally); *Washington v. Cashforiphones.com*, No. 15-cv-0627, 2016 WL 6804429, *4 (S.D. Cal. Jun. 1, 2016) (rejecting arguments related to contract validity for failure to identify the contracting parties, fraud, and public policy); *Cream v. N. Leasing Sys., Inc.*, No. 15-cv-1208-MEJ, 2015 WL 4606463, *6 (N.D. Cal. Jul. 31, 2015) (rejecting arguments related to concealment, fraudulent inducement, and public policy); *Lizdale v. Advanced Planning Servs., Inc.*, No. 10-cv-0834, 2011 WL 1103642, *6 (S.D. Cal. Mar. 25, 2011) (rejecting arguments related to fraudulent inducement, lack of consideration, inconvenience of parallel litigation, risk of unfair prejudice, and risk of conflicting judgments); *SeeComm Network Servs. Corp. v. Colt Telecomm.*, No. 04-cv-1283-MEJ, 2004 WL 1960174, *4 (N.D. Cal. Sept. 3, 2004) (rejecting arguments related to

unilateral mistake, fraudulent inducement, and affordability)).

In order to determine if Section 20040.5 applies or is preempted, I must first decide whether the arbitration provision in the Distribution Agreement is enforceable. Fleming gives several reasons that it is not: it is void by its own terms; even if it is not, it would expressly exclude his claims; it is invalid; and it is not severable. *Oppo.* at 10-19. I review those arguments below.

II. THE ENFORCEABILITY OF THE ARBITRATION PROVISION

Fleming asserts that, by its own terms, the arbitration provision is null and void in light of the Distribution Agreement's severability provision and the impermissible waiver of his PAGA claim. *Oppo.* at 10-12. The portion of the Distribution Agreement titled "Severability" states:

It is the desire and intent of the parties to this Agreement that the provisions of this Article be enforced to the fullest extent permissible under the laws and public policy applied in each jurisdiction *1132 in which enforcement is sought. Accordingly, if any part of this Article is adjudicated to be invalid or unenforceable, then this Article will be deemed amended to delete that portion thus adjudicated to be invalid or unenforceable, such deletion to apply only with respect to the operation of this Article in the particular jurisdiction in which the adjudication is made. Further, to the extent any provision of this Article is deemed unenforceable by virtue of its scope, the parties to this Agreement agree that the same will, nevertheless be enforceable to the fullest extent permissible under the laws and public policies applied in such jurisdiction where enforcement is sought, and the scope in such a case will be determined by Arbitration as provided herein, **provided, however that if the provision prohibiting classwide or private attorney general arbitration is deemed invalid, then the provision requiring arbitration of breaches between the parties**

shall be null and void and there shall be no obligation to arbitrate such breaches.

Distribution Agreement at ¶ 12.12 (emphasis added). The portion of the Distribution Agreement titled “No Class Actions” states in relevant part:

No matter how styled by the party bringing the claim, any claim or dispute is to be arbitrated on an individual basis and not as a class action. **THE DISTRIBUTOR EXPRESSLY WAIVES ANY RIGHT TO ARBITRATE OR LITIGATE AS A CLASS ACTION OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.**

Distribution Agreement at ¶ 12.7 (emphasis in original). Read together, Fleming contends that if the PAGA waiver in ¶ 12.7 is found to be invalid, the arbitration provision is similarly invalid under ¶12.12. Oppo. at 10-12.

[8] [9] PAGA “authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state.” *Sakkab*, 803 F.3d at 429 (citing *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 173 Cal.Rptr.3d 289, 327 P.3d 129 (Cal. 2014)). It was enacted to (i) provide civil penalties for violations of parts of the labor code that had previously only carried criminal penalties, and (ii) to make up for the shortage of government enforcement resources to combat violations of the labor code. *Id.* at 429-30 (internal citations omitted). To compensate for the shortage of resources, PAGA permitted aggrieved employees to act as private attorneys general to collect civil penalties for labor code violations, with seventy five percent of recovered penalties distributed to the California Labor and Workforce Development Agency. *Id.* (internal citations omitted).

In *Sakkab*, the Ninth Circuit held that pre-dispute agreements to waive PAGA claims are unenforceable for two reasons. *Id.* at 430-31 (citing *Iskanian*, 59 Cal.4th at 382–83, 173 Cal.Rptr.3d 289, 327 P.3d 129). First, California Civil Code § 1668 states that agreements exculpating a party for violations of the law are unenforceable. *Id.* (internal citations omitted). Second, under California Civil Code § 3513, a law

established for a public reason may not be contravened by private agreement. *Id.* (internal citations omitted). Describing the California Supreme Court's reasoning in *Iskanian*, the Ninth Circuit stated that “agreements requiring the waiver of PAGA rights would harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations.” *Id.* (internal citations omitted). This applies to agreements *1133 waiving the right to bring “representative” PAGA claims—claims seeking penalties for Labor Code violations affecting other employees—as well. *Id.* (internal citations omitted).

[10] Applying the rule in *Sakkab* and *Iskanian* here, the Distribution Agreement's PAGA waiver contained in ¶12.7 constitutes an impermissible pre-dispute agreement to waive Fleming's PAGA claims. Combined with the severability provision contained in ¶ 12.12, the provision requiring arbitration of breaches between Fleming and Matco is null and void and neither party has an obligation to arbitrate. Similar non-severability clauses have been found to void arbitration agreements in other cases as well. See *McArdle v. AT & T Mobility LLC*, No. 09-cv-01117-CW, 2017 WL 4354998, at *5 (N.D. Cal. Oct. 2, 2017) (denying motion to compel arbitration based on non-severability provision); *Securitas Sec. Servs. USA, Inc. v. Superior Court*, 234 Cal. App. 4th 1109, 1125, 184 Cal.Rptr.3d 568 (Cal. App. Ct. 2015). Accordingly, I need not consider Fleming's arguments related to the unconscionability of the arbitration provision. Oppo. at 12-19.

In its briefing, Matco's only counterarguments were that (1) I should not consider the text of the arbitration provision because it is the forum selection clause that is at issue and (2) the governing law has yet to be determined. Reply at 1-4. At the hearing held on April 24, 2019, Matco also argued (3) that because the severability provision refers to “such breaches” it only contemplates PAGA claims. I have already disposed of Matco's first argument above. Matco's second argument is not persuasive because the terms of the arbitration provision encapsulated in ¶¶ 12.1, 12.7, and 12.12 are clear and there is no indication that my interpretation of their plain terms would differ under either California or Ohio law. As to the third argument, the term “breaches” in the Distribution Agreement is defined to include “all breaches, claims, causes of action, demands, disputes and controversies” between Fleming and Matco. Distribution

Agreement ¶ 12.1. Matco's argument that "such breaches" would mean only PAGA claims need not be arbitrated does not make sense given how the Distribution Agreement defines "breaches." Because the arbitration provision is void, the FAA does not preempt Cal. Bus. & Prof. Code § 20040.5 and the forum selection clause has no effect.³

III. IS CALIFORNIA BUSINESS & PROFESSIONS CODE § 20040.5 ENFORCEABLE?

A. The Dormant Commerce Clause

Matco claims that the Dormant Commerce Clause of the United States Constitution invalidates Cal. Bus. & Prof. Code § 20040.5 because it places a substantial burden on interstate commerce. Mot. at 11-13. It argues that although the legislative history of the statute states that it is to protect franchisees who cannot typically afford to litigate out of state, it is actually *1134 designed to deprive out-of-state franchisors, which are more likely to litigate in federal court with franchisees than in-state franchisors, from the protections of federal law in diversity cases. *Id.* It contends that the statute has the potential to wreak havoc on out-of-state franchisors' "interest of uniformity in franchise operations" because there is no assurance that the same laws, court rules, and regulations will apply to their franchise agreements. *Id.* Instead, California franchisors, whose contracts would typically be governed by California law and interpreted by California courts, will derive a competitive advantage over out-of-state franchisors because they may rely on consistent judicial interpretations of their obligations as franchisors. *Id.* It argues that the legislature could have achieved its stated purpose by non-discriminatory means, such as requiring franchisors to cover expenses incurred by California franchisees that are unique to litigating in the designated out of state forum. *Id.*

Matco's argument fails. To the extent that Matco is concerned about having the same laws, court rules, and regulations applied to its franchise agreements, it may always remove a case filed in state court to federal court. As the Ninth Circuit has stated, "[t]he purpose of diversity jurisdiction is to provide a federal forum for out-of-state litigants where they are free from prejudice in favor of a local litigant." *Tosco Corp. v. Communities for a Better*

Env't, 236 F.3d 495, 502 (9th Cir. 2001), *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010) (internal citation and quotation marks omitted). For this reason also, Matco's claim that enforcement of Cal. Bus. & Prof. Code § 20040.5 would lead to "economic balkanization" is also unpersuasive. Reply at 4-5.

Matco also cites *1-800-Got-Junk? LLC v. Superior Court*, 189 Cal. App. 4th 500, 515, 116 Cal.Rptr.3d 923 (Cal. Ct. App. 2010) for the proposition that it has "interest of uniformity in franchise operations" that would be harmed by application of Cal. Bus. & Prof. Code § 20040.5. Mot. at 11-13. That case does not help Matco. There, the court needed to determine whether the franchise agreement's choice of law provision requiring application of Washington law violated the anti-waiver provision contained in **California Franchise Relations Act** ("CFRA"). 189 Cal. App. 4th at 515, 116 Cal.Rptr.3d 923. The court had to resolve two issues. First, was there a reasonable basis for a choice of law provision in a franchise agreement? *Id.* at 511-12, 116 Cal.Rptr.3d 923. Second, was the provision contrary to a fundamental public policy of California? *Id.* at 511-12, 116 Cal.Rptr.3d 923.

Answering the first question, the court found that there was a reasonable basis because "a multi-state franchisor has an interest in having its franchise agreements governed by one body of law[.]" *Id.* at 515, 116 Cal.Rptr.3d 923. Here, the choice of law provision is not challenged; any federal court is equally well equipped to interpret California or Ohio law.

On the second question, the court reasoned that because the purpose of the CFRA was to protect franchisees, the franchisee in its case would be better protected by Washington law than California law and so the application of Washington law was not contrary to the goals of the CFRA. *Id.* at 514-19, 116 Cal.Rptr.3d 923. By way of example, the court actually identified Section 20040.5 as a model for how the legislature could have drafted the antiwaiver provision to have the preclusive effect suggested by the franchisor. *Id.* at 518, 116 Cal.Rptr.3d 923. Here, the franchisee *1135 is better protected by California laws.

^[1] *1-800-Got-Junk?* is of no help to Matco. The dormant commerce clause does not preclude application of Section

20040.5 here because there is no reason to believe that a federal court sitting in California cannot apply California or Ohio law, in this case, without prejudicing Matco. The statute is enforceable.

B. Equitable Estoppel

Matco also argues that Fleming is equitably estopped from repudiating the forum selection clause because his claims are inherently intertwined with the Distribution Agreement and his purported employment relationship with Matco arises from the Agreement. Mot. at 13-14. This argument fails because the forum selection clause is inoperative as a matter of law under Section 20040.5.

IV. PUBLIC AND PRIVATE FACTORS UNDER 28

U.S.C. § 1404(a)

^[12] Because the forum selection clause is void pursuant to Section 20040.5, I must decide whether to transfer the action under 28 U.S.C. 1404(a) “[f]or the convenience of parties and witnesses [or] in the interest of justice.” In assessing a motion to transfer for convenience, the court considers public factors, which go to the interests of justice, and private factors, which go to the convenience of the parties and witnesses. *Brackett v. Hilton Hotels Corp.*, 619 F. Supp. 2d 810, 820 (N.D. Cal. 2008) (Alsup, J.) (internal citation omitted).

A. Private Interest Factors

^[13] “Factors relating to the parties’ private interests include ‘relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.’ ” *Atl. Marine Constr. Co.*, 571 U.S. at 63 n.6, 134 S.Ct. 568 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, n.6, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)). Here, the private interest factors strongly favor Fleming.

Matco does not dispute the following: the Distribution Agreement was presented to Fleming in California; his

claims are brought pursuant to California law; courts in California are more familiar with California law than Ohio courts; the action arose based on conduct in California; Fleming has only worked for Matco in California and only seeks to represent California distributors; the majority of witnesses are located in California; and it would be significantly more expensive for Fleming to represent the interest of California-based Matco distributors in Ohio.⁴ Oppo. at 23-24. Matco makes no counterarguments, seeking to stand on the forum selection clause. Reply at 14.

^[14] Although Matco’s corporate headquarters are in Ohio, it has hired numerous citizens of California as distributors and implemented policies that allegedly violate California labor laws. That it is headquartered in Ohio “does not negate the local impact of [their] decisions when they are implemented elsewhere.” *Karl v. Zimmer Biomet Holdings, Inc.*, No. 18-cv-04176-WHA, 2018 WL 5809428, at *5 (N.D. Cal. Nov. 6, 2018) (citing *1136 *Shultz v. Hyatt Vacation Marketing Corp.*, 10-cv-04568-LHK, 2011 WL 768735, at *5 (N.D. Cal. Feb. 28, 2011)). As I have found that the forum selection clause is invalidated by Section 20040.5 and Matco makes no other arguments in relation to its private interests here, the private interest factors identified by Fleming favor denial of Matco’s motion to transfer.

B. Public Interest Factors

^[15] “Public factors include the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.” *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (quoting *Piper Aircraft Co.*, 454 U.S. at 241 n.6, 102 S.Ct. 252). The public interest factors slightly favor Fleming.

The parties disagree if the relative court congestion between here and the Northern District of Ohio weighs for or against transfer. Mot. at 16; Oppo. at 25. Matco points out that as of March 31, 2018, there were 4,700 civil cases pending in the Northern District of Ohio and 8,502 civil cases pending in

this district. Mot. at 16. It also notes that in its 2018 Annual Assessment, the Northern District of Ohio reported that total civil case filings decreased by 13.8% from 2016 to 2017. *Id.* Fleming counters that under Ninth Circuit caselaw, “[t]he real issue is not whether a dismissal [or transfer] will reduce a court’s congestion but whether a trial may be speedier in another court because of its less crowded docket” and the median time from filing to disposition in civil cases is 7 months in this district compared to 10.3 months in the Northern District of Ohio. *Oppo.* at 24 (*citing Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1337 (9th Cir. 1984)). Matco counters that the median time from filing to trial is more than eight months longer in this district than the Northern District of Ohio. *Reply* at 13. This factor, which is seldom informative, is neutral.

Fleming argues that the public interest in adjudicating local controversies lies here because Matco presented Fleming the Distribution Agreement in California; Fleming worked for Matco solely in California; and Matco employs over a hundred of other drivers in California. *Oppo.* at 25. In contrast, he and other putative plaintiffs have no connection to Ohio. *Id.* Matco responds that Ohio has an equivalent interest given that Matco is headquartered there and negotiated contracts containing choice of law and forum selection clauses that point to Ohio law and Ohio as a forum respectively. Mot. at 16. At most, this factor is neutral as well, if not slightly favoring Fleming and California as the forum because the purpose of Section 20040.5 is to protect franchisees from being forced to litigate claims based on a franchise agreement out of state.

^[16] The final factor is familiarity with the underlying law. Fleming contends that Ohio law has no corollary to most of Fleming’s claims, no statute similar to PAGA, no statute similar to California Labor Code § 2802, no daily overtime, and no meal and rest breaks. *Oppo.* at 25. Matco replies that because the governing law remains an open question this factor is neutral. *Reply* at 13-14. Further, federal judges routinely apply the law of other states than the one in which they sit. *Id.* (*citing Rowen v. Soundview Commc’ns, Inc.*, No. 14-cv-05530-WHO, 2015 WL 899294, at *7 (N.D. Cal. Mar. 2, 2015)). I agree with Matco, and this factor is neutral.

*1137 ^[17] Here the private factors, to a great degree, and the public factors, to a much lesser extent, favor Fleming. Matco

has failed to meet the factors outlined in 28 U.S.C. 1404(a). I deny its alternative motion to transfer.

CONCLUSION

Matco’s motion to dismiss is denied because by the Distribution Agreement’s own terms, the arbitration provision is invalid and Section 20040.5’s prohibition of forum selection clauses in franchise agreements restricting venue to a forum outside California is not preempted by the FAA. I deny the motion to transfer. Matco shall answer the complaint within 15 days.

IT IS SO ORDERED.

All Citations

384 F.Supp.3d 1124, 169 Lab.Cas. P 61,958

Footnotes

- ¹ In evaluating a motion to dismiss based on a forum selection clause, I may consider declarations by the parties. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996).
- ² Although *Bradley* has been called into question by the Ninth Circuit's decision in *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 432-33 (9th Cir. 2015) based on the Supreme Court's decision in *AT& T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), it remains good law. As the Honorable Jaqueline Scott Corley held in *Bell Prod., Inc. v. Hosp. Bldg. & Equip. Co.*, “[n]either the Ninth Circuit sitting *en banc* nor the Supreme Court have overruled *Bradley*[,] ... [n]or did the three-judge panel in *Sakkab* expressly overrule *Bradley* in light of *Concepcion*” and that “[a]bsent an order overruling the decision, it remains good law in the Ninth Circuit and binding precedent on the Court.” No. 16-cv-04515-JSC, 2017 WL 282740, at *4 (N.D. Cal. Jan. 23, 2017).
- ³ Fleming argues that in addition to Section 20040.5, the forum selection clause is also governed by California Labor Code § 925. Mot. at 6-10. Like Section 20040.5, California Labor Code § 925 invalidates forum selection clauses in employment agreements that require employees to arbitrate claims that arise in California outside of the state. Because Section 20040.5 is dispositive of this motion, I need not address the parties' arguments related to California Labor Code § 925. Additionally, because Fleming's proposed sur-reply is dedicated to argument related to California Labor Code § 925, it is not needed and Fleming's Objection to Reply Evidence and Administrative Motion for Leave to File Sur-Reply [Dkt. No. 25] is denied.
- ⁴ Fleming also contends that California Labor Code § 925 requires that California law apply to the instant action. *Id.* at 24. As noted above, because Section 20040.5 is dispositive, I decline to address the applicability of California Labor Code § 925 at this point.