No. 19-____

IN THE

Supreme Court of the United States

IN RE MATCO TOOLS CORPORATION, NMTC, INC. D/B/A MATCO TOOLS AND FORTIVE CORPORATION,
Petitioners,

v.

U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent;

JOHN FLEMING,
Real Party in Interest.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Courts adjudicating *forum non conveniens* motions seeking to enforce forum-selection clauses as a general rule do not consider whether the underlying contract is valid. Instead, they determine only whether the forum-selection clause itself is valid and enforceable. Here, however, the Ninth Circuit held this rule does not apply when the forum-selection clause is contained in an allegedly invalid arbitration agreement.

The question presented here is: May a district court create an exception to the rule that the validity of a forum-selection clause does not depend upon the validity of the underlying contract containing the clause, based upon the subject matter of the contract?

PARTIES TO THE PROCEEDINGS

Petitioners Matco Tools Corporation, Fortive Corporation and NMTC, Inc., d/b/a Matco Tools (collectively, "Petitioners") are the defendants in the United States District Court for the Northern District of California, and the Petitioners who sought and were denied a writ of mandamus in the Ninth Circuit Court of Appeals.

Respondent United States District Court for the Northern District of California denied Petitioners' motion to dismiss or transfer Real Party in Interest John Fleming's ("Plaintiff") civil complaint, pursuant to the doctrine of *forum non conveniens*, and was respondent to Petitioners' request for a writ of mandamus in the Ninth Circuit Court of Appeals.

Real Party in Interest John Fleming is the named plaintiff in a putative class action pending in the United States District Court for the Northern District of California, alleging violations of the California Labor Code and the California Business and Professions Code.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, undersigned counsel states that Petitioner Matco Tools Corporation is a wholly-owned subsidiary of Fortive Corporation; and that Petitioner Fortive Corporation is a publicly traded company. Prior to June 3, 2016, Petitioner Matco Tools Corporation was known as NMTC, Inc., d/b/a Matco Tools.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners Matco Tools Corporation, Fortive Corporation and NMTC, Inc., d/b/a Matco Tools, respectfully petition for a writ of *certiorari* to review the judgment of the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. District Court for the Northern District of California (App. 4a-24a) is reported at 384 F. Supp. 3d 1124 (2019). The Ninth Circuit's Order directing Plaintiff/Real Party in Interest to file an answer and staying the district court litigation (App. 25a-26a) is unreported. The Ninth Circuit's Memorandum denying Petitioners' Petition for a Writ of Mandamus (App. 1a-3a) is reported at 781 Fed. Appx. 681 (9th Cir. Oct. 25, 2019). The Ninth Circuit's Order denying Petitioners' Petition for Rehearing En Banc (App. 27a) is reported at 2020 U.S. App. LEXIS 95 (9th Cir. Jan. 3, 2020).

JURISDICTION

The Ninth Circuit's Memorandum denying Petitioners' Petition for a Writ of Mandamus was entered on October 25, 2019. The Ninth Circuit's order denying Petitioners' Petition for Rehearing En Banc was entered on January 3, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent portions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. (App. 28a), California Business and Professions Code § 20040.5 (App. 29a) and California Labor Code § 2698, *et seq*. (App. 30a-35a) are reproduced in Petitioners' Appendix.

STATEMENT OF THE CASE

1. Matco Tools Corporation ("Matco"), which is headquartered in Stow, Ohio, markets high quality, durable and innovative mechanic repair tools, diagnostic equipment and toolboxes. (App. 72a, ¶ 3.) Matco contracts with franchisees who sell Matco's products in designated areas through their "mobile stores." (App. 72a, ¶ 3.) Defendant Fortive Corporation is Matco's corporate parent. (App. 72a, ¶ 3.) Prior to June 3, 2016, Matco was known as NMTC Inc. (App. 72a, ¶ 3.)

2. Plaintiff and Matco's predecessor entered into two separate Distributorship Agreements in July 2012 and October 2013, respectively.[1] (App. 73a, ¶¶ 4-5; App. 75a-183a.) Starting in July 2012, Plaintiff operated at least one Matco distributorship in the Monterey, California area, until December 2018. (App. 73a, ¶¶ 4-5, 7.) In connection with this operation, Plaintiff purchased Matco tools which he then sold to his customers, all of which were based in California. (App. 73a, ¶ 7.)

3. Pursuant to his Distributorship Agreement, Plaintiff agreed to arbitrate any and all claims against Petitioners. That Distributorship Agreement states, in relevant part:

> **12.1 Arbitration.** Except as expressly provided in Section 12.5 of this Agreement, all breaches, claims, causes of action, demands, disputes and controversies (collectively referred to as "breaches" or "breach") between the Distributor, including [related parties], and

[1] For ease of reference, these two Agreements are referred to in the singular ("Distributorship Agreement") as their relevant provisions do not differ.

> Matco, including [related parties], whether styled as an individual claim, class action claim, private attorney general claim or otherwise, arising from or related to this Agreement, the offer or sale of the franchise and distribution rights contained in this Agreement, the relationship of Matco and Distributor, or Distributor's operation of the Distributorship, including any allegations of fraud, misrepresentation, and violation of any federal, state or local law or regulation, will be determined exclusively by binding arbitration on an individual, non-class basis only in accordance with the Rules and Regulations of the American Arbitration Association ("Arbitration").

(App. 116a, 171a.)

4. In addition, Plaintiff agreed any arbitration would take place in the State of Ohio:

> **12.10 <u>Venue and Jurisdiction</u>.** 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 [related parties]) and the Distributor (including [related parties]) 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 . . ."

(App. 122a, 177a.)

5. Plaintiff terminated his last-effective Distributorship Agreement in December 2018. (App. 73a, ¶¶ 4-5.) In January 2019, he filed the present putative class action in the Northern District of California alleging Petitioners had misclassified him as an "independent contractor." (App. 4a.)

6. On February 19, 2019, Petitioners moved to enforce the Ohio forum-selection clause in the Distributorship Agreement by filing a motion to dismiss, or, to transfer, pursuant to the doctrine of *forum non conveniens*. (App. 36a-70a.) Citing *Atl. Marine Constr. Co. v. Dist. Ct.*, 571 U.S. 49 (2013), Petitioners explained Plaintiff could not carry his burden to show that the mandatory forum-selection clause was invalid because: first, he did not allege, and could not prove, that the forum-selection clause resulted from fraud or overreaching (App. 56a-57a); second, he would receive his day in court if the forum-selection clause were enforced (App. 57a-58a); and third, enforcement of the forum-selection clause would not contravene the public policy reflected in California Business and Professions Code section 20040.5 ("Section 20040.5"), which purports to void non-California forum-selection clauses in franchise agreements, because the FAA preempts that provision. (App. 58a-60a, citing *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 892 (9th Cir. 2001)).

7. Accordingly, because the forum-selection clause was valid, Petitioners argued that, pursuant to *Atl. Marine*, Plaintiff's choice of forum was to be afforded

no weight. That meant that the District Court could properly consider only the so-called "public interest" factors in deciding whether to enforce the forum-selection clause (*i.e.* administrative difficulties resulting from court congestion; the local interest in the matter; and familiarity with the applicable law)—all of which were either neutral or favored litigation in Ohio. (App. 67a-69a.)

8. In his opposition, Plaintiff did not contest that the FAA preempts Section 20040.5. (App. 207a-210a.) Nor did he produce a shred of evidence that the forum-selection clause in the Distributorship Agreement had resulted from fraud or overreaching. (App. 199a-200a, n.1.)

9. Instead, Plaintiff attacked the enforceability of the arbitration provision which contained the forum-selection clause. As relevant here, he argued that the entire arbitration provision was invalid under *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), which held that pre-dispute waivers of claims under California's Private Attorneys General Act, Cal. Lab. Code § 2698 *et seq.* ("PAGA"), are unenforceable.[2] (App. 207a-210a.)

10. Based on the premise that the entire arbitration provision was invalid, Plaintiff contended that the forum-selection clause contained within it was

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[2] Section 12.7 of the Distributorship Agreement states, "THE DISTRIBUTOR EXPRESSLY WAIVES ANY RIGHT TO ARBITRATE OR LITIGATE . . . IN A PRIVATE ATTORNEY GENERAL CAPACITY." (App. 120a, 175a.) Section 12.12 then states that "if the provision prohibiting . . . 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 any such breaches." (App. 123a, 178a.)

necessarily invalid as well. And based on that latter premise, Plaintiff argued that the private interest factors were therefore relevant and compelled denial of the motion to dismiss or transfer. (App. 225a-227a.)

11. In their reply, Petitioners demonstrated that Plaintiff had provided no justification for departing from the general rule that a valid forum-selection clause must be enforced unless, as was not the case here, the "public interest" factors compelled otherwise:

--first, Plaintiff had not carried his burden of showing that the forum-selection clause *itself* was invalid because he had not contested that the FAA applied and preempted Section 20040.5 (App. 239a); and

--second, as reflected in numerous district court decisions,[3] the supposed invalidity of the underlying arbitration provision was of no moment because the proper question on a *forum non conveniens* motion is whether the forum-selection clause *itself* is enforceable, not whether the underlying agreement is enforceable. (App. 240a-241a.)

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[3] *Washington v. Cashforiphones.com*, No. 15-cv-0627-JAH (JMA), 2016 U.S. Dist. LEXIS 192253, *12-13 (S.D. Cal. Jun. 1, 2016) ("When the issue before a district court is limited to venue[,] the court need not address the validity of an entire contract."); *SeeComm Network Servs. Corp. v. Colt Telecomm.*, No. C 04-1283, 2004 U.S. Dist. LEXIS 18049, *12-13 (N.D. Cal. Sept. 3, 2004) ("To hold that the Forum-Selection Clause is invalid because the contract as a whole is invalid…requires the Court to assess the merits of the case. [This] analysis is clearly backwards. The question before the Court is the validity of the Forum-Selection Clause, not the validity of the contract as a whole."); *Cream v. N. Leasing Sys., Inc.*, No. 15-cv-1208, 2015 U.S. Dist. LEXIS 100537, *18-19 (N.D. Cal. Jul. 31, 2015) (same); *Lizdale v. Advanced Planning Servs., Inc.*, No. 10-cv-0834, 2011 U.S. Dist. LEXIS 31277, *15-16 (S.D. Cal. Mar. 25, 2011).

12. The District Court denied Petitioners' motion. (App. 23a.) At the outset, it acknowledged that Petitioners were "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 the contract as a whole, when ruling on a motion to dismiss or transfer." (App. 10a-11a.)

13. Nonetheless, and citing no authority, it decided to "make a threshold determination on the validity of the arbitration provision to determine if it preempts Section 20040.5." (App. 11a.) Such a determination was appropriate, it reasoned, "because the only reason that a directly on point state statute does not invalidate the [Distributorship] Agreement's forum selection clause is the preemptive effect of an allegedly invalid arbitration provision." (App. 11a.)

14. Further, in its view, "[Petitioners'] 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," but establish only that "generally it is inappropriate to analyze the validity of the contract as a whole when determining the applicability of a forum selection clause." (App. 11a-12a.)

15. The District Court proceeded to find that the arbitration provision was void under Ninth Circuit and California law precluding the enforcement of predispute waivers of PAGA claims, and assumed the outcome would be no different under Ohio law. (App. 13a-16a (citing *Sakkab* and *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. 2014)).)

16. Based on its conclusion that the arbitration provision was void, the District Court held that "the FAA does not preempt Cal. Bus. & Prof. Code

§ 20040.5" and that "the forum selection clause has no effect." (App. 16a.) It then analyzed *both* the private interest factors and public interest factors relating to the enforcement of the forum-selection clause, determined that they favored Plaintiff, and denied Petitioners' motion to dismiss or transfer the case. (App. 20a-24a.)

17. On May 31, 2019, Petitioners filed a timely Petition for Writ of Mandamus in the Ninth Circuit, asking it to vacate the District Court's Order, and to remand with instructions to either dismiss or transfer the case to the Northern District of Ohio. (App. 264a-299a.)

18. In their Petition, Petitioners stressed that the First, Seventh and Eleventh Circuits had all previously held that the validity of a forum-selection clause does not depend upon the validity of the underlying contract containing the clause. (App. 288a (citing *Autoridad de Energia ElElectrica v. Vitol S.A.*, 859 F.3d 140, 147-148 (1st Cir. 2017); *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006); *Rucker v. Oasis Legal Fin., LLC*, 632 F.3d 1231, 1237-38 (11th Cir. 2011).) Petitioners accordingly argued the District Court had committed plain error in denying transfer based on the purported invalidity of the underlying arbitration provision containing the forum-selection clause. (App. 289a-292a.)

19. On June 24, 2019, a Ninth Circuit motion panel found that the Petition raised issues warranting an answer, directed Plaintiff to file an answer, and stayed the trial court proceedings. (App. 25a-26a.)

20. Plaintiff filed his answer on July 11, 2019. He cited no authorities contrary to the unanimous view of the First, Seventh and Eleventh Circuits that the

validity of the underlying contract has no bearing on the validity of a forum-selection clause. (App. 302a-330a.)

21. After Petitioners filed their reply, a merits panel issued a summary disposition on October 25, 2019 denying the Petition. (App. 1a-3a.) The panel held:

> The district court did not err—much less clearly so—in considering the validity of the franchise agreement's arbitration provision in the course of deciding Matco's motion. To the contrary, the district court followed binding Ninth Circuit precedent in concluding: (i) [Petitioners] and Fleming did not agree to arbitrate their dispute under the plain terms of their contract, *see Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 439 (9th Cir. 2015); (ii) absent a valid arbitration provision, the Federal Arbitration Act, 9 U.S.C. §§ 1-307, does not preempt section 20040.5, *see Bradley v. Harris Research, Inc.*, 275 F.3d 884, 892 (9th Cir. 2001); and (iii) applying section 20040.5, the forum-selection clause here is unenforceable because it would require Fleming, a California franchisee, to litigate in a non-California venue, *see Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000).

(App. 3a.) The Ninth Circuit never addressed why, contrary to the unanimous view of its Sister Circuits, it was proper to assess the validity of the underlying contract in determining the enforceability of its forum-selection clause.

22. Petitioners filed a Petition for Rehearing En Banc on November 8, 2019, which the Ninth Circuit denied on January 3, 2020. (App. 27a.)

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* in order to resolve an irreconcilable split between the Ninth Circuit on the one hand, and the First, Seventh and Eleventh Circuits on the other. It is unequivocal, black letter law, within the latter Circuits that district courts may not assess the validity of the contract containing a forum-selection clause when a party seeks to enforce the forum-selection clause itself. The Ninth Circuit, however, ruled here that the District Court properly deviated from this rule because the forum-selection clause in question appeared within an arbitration agreement. These holdings are diametrically opposed, and the rift between the Circuits is consequential. Left unresolved, the split ensures parties will engage in forum shopping aimed at securing collateral rulings on the merits of issues extraneous to the enforceability of a forum-selection clause—such as here, where the arbitration provision in Plaintiff's Distributorship Agreement was deemed void despite the fact that Petitioners did not seek to enforce it.

I. This Court's Jurisprudence Strongly Suggests, But Does Not Authoritatively Determine, That The Validity Of The Underlying Contract Has No Bearing On Whether A Forum-Selection Clause Is Enforceable.

This Court has made clear that "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases." *Atl. Marine Constr. Co.*, 571 U.S. at 60 (internal quotation omitted). As it explained:

> When parties have contracted in advance to litigate disputes in a particular forum, courts

> should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause . . . may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, "the interest of justice" is served by holding parties to their bargain.

Id. at 66.

To that end, this Court's precedent sets forth a multi-step process to determine whether a forum-selection clause is enforceable in the face of a plaintiff's objection.

First, "the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." *Id.* at 63. To overcome the presumption that a forum-selection clause is valid, a plaintiff must show that: (a) "enforcement [of the clause] would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching"; (b) "trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court; or (c) "enforcement [of the forum-selection clause] would contravene a strong public policy of the forum in which the suit is brought." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 18 (1972). *See also Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004) (adopting the *Bremen* factors).

Second, if the forum-selection clause withstands scrutiny under *Bremen* and is adjudged to be valid, "a district court may consider arguments about public interest factors only" when deciding whether enforcement of the clause would promote the interests of

justice. *Atl. Marine Constr. Co.*, 571 U.S. at 63-64. This is so because the plaintiff "waive[d] the right to challenge the preselected forum as inconvenient or less convenient." *Id.* at 64.

The public interest factors district courts may consider are "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 64 n.6. With that said, public interest factors "will rarely defeat a transfer motion, [and] the practical result is that forum-selection clauses should control except in unusual cases." *Id.* at 64.

This Court's jurisprudence accordingly makes clear that forum-selection clauses are presumed valid, and that the presumption of validity may only be overcome for one of several enumerated reasons. *See The Bremen*, 407 U.S. at 15, 18. Moreover, if a plaintiff fails to carry his or her burden of showing that one of the *Bremen* factors operates to invalidate a forum-selection clause, then *Atl. Marine* requires district courts to enforce the clause in all but "unusual cases." *Atl. Marine Constr. Co.*, 571 U.S. at 63-64.

In sum, neither *The Bremen* nor *Atl. Marine* contemplate that the validity of the underlying contract should be litigated before the validity of a forum-selection clause contained within it. However, this Court has not explicitly addressed the precise question presented here: whether it is permissible to create exceptions to the general rule that courts should not consider the validity of the contract containing a forum-selection clause, based upon the subject matter of the contract.

As explained below, this question divides the Circuit courts and clarity from this Court is accordingly much needed.

II. The Ninth Circuit's Ruling, By Making The Enforceability Of A Forum-Selection Clause Dependent On The Validity Of The Underlying Contract, Conflicts With The Unanimous Views Of Its Sister Circuits.

The First, Seventh and Eleventh Circuits agree: the validity of a forum-selection clause is not dependent upon the validity of the contract containing it. Until the present case, no Circuit court had even suggested to the contrary.

--**The Seventh Circuit.** The Seventh Circuit has squarely held that courts should *not* first analyze whether a contract is valid before enforcing its forum-selection clause. *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759 (7th Cir. 2006). In *Muzumdar*, a party to multiple distributorship contracts sued the other alleging it had engaged in an unlawful pyramid scheme under federal and state law. The district court dismissed without prejudice pursuant to the Texas forum-selection clauses in the distributorship contracts. *Id.* at 760-761.

On appeal, the Seventh Circuit rejected plaintiff's contention that the forum-selection clauses were invalid because the underlying distributorship contracts were purportedly "void and unenforceable" because "they set out a pyramid scheme." *Id.* at 762. As it explained, it would be backwards for a court not selected by the parties to resolve the merits in deciding whether to enforce the parties' forum-selection clause:

> The logical conclusion of [plaintiffs'] argument would be that the federal courts in Illinois

> would first have to determine whether the contracts were void before they could decide whether, based on the forum selection clauses, they should be considering the cases at all. An absurdity would arise if the courts in Illinois determined the contracts were not void and that therefore, based on valid forum selection clauses, the cases should be sent to Texas—for what? A determination as to whether the contracts are valid?

Id. Applying the *Bremen* factors, the Seventh Circuit affirmed the transfer order because plaintiff had introduced no evidence that the forum-selection clauses had been secured by fraud, or that their enforcement would be "unreasonable or unjust." *Id.*

--**The First Circuit.** The First Circuit likewise rejected as "absurd" the position that was endorsed here by the Ninth Circuit. *Autoridad de Energia ElElectrica v. Vitol S.A.*, 859 F.3d 140 (1st Cir. 2017). There, the parties had entered into oil delivery contracts containing a Puerto Rico state court forum-selection clause. *Id.* at 142-143. The plaintiff brought suit in that court, seeking a declaration that the contracts were void because the other party had allegedly made illegal payments to Iraqi officials.

After defendants removed, the district court issued a remand order, concluding the contractual forum-selection clauses in the contracts precluded removal. *Id.* at 145. The First Circuit affirmed, rejecting plaintiff's contention that enforcement of the forum-selection clauses would be unreasonable because defendant had taken "seemingly inconsistent positions by seeking enforcement of the forum-selection clauses while arguing the contracts containing those clauses are void ab initio." *Id.* at 146-147.

Quoting *Muzumdar*, the First Circuit highlighted "the absurdity of [plaintiff's] position" that, in a lawsuit challenging the validity of the underlying contract, the court asked to rule on the validity of a forum-selection clause should first adjudicate the validity of the underlying contract. *See id.* at 147.

In so ruling, the First Circuit relied on *Buckeye Check Cashing, Inc. v. Cardegena*, 546 U.S. 440 (2006), which held that a challenge to the validity of an arbitration provision must be resolved by the arbitrator, whether or not the underlying contract was void. Similarly, it held "the forum selection clauses are enforceable even if [the appellee] argues that the contracts are void." *Autoridad,* 859 F.3d at 147-148.

--**The Eleventh Circuit.** In *Rucker v. Oasis Legal Fin., LLC*, 632 F.3d 1231 (11th Cir. 2011), plaintiffs brought suit outside the contractually designated forum seeking a declaration that their "purchase agreements" were void as illegal gambling contracts. *Id.* at 1234-35. The Eleventh Circuit reversed the denial of defendant's motion to dismiss, concluding plaintiffs had not established that the forum-selection clause was unenforceable under *Bremen*.

Of particular relevance, the Eleventh Circuit rejected plaintiffs' contention that the forum-selection clause was "void" because it "is included within" "purchase agreements [that] are void as illegal gambling contracts under Alabama law." *Id.* at 1237-38. As it explained, "[a] forum selection clause is viewed as a separate contract that is severable from the contract in which it is contained." *Id.*

Thus, the Eleventh Circuit squarely held that the purported illegality of the underlying purchase agreements had no bearing on the enforceability of the

forum-selection clause under *Bremen*. *Id.* (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974) (forum-selection clause in fraudulent contract enforceable if clause itself not the product of fraud); *Marra v. Papandreou*, 216 F.3d 1119, 1123 (D.C. Cir. 2010) (forum-selection clause enforceable notwithstanding revocation of underlying contract)).

--**The Ninth Circuit's Conflicting View.** The District Court here correctly recognized, as reflected in the foregoing cases, that "typically[,] 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." (App. 10a-11a.) Nonetheless, it departed from this well-established rule because, unlike the supposed "typical situation," "the only reason that the forum selection clause would not be invalidated [here was] the preemptive effect of the Distribution Agreement's arbitration provision." (App. 11a.) Believing the enforceability of the forum-selection clause "hinge[d] on the preemptive effect of the arbitration provision," it declined to "turn a blind eye toward questions of its validity." (App. 11a.)

The Ninth Circuit then affirmed, holding that the "district court did not err—much less clearly so—in considering the validity of the franchise agreement's arbitration provision." (App. 3a.)

Thus, the ruling of the Ninth Circuit here flatly conflicts with the prior decisions of the First, Seventh and Eleventh Circuits. Those Circuits, consistent with this Court's decision in *Schreck,* view a forum-selection clause as separate from the underlying agreement in which it is contained. And for that reason, those Circuits do not examine the supposed invalidity of the underlying contract in adjudicating the enforceability of the forum-selection clause.

Here, in sharp contrast, the Ninth Circuit strayed from the "typical" approach solely because the forum-selection clause appeared in an arbitration provision. Rather than viewing the forum-selection clause as distinct from the arbitration provision in which it is contained, it held that the forum-selection clause was unenforceable because the underlying agreement was supposedly invalid. (App. 3a.)

This difference in approach is not merely theoretical, but case-dispositive. Had the Ninth Circuit followed the "typical" approach of "not consider[ing] other parts of the contract, or the validity of [the] contract as a whole," it is unquestionable that the FAA would have preempted the application of Section 20040.5 under that court's precedent. (App. 10a, n.2 (*Bradley* remains binding precedent in the Ninth Circuit).) And if Section 20040.5 were preempted, there would be no basis for finding the forum-selection clause invalid.

The "typical" approach disavowed by the District Court and the Ninth Circuit is the correct one, and, the one consistent with this Court's precedent. As explained next, this Court should grant *certiorari* and resolve this mature Circuit conflict by reversing the decision of the Ninth Circuit.

III. Left Unresolved, The Circuit Split Will Deprive Parties Of Their Substantive Rights And Encourage Forum Shopping.

The conflict between the Circuits could not be more stark. The approach sanctioned by the Ninth Circuit is precisely the one deemed "absurd" by the First Circuit in *Autoridad* and the Seventh Circuit in *Muzumdar*, and rejected by the Eleventh Circuit in *Rucker*. Because the issue is squarely presented on

this record and result-dispositive, this case provides an ideal vehicle for this Court to consider and resolve this Circuit split, which it now should do in order to promote clarity, discourage forum shopping, and protect important substantive rights.

A. The Circuit Split Ensures The Merits Of Cases Will Be Determined Based Upon The Forum In Which They Are Filed.

Until resolved, the Circuit split addressed herein would not merely impact the disposition of *forum non conveniens* motions in the district courts, it would also deprive litigants of their contractual and statutory rights.

The First, Seventh and Eleventh Circuits, in *Autoridad, Muzumdar* and *Rucker*, respectively, all recognize that adjudicating the validity of the contract containing a forum-selection clause would, in many cases, operate as a ruling on the ultimate merits of the litigation. This is obviously troublesome where, as here, the original court denies the transfer motion—in that instance, a merits determination has been made by a court other than the one contractually selected by the parties.

But it is equally troublesome even if the original court grants the transfer motion. As the Seventh Circuit noted in *Muzumdar*, where the merits turned on the validity of purportedly illegal contracts, had the district court "determined the contracts were not void and that therefore, based on valid forum selection clauses, the cases should be" transferred to Texas, "[a]n absurdity would arise"—the cases would have arrived in Texas with their merits pre-determined. *See Muzumdar*, 438 F.3d at 762. Again, the wrong

court would have effectively decided the matters, contrary to the parties' contractual preference.

The regime endorsed by the Ninth Circuit not only impairs contractual rights, it also impairs the parties' statutory rights in cases like the present one. Had the District Court deemed the arbitration provision in Plaintiff's Distributorship Agreement valid and the forum-selection clause enforceable, the case would have been transferred to Ohio—where Petitioners would have moved the court to order Plaintiff to arbitrate his claims in Ohio. If that court were to deny that motion, Petitioners would have an absolute statutory right to take an immediate appeal. *See* 9 U.S.C. § 16(a)(1)(B).

In contrast, however, an order denying a *forum non conveniens* motion is not immediately appealable. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988). As a consequence, even though the District Court's order forecloses arbitration under Plaintiff's Distributorship Agreement by deeming the arbitration provision void, Petitioners cannot invoke appellate rights available to them under the FAA because they did not move to compel arbitration.[4]

Petitioners respectfully submit that the Ninth Circuit's ruling thus interferes with arbitration by effectively depriving parties in Petitioners' position of their statutory rights under the FAA and this Court's precedents favoring arbitration. *See AT&T Mobility*

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[4] Petitioners did not also file a petition to compel arbitration because the forum California court could not have ordered the parties to arbitrate in Ohio. *Textile Unlimited, Inc. v. A..BMH and Co., Inc.*, 240 F.3d 781, 785 (9th Cir. 2001) (FAA confines arbitration to district in which petition is filed).

LLC v. Concepcion, 563 U.S. 333, 346-347 (2011) (striking down law that interfered with arbitration).

In sum, regardless of which approach is correct, the fact remains that the Circuit courts are not aligned on a uniform approach. The resulting uncertainty is intolerable because it undermines the clarity regarding the enforceability of forum-selection clauses that had been established by this Court's decisions in *Bremen* and *Atl. Marine*, and in doing so frustrates contractual and statutory rights. For this reason alone, this Court should grant *certiorari* and authoritatively resolve, whether, depending upon the subject matter of the contract in question, courts may depart from the general rule that the validity of a forum-selection clause is not dependent on the validity of the underlying contract.

B. The Circuit Split Promotes Forum Shopping.

The lack of uniformity among the Circuits, if left unresolved, also would encourage unnecessary forum shopping. Plaintiffs would be incentivized to file suit in Ninth Circuit district courts in order to avail themselves of a full-scale analysis of the underlying contract which would not be available in another forum, in an effort to circumvent the forum-selection clauses to which they agreed.

The likelihood of this scenario is particularly enhanced where an arbitration agreement contains a forum-selection clause. A defendant seeking to compel arbitration under such circumstances would face a Catch-22: either a) move to enforce the forum-selection clause as a precedent to moving to compel arbitration in the contractually agreed upon forum and assume the risk that the court will void the arbitration

agreement without any prospect of appellate recourse under the FAA, or b) move to compel arbitration in the plaintiff's chosen forum, in contravention of the forum-selection clause, to ensure the right to appeal an order denying the motion is protected.[5]

Regardless of whether the Ninth Circuit's minority view is correct, adoption of a uniform rule applicable to all Circuits is essential to deter forum shopping. For this reason as well, this Court should grant *certiorari*.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioners' petition for a writ of *certiorari*.

Respectfully submitted,

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March 26, 2020

[5] As previously noted, a district court may only order arbitration within its district. *Textile Unlimited*, 240 F.3d at 785.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: October 25, 2019]

No. 19-71352
D.C. No. 3:19-cv-00463-WHO

In re: MATCO TOOLS CORPORATION; ET AL.,

MATCO TOOLS CORPORATION,
a Delaware Corporation; et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO,

Respondent,

JOHN FLEMING, On Behalf of Himself and
All Others Similarly Situated,

Real Party in Interest.

Petition for a Writ of Mandamus

Submitted October 23, 2019[**]

San Francisco, California

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

MEMORANDUM[*]

Before: THOMAS, Chief Judge, and HAWKINS and BADE, Circuit Judges.

Matco Tools Corporation, NMTC, Inc., and Fortive Corporation (collectively "Matco") seek a writ of mandamus compelling the district court to dismiss Fleming's action or transfer it to Ohio under a forum-selection clause. Because the facts are known to the parties, we need not recount them here. We have jurisdiction pursuant to 28 U.S.C. § 1651 and deny Matco's petition.

Matco has failed to show that it is entitled to the "drastic and extraordinary remedy" of mandamus. *In re Pangang Grp. Co., LTD.*, 901 F.3d 1046, 1054 (9th Cir. 2018) (internal citation and quotations omitted). Whether a writ of mandamus should be granted is determined case by case, weighing the factors outlined in *Bauman v. U.S. District Court*, 557 F.2d 650 (9th Cir. 1977): (1) the party seeking the writ has no other means, such as a direct appeal, of attaining the desired relief; (2) the petitioner will be damaged in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the order raises new and important problems, or issues of law of first impression. *Id.* at 654-55.

We may not disturb the district court's order absent "clear error"—a "significantly deferential" standard of review. *In re United States*, 884 F.3d 830, 836 (9th Cir. 2018) (internal citation and quotations omitted); *see also In re Pangang Grp.*, 901 F.3d at 1060 (denying

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

mandamus relief upon concluding that order was not clearly erroneous).

The district court did not err—much less clearly so—in considering the validity of the franchise agreement's arbitration provision in the course of deciding Matco's motion. To the contrary, the district court followed binding Ninth Circuit precedent in concluding: (i) Matco and Fleming did not agree to arbitrate their dispute under the plain terms of their contract, *see Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 439 (9th Cir. 2015); (ii) absent a valid arbitration provision, the Federal Arbitration Act, 9 U.S.C. § 1-307, does not preempt section 20040.5, *see Bradley v. Harris Research, Inc.*, 275 F.3d 884, 892 (9th Cir. 2001); and (iii) applying section 20040.5, the forum-selection clause here is unenforceable because it would require Fleming, a California franchisee, to litigate in a non-California venue, *see Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000).[1]

Accordingly, the petition for a writ of mandamus is DENIED.

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[1] We decline to consider the purported error that Matco raises only in a footnote of its petition. *See Estate of Saunders v. Comm'r*, 745 F.3d 953, 962 n.8 (9th Cir. 2014).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed May 3, 2019]

Case No. 19-cv-00463-WHO

JOHN FLEMING,

Plaintiff,

v.

MATCO TOOLS CORPORATION, et al.,

Defendants.

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

Re: Dkt. Nos. 16, 25

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 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

[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).

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.

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

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 over-reaching." *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.*

"[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 (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. 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.

"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 (internal quotation marks omitted). Plaintiff bears the burden of showing these exceptional circumstances that make transfer inappropriate. *Id.* at 64. 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; *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

The success of Matco's motion to dismiss or transfer this case depends on 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 (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 (1996) and *Perry v. Thomas*, 482 U.S. 483 (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; 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,

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[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 (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)

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 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 (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); *See Comm 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 ARBITATION 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 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 potion 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.

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 (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). 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 waiving the right to bring "representative" PAGA claims—claims seeking penalties for Labor Code violations affecting other employees—as well. *Id.* (internal citations omitted).

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 (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]

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[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 agree-

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 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

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ments 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.

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 (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 (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. The court had to resolve two issues. First, was there was a reasonable basis for a choice of law provision in a franchise agreement? *Id.* at 511-12. Second, was the provision contrary to a fundamental public policy of California? *Id.* at 511-12.

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. 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. 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. Here, the franchisee is better protected by California laws.

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)

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

"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 (*quoting Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, n.6 (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.

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 Schultz 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

"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 unre-

[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.

lated 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). 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.

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.

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.

Dated: May 3, 2019

/s/ William H. Orrick
William H. Orrick
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 24, 2019]

No. 19-71352
D.C. No. 3:19-cv-00463-WHO
Northern District of California,
San Francisco

In Re: MATCO TOOLS CORPORATION; et al.

MATCO TOOLS CORPORATION,
a Delaware corporation; et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO,

Respondent,

JOHN FLEMING, On Behalf of Himself and
All Others Similarly Situated,

Real Party in Interest.

ORDER

Before: CLIFTON, N.R. SMITH, and FRIEDLAND, Circuit Judges.

This petition for a writ of mandamus raises issues that warrant an answer. *See* Fed. R. App. P. 21(b).

Accordingly, within 14 days after the date of this order, the real party in interest shall file an answer.

The district court, within 14 days after the date of this order, may address the petition if it so desires. The district court may elect to file an answer with this court or to issue an order and serve a copy on this court. Petitioners may file a reply within 5 days after service of the answer(s). The petition, answer(s), and any reply shall be referred to the next available merits panel.

Petitioners' motion to stay district court proceedings pending appeal (Docket Entry No. 2) is granted. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

The Clerk shall serve this order on the district court and District Judge William H. Orrick.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: January 3, 2020]

No. 19-71352
D.C. No. 3:19-cv-00463-WHO
Northern District of California,
San Francisco

In Re: MATCO TOOLS CORPORATION; ET AL.

MATCO TOOLS CORPORATION,
a Delaware corporation; et al.,
Petitioners,
v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO,
Respondent,

JOHN FLEMING, On Behalf of Himself and
All Others Similarly Situated,
Real Party in Interest.

ORDER

Before: THOMAS, Chief Judge, and HAWKINS and BADE, Circuit Judges.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing en banc is denied.

APPENDIX E

§16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

APPENDIX F

CALIFORNIA LEGISLATIVE
Business and Professions Code – BPC
Division 8. Special Business Regulations
[18400 - 22949.51]
(Division 8 added by Stats. 1941, Ch. 44.)
Chapter 5.5. Franchise Relations [20000 - 20043]
(Chapter 5.5 added by Stats. 1980, Ch. 1355, Sec. 1.)

ARTICLE 8. Venue of Disputes [20040.5- 20040.5.]
(Article 8 added by Stats. 1994, Ch. 1277, Sec. 1.)

20040.5. A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state.

(Added by Stats. 1994, Ch. 1277, Sec. 1. Effective January 1, 1995.)

APPENDIX G

STATE OF CALIFORNIA

Labor Code, Section 2698

Section 2698. This part shall be known and may be cited as the Labor Code Private Attorneys General Act of 2004.

(Added by Stats. 2003, Ch. 906, Sec. 2. Effective January 1, 2004.)

APPENDIX H

STATE OF CALIFORNIA

Labor Code, Section 2699

Section 2699. (a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

(b) For purposes of this part, "person" has the same meaning as defined in Section 18.

(c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

(d) For purposes of this part, "cure" means that the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the underlying statutes as specified in the notice required by this part, and any aggrieved employee is made whole. A violation of paragraph (6) or (8) of subdivision (a) of Section 226 shall only be considered cured upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice sent pursuant to paragraph (1) of subdivision (c) of Section 2699.3.

(e) (1) For purposes of this part, whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.

(2) In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars ($500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

(3) If the alleged violation is a failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, there shall be no civil penalty.

(g) (1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

(2) No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.

(h) No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself or others or initiates a proceeding pursuant to Section 98.3.

(i) Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of

labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.

(j) Civil penalties recovered under paragraph (1) of subdivision (f) shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

(k) Nothing contained in this part is intended to alter or otherwise affect the exclusive remedy provided by the workers' compensation provisions of this code for liability against an employer for the compensation for any injury to or death of an employee arising out of and in the course of employment.

(l) (1) For cases filed on or after July 1, 2016, the aggrieved employee or representative shall, within 10 days following commencement of a civil action pursuant to this part, provide the Labor and Workforce Development Agency with a file-stamped copy of the complaint that includes the case number assigned by the court.

(2) The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.

(3) A copy of the superior court's judgment in any civil action filed pursuant to this part and any other

order in that action that either provides for or denies an award of civil penalties under this code shall be submitted to the agency within 10 days after entry of the judgment or order.

(4) Items required to be submitted to the Labor and Workforce Development Agency under this subdivision or to the Division of Occupational Safety and Health pursuant to paragraph (4) of subdivision (b) of Section 2699.3, shall be transmitted online through the same system established for the filing of notices and requests under subdivisions (a) and (c) of Section 2699.3.

(m) This section shall not apply to the recovery of administrative and civil penalties in connection with the workers' compensation law as contained in Division 1 (commencing with Section 50) and Division 4 (commencing with Section 3200), including, but not limited to, Sections 129.5 and 132a.

(n) The agency or any of its departments, divisions, commissions, boards, or agencies may promulgate regulations to implement the provisions of this part.

(Amended by Stats. 2016, Ch. 31, Sec. 189. (SB 836) Effective June 27, 2016.)

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:19-cv-00463-WHO

JOHN FLEMING, on behalf of himself and all others similarly situated,

Plaintiff,

v.

MATCO TOOLS CORPORATION, a Delaware corporation; NMTC, INC. d/b/a MATCO TOOLS, a Delaware corporation, FORTIVE CORPORATION, a Delaware corporation; and DOES 1-20, inclusive,

Defendant.

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TRANSFER VENUE TO THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO [*FORUM NON CONVENIENS*]

Date: April 3, 2019
Time: 2:00 p.m.
Dept: Courtroom 2, 17th Floor
Judge: Hon. William Orrick
Complaint Filed: January 25, 2019

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Attorneys for Defendant
Matco Tools Corporation, NMTC, Inc.
and Fortive Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL STATUTES

STATE STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

NOTICE OF MOTION AND MOTION

NOTICE IS HEREBY GIVEN that on April 3, 2019, at 2:00 p.m. in Courtroom 2, 17th Floor of this Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants MATCO TOOLS CORPORATION, NMTC, INC. and FORTIVE CORPORATION ("Defendants") will and do hereby move the Court for an order dismissing Plaintiff's Complaint, or, alternatively, transferring this matter to the U.S. District Court for the Northern District of Ohio, pursuant to the doctrine of *forum non conveniens*. This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Mike Swanson and the exhibits thereto, the Request for Judicial Notice, the accompanying Proposed Order, all other papers and pleadings on file in this action, and on any further evidence that may be presented at the hearing of this matter.

RELIEF SOUGHT

Plaintiff John Fleming ("Plaintiff") entered into two distributorship agreements with Defendant NMTC, Inc. which contain binding provisions requiring arbitration of his claims against Defendants in Ohio. Because this Court cannot order the parties to arbitrate in Ohio, Defendants respectfully request an order from this Court, pursuant to the doctrine of *forum non conveniens*, dismissing Plaintiff's Complaint, or, in the alternative, transferring this matter to the U.S. District Court for the Northern District of Ohio, so that Defendants may file a petition to compel arbitration in Ohio.

DATED: February 19, 2019

Respectfully submitted,

SEYFARTH SHAW LLP

By: /s/ Eric M. Lloyd

Christian J. Rowley
Matthew A. Goodin
Eric M. Lloyd

Attorneys for Defendant
MATCO TOOLS CORPORATION, NMTC, INC. and FORTIVE CORPORATION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I. INTRODUCTION

This motion is straightforward. Plaintiff agreed to arbitrate any and all claims against Defendants arising from his franchise agreements, or, his relationship with Defendants, in the State of Ohio.[1] Neverthe-

[1] Plaintiff's Distributor Agreements specify that all arbitrations or court proceedings must be venued "in Summit or Cuyahoga County, Ohio." (Declaration of Mike Swanson ("Swanson Dec.") ¶ 4, Ex. 1 at § 12.10; *id.* ¶ 5, Ex. 3 at § 12.10.) Accordingly, should the Court decline to dismiss this matter and instead determine that transfer is warranted, the Northern District of Ohio, which has jurisdiction over Summit County and Cuyahoga County, is the appropriate forum for this diversity action. *See Simonoff v. Expedia, Inc.*, 643 F.3d 1202, 1205-07 (9th Cir. 2011) ("[W]e hold that a forum selection clause that vests 'exclusive jurisdiction and venue' in the courts 'in' a county provides venue in the state and federal courts located in that county."). *See also* United States District Court, Northern District of Ohio, Counties Served By Division, https://www.ohnd.uscourts.gov/counties-served-division (listing Summit County and Cuyahoga County).

less, in violation of his contracts, Plaintiff filed suit in this Court. Defendants seek to hold Plaintiff to the bargains he struck and intend move to compel arbitration in Ohio. However, this Court cannot order the parties to arbitrate in a forum outside of its jurisdiction. Thus, dismissal of Plaintiff's Complaint, or, alternatively, transfer of this matter to the Northern District of Ohio, pursuant to the doctrine of *forum non conveniens*, is warranted.

Motions seeking dismissal or transfer on *forum non conveniens* grounds are only denied in exceptional cases. This, however, is not an exceptional case. Plaintiff cannot carry his burden of showing that the forum-selection clause in his franchise agreements is invalid. The clause is not tainted by fraud or overreaching, and, Plaintiff will not be denied his day in court if it is upheld. Moreover, no California public policy poses an obstacle to enforcement of the clause. Finally, none of the public interest factors considered by courts in ruling on a *forum non conveniens* motion involving a mandatory forum-selection clause warrant the disruption of the parties' contractual agreement to arbitrate in Ohio. Accordingly, the Court should grant Defendants' motion.

II. THE PARTIES

A. Defendants Matco Tools Corporation, NMTC, Inc. And Fortive Corporation.

Matco Tools Corporation ("Matco"), which is headquartered in Stow, Ohio, markets high quality, durable and innovative mechanic repair tools, diagnostic equipment and toolboxes. (Swanson Dec. ¶ 3.) Matco contracts with franchisees who sell Matco's products in designated geographic areas through their "mobile

stores." (*Id.*[2]) Prior to June 3, 2016, Matco was known as NMTC Inc., d/b/a Matco Tools. (*Id.*) Defendant Fortive Corporation, which is headquartered in Everett, Washington, is the corporate parent of Matco. (*Id.*)

B. Plaintiff John Fleming.

Plaintiff entered into two separate distributorship agreements with NMTC in July 2012 and October 2013, respectively. (Swanson Dec. ¶¶ 4-5, Exs. 1, 3.) Starting in July 2012, Plaintiff operated at least one Matco distributorship in the Monterey, California area, until December 2018. (*Id.* ¶¶ 4-5, 7.) All of Plaintiff's customers and potential customers were based in California. (*Id.* ¶ 7.) In connection with the operation of his distributorships, Fleming purchased tools from NMTC (and its successor entity, Matco) which he then sold to his customers. (*Id.*)

Plaintiff alleges that Defendants misclassified him as an "independent contractor" due to their purported control over his work as a distributor. (Dkt. No. 1 ("Compl.") ¶¶ 5-6, 34, 35.) In January 2019, Plaintiff filed a putative class action lawsuit against Defendants, alleging causes of action for: 1) reimbursement of business expenses; 2) failure to pay overtime; 3) unlawful collection and receipt of earned wages; 4) failure to provide meal and rest periods; 5) failure to furnish accurate wage statements; 6) waiting time penalties; 7) violation of Business and Professions

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[2] Courts may consider declarations submitted in connection with a *forum non conveniens* motion. *See Kelso Enters., Ltd. v. M/V Wisida Frost*, 8 F. Supp. 2d 1197, 1201 (C.D. Cal. 1998) ("In reviewing a motion to dismiss based on the enforcement of a forum selection clause, the court does not need to accept the pleadings as true, and the court is permitted to consider facts outside of the pleadings.").

Code section 17200, *et seq.*; and 8) violation of the California Private Attorneys General Act. (*See generally* Compl.)

III. FACTUAL BACKGROUND

A. Plaintiff's Distributorship Agreements Require Arbitration In Ohio.

Pursuant to his Distributorship Agreements, Plaintiff agreed to arbitrate any and all claims against NMTC, Matco and Fortive.[3] Plaintiff's Distributorship Agreements state, in relevant part:

> 12.1 Arbitration. Except as expressly provided in Section 12.5 of this Agreement, all breaches, claims, causes of action, demands, disputes and controversies (collectively referred to as "breaches" or "breach") between the Distributor, including his/her Spouse, immediate family members, heirs, executors, successors, assigns, shareholders, partners or guarantors, and Matco, including its employees, agents, officers or directors and its parent, subsidiary or affiliated companies, whether styled as an individual claim, class action claim, private attorney general claim or otherwise, arising from or related to this Agreement, the offer or sale of the franchise and distribution rights contained in this

[3] Plaintiff's July 2012 Distributor Agreement was amended in October 2013 and November 2016. (Swanson Dec. ¶ 4, Ex. 2.) None of the amendments modified Section 12 of the Distributor Agreement concerning arbitration and the venue for arbitration. (*Id.*) Moreover, the July 2012 Distributor Agreement was not amended, modified or extended after December 31, 2016. (*Id.* ¶ 4.) Plaintiff terminated his October 2013 distributorship agreement in September 2015. (*Id.* ¶ 5.)

> Agreement, the relationship of Matco and Distributor, or Distributor's operation of the Distributorship, including any allegations of fraud, misrepresentation, and violation of any federal, state or local law or regulation, will be determined exclusively by binding arbitration on an individual, non-class basis only in accordance with the Rules and Regulations of the American Arbitration Association ("Arbitration").

(Swanson Dec. ¶ 4, Ex. 1 at § 12.1; *id.* ¶ 5, Ex. 3 at § 12.1.)

In addition, Plaintiff agreed to arbitrate any and all disputes against the Defendants in the State of Ohio:

> 12.10 Venue and Jurisdiction. 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 in 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.

(*Id.* ¶ 4, Ex. 1 at § 12.10; *id.* ¶ 5, Ex. 3 at § 12.10.)

Plaintiff plainly knew that his Distributorship Agreements contained provisions affecting his rights with regard to the forum for any prospective arbitration. In his Distributor Disclosure Questionnaires, which he executed on the same dates as his Distributorship Agreements, Plaintiff acknowledged that he personally reviewed the Distributorship Agreements, and, that he understood that the Agreements contained provisions regarding "required arbitration" and "designated locations or states for arbitration." (*Id.* ¶ 6, Exs. 4-5 (Responses to Questions Nos. 5-6).)

IV. LEGAL STANDARD

"The 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. Dist. Ct.*, 134 S. Ct. 568, 580 (2013). A

party may file a motion to dismiss, or, alternatively, to transfer venues, pursuant to the *forum non conveniens* doctrine as an initial response to a plaintiff's complaint. *Glob. Quality Foods, Inc. v. Van Hoekelen Greenhouses*, No. 16-cv-00920-LB, 2016 U.S. Dist. LEXIS 107121, *8-9 (N.D. Cal. Aug. 12, 2016) (converting Rule 12(b)(3) motion to motion to dismiss for *forum non conveniens* pursuant to the U.S. Supreme Court's decision in *Atl. Marine Constr. Co.*; dismissing complaint on *forum non conveniens* grounds); *Monastiero v. appMobi, Inc.*, No. C 13-05711 SI, 2014 U.S. Dist. LEXIS 67202, *4, 20-21 (N.D. Cal. May 15, 2014) (dismissing case on *forum non conveniens* grounds pursuant to motion for reconsideration following issuance of *Atl. Marine Constr. Co.* decision); *Mechanix Wear, Inc. v. Performance Fabrics, Inc.*, No. 2:16-cv-09152-ODW, 2017 U.S. Dist. LEXIS 13357, *6 (C.D. Cal. Jan. 31, 2017) (converting Rule 12(b)(3) motion to motion to dismiss for *forum non conveniens*). *See also Brady Mktg. Co. v. KAI USA, Ltd.*, No. 16-cv-02854-RS, 2016 U.S. Dist. LEXIS 115877, *3-4 (N.D. Cal. Aug. 29, 2016) ("Whether to grant a motion to dismiss or to transfer a case based on the doctrine of *forum non conveniens* lies in the sound discretion of district courts.") (internal citations omitted).

Federal law governs the interpretation of forum-selection clauses. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). Pursuant to federal law, "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases." *Atl. Marine Constr. Co.*, 134 S. Ct. at 581 (alterations in original and internal quotation omitted). As the Supreme Court explained:

> When parties have contracted in advance to litigate disputes in a particular forum, courts

> should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause . . . may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, "the interest of justice" is served by holding parties to their bargain.

Id. at 583. Thus, where, as here, "the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause." *Id.* at 581.

"In the face of a valid forum-selection clause, the plaintiff bears the burden of showing why the forum he or she selected is appropriate." *Brady Mktg. Co.*, 2016 U.S. Dist. LEXIS 115877 at *4 (citing, e.g., *Atl. Marine Constr. Co.*). To overcome the presumption that a forum-selection clause is valid, a plaintiff must show: "(1) that the inclusion of the clause in the agreement was the product of fraud or overreaching; (2) that the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; or (3) that enforcement would contravene a strong public policy of the forum in which suit is brought." *Id.* at *4-5 (citing *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1113, 1140 (9th Cir. 2004) and *Richards v. Lloyd's of London*, 135 F.3d 1289, 1294 (9th Cir. 1998) (internal punctuation omitted).)

Where a valid forum-selection clause is mandatory, "the plaintiff's choice of forum merits no weight, and he or she has waived the right to challenge the preselected forum as inconvenient or less convenient." *Atl. Marine Constr. Co.*, 134 S. Ct. at 582. Thus, in determining whether a plaintiff resisting the enforcement of a mandatory forum-selection clause has carried his or her burden, courts "should not consider the parties'

private interests because such considerations were waived by agreement to the forum selection clause." *Balducci v. Congo Ltd.*, No. 17-cv-04062-KAW, 2017 U.S. Dist. LEXIS 154523, *20 (N.D. Cal. Sept. 21, 2017) (citing *Atl. Marine Constr. Co.*). Instead, courts should consider only the following public interest factors, which will "rarely defeat" a *forum non conveniens* motion: "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." *Monastiero*, 2014 U.S. Dist. LEXIS 67202 at *11-14 (citing *Atl. Marine Constr. Co.*).

The forum-selection clause at issue is valid and enforceable and there are no extraordinary circumstances warranting the disruption of the parties' agreements. Accordingly, this case should be dismissed, or, in the alternative, transferred to the U.S. District Court for the Northern District of Ohio.

V. LEGAL ARGUMENT

A. Plaintiff Agreed To Arbitrate All Claims Alleged Against Defendants In Ohio.

1. The Forum-Selection Clause Applies To All Defendants.

Plaintiff's agreement to arbitrate his potential claims in Ohio by virtue of the forum-selection clause in his Distributorship Agreements applies to all of the Defendants. There can be no question that NTMC, which executed Plaintiff's Distributorship Agreements, is bound by the forum-selection clause. Likewise, Matco and Fortive, although non-signatories to Plaintiff's Distributorship Agreements, fall within the scope of the forum-selection clause. As noted above,

the arbitration provision (Section 12.1 of the Distributorship Agreements), which contains the forum-selection clause, applies to NTMC and "its parent, subsidiary or affiliated companies." (Swanson Dec. ¶ 4, Ex. 1 at § 12.1; *id.* ¶ 5, Ex. 3 at § 12.1.) Accordingly, as the successor entity to NTMC and the parent of its successor, respectively, Matco and Fortive have standing to enforce the forum-selection clause as third-party beneficiaries. *See Moretti v. Hertz Corp.*, No. C 13-02972 JSW, 2014 U.S. Dist. LEXIS 50660, *13 (N.D. Cal. Apr. 11, 2014) ("A third-party qualifies as a beneficiary under a contract if the parties intended to benefit the third party and the terms of the contract make that intent evident.") (quoting *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 821–22 (9th Cir. 1985).) Moreover, the forum-selection clause is enforceable by and against Matco and Fortive because "[their] alleged conduct . . . is closely related to the contractual relationship" such that they are considered "transaction participants" intended to "benefit from and be subject to" the forum-selection clause. *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 456 (9th Cir. 2007); *Manetti-Farrow, Inc.*, 858 F.2d at 514 ("[A] range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses.") (quoting *Clinton v. Janger*, 583 F.Supp. 284, 290 (N.D. Ill. 1984)). The "closely related" standard is met here given the Defendants' corporate relationships. *See in re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2017 U.S. Dist. LEXIS 140212, *176 (N.D. Cal. Aug. 30, 2017) (holding that non-party to the contract, who was a subsidiary of the signatory to the forum-selection agreement, was closely related and thus bound by the agreement).

Moreover, because Plaintiff alleges that all Defendants purportedly misclassified him as an "independent contractor," and, that "Fortive Corporation guarantees Matco Tools Corporation's obligations under the Distributorship Agreement," it follows that Matco and Fortive should be able to enforce the forum-selection clause. (Compl. ¶¶ 5-6, 12-13.) *See Zaklit v. Glob. Linguist Sols., LLC*, No. CV13-08654MMM (MANx), 2014 U.S. Dist. LEXIS 197536, *37 n.92 (C.D. Cal. Mar. 24, 2014) (finding non-signatory defendant to be so closely related to signatory such that it could enforce forum-selection provision because plaintiff alleged all defendants, whether signatories or non-signatories to forum-selection provision, were plaintiff's employer). In addition, where, as here, a non-signatory defendant seeks to enforce a forum-selection clause against a plaintiff, and, the signatory and non-signatory defendants agree that the plaintiff's relationship with the non-signatory defendant is related to the relationship between the plaintiff and the signatory defendant, courts will permit the non-signatory defendant to enforce a forum-selection clause. *See TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) (finding that it was not unjust to enforce forum-selection clause where third-party defendants agreed to jurisdiction of the designated forum).

2. All Of Plaintiff's Claims Are Covered By The Forum-Selection Clause.

Plaintiff's causes of action all clearly fall within the scope of the forum-selection clause. Indeed, the arbitration provision is all-encompassing, as it covers "all breaches, claims, causes of action, demands, disputes and controversies . . . arising from or related to this Agreement, the offer or sale of the franchise and dis-

tribution rights contained in this Agreement, the relationship of Matco and Distributor, or Distributor's operation of the Distributorship, including any allegations of fraud, misrepresentation, and violation of any federal, state or local law or regulation." (Swanson Dec. ¶ 4, Ex. 1 at § 12.10; *id.* ¶ 5, Ex. 3 at § 12.10.) The absence of any limiting or qualifying language renders each cause of action asserted by Plaintiff subject to the forum-selection clause. *Robles v. Schneider Nat'l Carriers, Inc.*, No. EDCV 16-2482 JGB (KKx), 2017 U.S. Dist. LEXIS 222314, *7 (C.D. Cal. Dec. 11, 2017) (citing *LaCross v. Knight Transp., Inc.*, 95 F. Supp. 3d 1199, 1207 (C.D. Cal. 2015) (forum-selection clause applied to plaintiff's California Labor Code claims due to its broad "arising from or in connection with" language); *Scott v. Lopez*, No. C12-01456 HRL, 2013 U.S. Dist. LEXIS 40636, *9 (N.D. Cal. Mar. 21, 2013) ("[C]lauses using the phrase 'relating to' indicate that the scope of the clause is subject to broader interpretation.").

B. Plaintiff Cannot Carry His Burden Of Showing That The Presumptively Valid Forum-Selection Clause Is Unenforceable.

Plaintiff has the burden of showing that the forum-selection clause is invalid. *Brady Mktg. Co.*, 2016 U.S. Dist. LEXIS 115877 at *4. He cannot carry this burden.

1. The Forum-Selection Clause Is Free From Fraud Or Overreaching.

A party asserting that a forum-selection clause is the product of fraud or overreaching must demonstrate that the at-issue provision itself, and not the contract as a whole, was obtained through illicit means. *Roberts v. C.R. England, Inc.*, 827 F. Supp. 2d 1078, 1086 (N.D. Cal. 2011). The parties' relative posi-

tions in terms of bargaining power are irrelevant to this analysis, because "[u]nder *Carnival Cruise*, a differential in power or education on a non-negotiated contract will not vitiate a forum-selection clause." *Murphy*, 362 F.3d at 1141 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991)); *see also Marcotte v. Micros Sys., Inc.*, No. C 14-01372 LB, 2014 U.S. Dist. LEXIS 128054, *20 (N.D. Cal. Sept. 11, 2014) ("the Ninth Circuit has rejected the argument that unequal bargaining power is a ground to reject enforcement of a forum selection clause in an employment contract" (citing *Murphy*, 362 F.3d at 1141)). Plaintiff does not allege any fraud or overreaching with regard to the forum-selection clause contained in his Distributorship Agreements, and indeed, no such evidence exists. The forum-selection clause should thus be enforced.

2. Plaintiff Will Receive His Day In Court If This Motion Is Granted.

Having agreed to commit all disputes relating to the Distributorship Agreements, or, his relationship with Defendants, to arbitration in Ohio, Plaintiff cannot now complain of being denied his day in court. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17-18 (1972) ("Whatever 'inconvenience' [Plaintiff] would suffer by being forced to litigate in the contractual forum as [he] agreed to do was clearly foreseeable at the time of contracting."). As the Supreme Court has explained, "when a plaintiff agrees by contract to bring suit only in a specified forum—presumably in exchange for other binding promises by the defendant—the plaintiff has effectively exercised its 'venue privilege' before a dispute arises" and "waive[s] the right to challenge the preselected forum as inconvenient or less convenient for [his or her self] or [his or her]

witnesses." *Atl. Marine Constr. Co.*, 134 S. Ct. at 581-82. Accordingly, expense and inconvenience are not sufficient grounds for invalidating a forum-selection clause. *Balducci*, 2017 U.S. Dist. LEXIS 154523 at *11-12 (plaintiff's assertion of increased expense and inconvenience by virtue of litigating in Colorado was "inadequate to show that litigating this case in Colorado would effectively deprive him of his day in court"). Absent a grave hardship, which, Defendants submit, Plaintiff cannot demonstrate, Plaintiff will not be deprived of his day in court—he must simply adhere to his agreement to have that day in Ohio. *Id.* (quoting *Storm v. Witt Biomedical Corp.*, No. C-95-3718 SI, 1996 U.S. Dist. LEXIS 1493 (N.D. Cal. Jan. 23, 1996) ("These difficulties are not the grave hardships that would deprive plaintiff of a meaningful day in court.")).

3. The Forum-Selection Clause Must Be Enforced Because California's Public Policy Considerations Are Superseded By Federal Preemption, The Dormant Commerce Clause And The Doctrine Of Equitable Estoppel.

Defendants are aware the Ninth Circuit has ruled that California Business and Professions Code section 20040.5 ("Section 20040.5"), which voids non-California forum-selection clauses in franchise agreements signed by California franchise businesses, is a "strong public policy." *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). Nevertheless there are three reasons why Section 20040.5 does not invalidate the forum-selection clause here. First, the Ninth Circuit has determined that Section 20040.5 is preempted

by the Federal Arbitration Act ("FAA").[4] Second, application of Section 20040.5 would violate the Dormant Commerce Clause of the U.S. Constitution. Third, Plaintiff is estopped from repudiating the forum-selection clause because his claims arise from the very same Distributorship Agreements which contain it.[5]

a. The FAA Preempts Section 20040.5.

Section 20040.5 must yield to the FAA's preemptive scope and cannot preclude enforcement of the forum-selection clause. In *Bradley v. Harris Research*, the Ninth Circuit held that Section 20040.5 is preempted by the FAA. *Bradley v. Harris Research*, 275 F.3d 884, 892 (9th Cir. 2001). The defendant in *Bradley* appealed the district court's order dismissing the plaintiff franchisees' lawsuit and ordering the parties to arbitrate in California on account of Section 20040.5, despite the franchise agreement's requirement that arbitration occur in Utah. *Id.* at 886. The Ninth Circuit reversed, holding that Section 20040.5 was preempted by the FAA, and, that the district court thus lacked the authority to order arbitration in

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[4] The FAA applies here because Plaintiff's and NMTC's/Matco's dealings "involve commerce" within the broad meaning of that phrase. *See* 9 U.S.C. § 2 (FAA applies to "written provision in. . . a contract evidencing a transaction involving commerce"); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 274 (1995) ("[W]e conclude that the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full.").

[5] California Labor Code section 925, even if applicable to a franchisor-franchisee dispute (which it is not), does not apply here because Plaintiff's Distributor Agreements were not entered into, modified or extended on or after January 1, 2017. (Swanson Dec. ¶¶ 4-5.) Cal. Lab. Code § 925.

California. *Id.* at 890, 892 (noting that Section 20040.5 "applies only to forum selection clauses and only to franchise agreements," and accordingly is preempted by the FAA because it is not generally applicable to "any contract"). This Court recently affirmed that *Bradley* remains binding precedent in the Ninth Circuit. *Bell Prods. v. Hosp. Bldg. & Equip. Co.*, No. 16-cv-04515-JSC, 2017 U.S. Dist. LEXIS 9183, *12 (N.D. Cal. Jan. 23, 2017) ("*Bradley* remains good law in the Ninth Circuit and binding precedent on the Court. The Court therefore must follow that decision, particularly given that *Bradley* is directly on point with the facts of this case[.]"). Plaintiff, therefore, cannot rely on Section 20040.5 to evade his binding agreement to arbitrate in Ohio.[6]

b. Section 20040.5 Cannot Withstand Scrutiny Under A Dormant Commerce Clause Analysis.

Section 20040.5 should also be disregarded because it violates the Dormant Commerce Clause of the U.S. Constitution. "Modern dormant commerce clause jurisprudence primarily is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by

[6] The legislative history of Section 20040.5 confirms that the Legislature contemplated that disputes involving California franchisees could still be transferred to non-California forums, notwithstanding the proposed law. (Request for Judicial Notice ("RJN") ¶ 1, Ex. A ("While AB 1920 would thus permit the action to be filed in California, the doctrine of 'forum non convenience' may persuade a California court to transfer the action to another venue, particularly if the contract binds the parties to follow the law of another forum. [. . .] Nothing in AB 1920 would preclude application of the doctrine of 'forum non convenience' to cause the transfer of a franchise dispute brought in California by reason by AB 1920.").)

burdening out-of-state competitors." *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015) (quoting *Dep't of Revenue of Ky. V. Davis*, 553 U.S. 328, 338 (2008) (internal punctuation omitted)). A party raising a Dormant Commerce Clause argument must show that the challenged law places a substantial burden on interstate commerce. *Id.* "If a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it serves a legitimate local purpose, and this purpose could not be served as well by available non-discriminatory means." *Id.* at 399 (internal punctuation omitted). Courts may consider legislative history to determine whether a statute is motivated by a discriminatory purpose. *Id.* at 402 n.10.

The discriminatory purpose of Section 20040.5 is made plain by the legislative history of the statute. In enacting Section 20040.5, the Legislature sought to frustrate out-of-state franchisors' legitimate interest in ensuring the uniform enforcement of their franchise agreements. *See 1-800-Got-Junk? LLC v. Super. Ct.*, 189 Cal. App. 4th 500, 515 (Cal. Ct. App. 2010) (petitioner franchise had "interest of uniformity in franchise operations") ("Because a multistate franchisor has an interest in having its franchise agreements governed by one body of law, Got Junk had a reasonable basis for inserting a choice of law provision in the franchise agreement. Further, given Washington State's proximity to Got Junk's headquarters in Vancouver, Canada, there was a reasonable basis for the designation of that state's laws in particular."). As reflected in the California State Senate's Bill Analysis, Section 20040.5 targets out-of-state franchisors:

> 1. Stated need for legislation
>
> Many franchise contracts contain clauses that require a civil action or proceeding arising under or relating to a franchise agreement be commenced in a designated out-of-state venue, which is usually the state of the franchisor's headquarters. Few franchisees can easily afford to defend or prosecute their actions in another state. The author of AB 1920 contends that these contractual provisions put the California franchisee at a great disadvantage in pursuing meritorious actions against a franchisor. Moreover, he asserts, these provisions are usually part of the standard contract which the franchisee is offered on a "take-it or leave-it" basis. In the absence of arms length negotiations and equal bargaining position, such terms are usually unconscionable. The author asserts that it is in the state's interest and powers to void such contractual terms to protect its residents.

(RJN ¶ 1, Ex. A.)

While the Legislature's stated need for the statute was ostensibly to protect California-based franchisees from costly out-of-state litigation, the discriminatory purpose of Section 20040.5 is apparent nonetheless. Section 20040.5 is premised on a presumption that non-California forum-selection clauses necessarily evince inequality in bargaining power. However, this consideration is irrelevant to the enforceability of a forum-selection clause under federal law. *Murphy*, 362 F.3d at 1141. Section 20040.5 therefore deprives out-of-state franchisors, which are more likely to litigate in federal court with California franchisees than are California franchisors, from the protections of federal

law in diversity cases. The statute therefore holds 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. *1-800-Got-Junk? LLC*, 189 Cal. App. 4th at 515. California franchisors, whose contracts would typically be governed by California law and interpreted by California courts, thus derive a competitive advantage over out-of-state franchisors insofar as they are able to rely on consistent judicial interpretations of their obligations as franchisors. *See Int'l Franchise Ass'n*, 803 F.3d at 401 ("[S]tatutes struck down for their impermissible purpose have contained language promoting local industry or seeking to level the playing field.").

The Legislature's stated purpose of protecting California franchisees could be served equally well by non-discriminatory means. *See Int'l Franchise Ass'n*, 803 F.3d at 399. For instance, the Legislature could have required franchisors to cover expenses incurred by California franchisees which are unique to litigating in the forum designated by the forum-selection clause. Such a requirement would protect California franchisees from the expense of litigation outside of California while placing California and out-of-state franchisors on equal footing—California and non-California franchisors alike would be able to ensure uniformity in their franchise operations by designating an appropriate forum, and, both would be required to pay for the perceived benefit of ensuring that any disputes would be litigated in a non-California forum. In light of the foregoing, the Dormant Commerce Clause should preclude application of Section 20040.5.

c. Plaintiff Is Equitably Estopped From Refuting The Forum-Selection Clause.

Finally, Plaintiff is equitably estopped from repudiating the forum-selection clause because his claims are inherently intertwined with his Distributorship Agreements and his purported employment relationship with the Defendants arising from them. "Equitable estoppel . . . precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Turner v. Thorworks Indus.*, No. CIV S-05-02653 WBS KJM, 2006 U.S. Dist. LEXIS 21668, *9 (E.D. Cal. Mar. 28, 2006) (internal citations and punctuation omitted). In *Turner*—a case initiated long after Section 20040.5 became effective—the court granted, in part, the defendants' motion to dismiss for *forum non conveniens* on account of an Ohio forum-selection clause in a franchise agreement. *Id.* at *12-14. The California franchisee plaintiffs alleged several claims arising from their franchise agreement, including fraud and breach of contract. *Id.* at *1-5. The court rejected the plaintiffs' argument that the Ohio forum-selection clause was unenforceable, holding that the plaintiffs could not seek to vindicate their rights under the contract while at the same time purporting to reject one of its terms. *See id.* at *9 (discussing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-758 (11th Cir. 1993) ("The [*Sunkist*] court reasoned that the plaintiff could not selectively rely on the contract when convenient but disavow such reliance when it became inconvenient."). Because the plaintiffs "asserted certain claims in the complaint that necessarily [relied] upon the Franchise Agreement and the relationships thereby created," the court ruled that the plaintiffs were bound by the Ohio forum-selection clause with respect to those claims—despite

the plaintiffs' argument that the California Franchise ws (Cal. Corp. Code §§ 31000 *et seq.*) warranted the court's retention of jurisdiction in order to protect California citizens. *Id.* at *9-10, 12-13.

Turner's rationale applies with equal force here. Plaintiff's claims arise from his Distributorship Agreements and his (purported) employment relationships with Defendants as a consequence of those contracts. Indeed, Plaintiff's Complaint is rife with allegations confirming that his claims are entirely dependent upon his alleged misclassification as an independent contractor pursuant to his franchise agreements. (*E.g.*, Compl. ¶ 9 ("Plaintiff Fleming entered into Matco's form Distributor Agreement, under which he served as a Matco Distributor."), ¶¶ 15-19 (citing the Distributorship Agreements as evidence that distributors purportedly "Perform Work Within Matco's Usual Course of Business And Are Not Engaged In An Independent Trade, Occupation, or Business"), ¶¶ 20-23 (citing the Distributorship Agreements as evidence that Defendants have "All Necessary Control Over The Manner And Means By Which Distributors Perform Their Work"), ¶¶ 24-26 (citing the Distributorship Agreements as evidence that "Defendants Dictate Distributors' Appearance And Equipment"), ¶¶ 27-31 (citing the Distributorship Agreements as evidence that Defendants require distributors to incur business expenses), ¶¶ 32-33 (citing the Distributorship Agreements as evidence that Matco has "The Right To Terminate Distributors For Virtually Any Reason").) But for Plaintiff's Distributorship Agreements, and, his (purported) employment relationships with Defendants, none of his claims in this lawsuit would exist. Accordingly, because Plaintiff is invoking the Distributorship Agreements to pursue his remedies against Defendants, he must pursue his claims in

Ohio pursuant to the forum-selection clause. *Turner*, 2006 U.S. Dist. LEXIS 21668 at *9-14 (dismissing claims which arose from franchise agreement pursuant to Ohio forum-selection clause). *See also* Cal. Civ. Code § 3521 ("He who takes the benefit must bear the burden.").

d. Dismissal Or Transfer Is Necessary To Uphold The Principal Purpose Of The FAA: To Enforce Private Arbitration Agreements According To Their Terms.

Although neither Section 20040.5, nor any other public policy, precludes enforcement of the forum-selection clause, the parties' binding agreement to arbitrate in Ohio cannot be upheld unless this Court dismisses Plaintiff's case or transfers it to the Northern District of Ohio. This is so because the FAA confines arbitration to the district in which a petition to compel arbitration is filed. *Textile Unlimited v. A. BMH and Co.*, 240 F.3d 781, 785 (9th Cir. 2001) (citing 9 U.S.C. § 4). Defendants therefore cannot petition this Court to order the parties to arbitrate in Ohio. Dismissal or transfer is thus necessary to uphold the "principal purpose of the FAA[:] to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (internal citation and punctuation omitted). Indeed, only the Northern District of Ohio can order the parties to arbitrate in Summit or Cuyahoga Counties in Ohio. 9 U.S.C. § 4. For this reason, Defendants ask the Court to dismiss or transfer this case so that they may seek an order

compelling arbitration within the Northern District of Ohio.[7]

C. Public Interest Factors Weigh In Favor Of Dismissal Or Transfer.

Because the forum-selection clause is mandatory,[8] Plaintiff's choice of forum is afforded no weight, and the Court may only consider public interest factors in deciding whether to enforce the forum-selection clause. *Atl. Marine Constr. Co.*, 134 S. Ct. at 582; *Balducci*, 2017 U.S. Dist. LEXIS 154523 at *20; *Monastiero*, 2014 U.S. Dist. LEXIS 67202 at *11-14. Following the Supreme Court's decision in *Atl. Marine Constr. Co.*, courts recognize that public interest factors will "rarely defeat" a motion to transfer venue. *See Monastiero*, 2014 U.S. Dist. LEXIS 67202 at *13-14. The outcome should be no different here.

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[7] The Court should disregard any argument by Plaintiff that the arbitration provision in his Distributor Agreements is somehow unenforceable. The forum-selection clause also provides that any court proceedings must occur in Ohio, and so Plaintiff must pursue a civil lawsuit there if a court declines to order arbitration. (Swanson Dec. ¶ 4, Ex. 1 at § 12.10; *id.* ¶ 5, Ex. 3 at § 12.10.)

[8] There can be no dispute that the forum-selection clause is mandatory. (*See* Swanson Dec. ¶ 4, Ex. 1 at § 12.10; *id.* ¶ 5, Ex. 3 at § 12.10 ("all arbitration hearings must and will take place exclusively in Summit or Cuyahoga County, Ohio") ("[a]ll 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").) *See S. Cty. Prof'l Park, Ltd. v. Orchard Supply Co. LLC*, No. 5:14-cv-02348-PSG, 2014 U.S. Dist. LEXIS 100064, *8 (N.D. Cal. July 21, 2014) ("Under Ninth Circuit authority, the phrase 'shall be brought' in a forum selection clause makes the clause mandatory.").

1. The Northern District Of Ohio Is Far Less Congested Than The Northern District Of California.

As of March 31, 2018, there were 4,700 civil cases pending in the Northern District of Ohio. (RJN ¶ 2, Ex. B.) The Northern District of California, by comparison, had 8,502 civil cases pending as of March 31, 2018. (*Id.*) In addition, 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.* ¶ 3, Ex. C.) The less crowded docket in the Northern District of Ohio warrants dismissal, or, transfer, to that forum.

2. The Local Interest Factor Is Neutral.

While California has an interest in this lawsuit given that Plaintiff operated distributorships here, "this interest is insufficient to prevent transfer in this case." *Balducci*, 2017 U.S. Dist. LEXIS 154523 at *23 (internal citation omitted). The State of Ohio has an equivalent interest given that NMTC and Matco are headquartered there, and, negotiated contracts containing Ohio choice of law and forum-selection clauses. (Swanson Dec. ¶¶ 3-5, Ex. 1 at §§ 12.10 and 13.3, Ex. 3 at §§ 12.10 and 13.3.) Accordingly, this factor is neutral and does not defeat the application of the forum-selection clause. *Balducci*, 2017 U.S. Dist. LEXIS 154523 at *23-24 (granting *forum non conveniens* motion; plaintiff's choice of California forum merited no weight and Colorado had a local interest in the case); *E.E.O.C. v. United Airlines, Inc.*, No. C 09-2469 PJH, 2009 U.S. Dist. LEXIS 130565, *15 (N.D. Cal. Dec. 3, 2009) ("because the company's headquarters and the Chicago O'Hare Airport are located in Illinois, [the Northern District of Illinois] has a greater local interest in this case").

3. The Northern District Of Ohio Is Capable Of Applying Ohio Or California Law, Regardless Of Which State's Law Governs.

Plaintiff's Distributorship Agreements specify that Ohio law governs the rights of the parties. (Swanson Dec. ¶ 4, Ex. 1 at § 13.3; *id.* ¶ 5, Ex. 3 at § 13.3.) Thus, assuming Ohio law applies, this factor weighs in favor of dismissal, or, a transfer.[9] *Glob. Quality Foods, Inc.*, 2016 U.S. Dist. LEXIS 107121 at *26-27 ("This factor too weighs in favor of enforcing the forum-selection clause. [. . .] This court is certainly capable of applying Ohio law, but it has no particular familiarity therewith.") (internal citation and punctuation omitted). However, even if California law applies (which it does not), the Northern District of Ohio remains an appropriate forum because "federal judges routinely apply the law of a State other than the State in which they sit." *Balducci*, 2017 U.S. Dist. LEXIS 154523 at *23 (quoting *Atl. Marine Constr. Co.*) (transferring case to Colorado pursuant to *forum non conveniens* doctrine). This factor is thus neutral and cannot defeat the instant motion.

VI. CONCLUSION

The forum-selection clause requiring Plaintiff to arbitrate his claims against Defendants in Ohio is valid and enforceable. However, this Court cannot compel the parties to arbitrate in Ohio as required by Plaintiff's Distributorship Agreements. Accordingly,

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[9] Courts within the Ninth Circuit typically consider choice of law provisions irrelevant to the determination of whether a forum-selection clause is enforceable. *Balducci*, 2017 U.S. Dist. LEXIS 154523, *13-14 (collecting cases). Plaintiff therefore cannot defeat the instant motion by reference to the Ohio choice of law provisions in his Distributorship Agreements.

for the reasons set forth above, Defendants respectfully request that the Court grant this motion, and dismiss Plaintiff's Complaint, or, alternatively transfer this matter to the Northern District of Ohio, pursuant to the doctrine of *forum non conveniens*.

DATED: February 19, 2019

Respectfully submitted,

SEYFARTH SHAW LLP

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MATCO TOOLS CORPORATION, NMTC, INC. and FORTIVE CORPORATION

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:19-cv-00463-WHO

JOHN FLEMING, on behalf of himself and all others similarly situated,

Plaintiff,

v.

MATCO TOOLS CORPORATION, a Delaware corporation; NMTC, INC. d/b/a MATCO TOOLS, a Delaware corporation, FORTIVE CORPORATION, a Delaware corporation; and DOES 1-20, inclusive,

Defendant.

Date: April 3, 2019
Time: 2:00 p.m.
Dept: Courtroom 2, 17th Floor
Judge: Honorable William H. Orrick
Complaint Filed: January 25, 2019

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DECLARATION OF MIKE SWANSON IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TRANSFER VENUE TO THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO [*FORUM NON CONVENIENS*]

I, Mike Swanson, declare as follows:

1. I am over the age of 18, and I make this Declaration based upon my own personal knowledge, and if called upon, I could and would testify competently to the facts stated herein.

2. I am the Director of Franchise Programs and Development for Matco Tools Corporation ("Matco") and work in the company's Stow, Ohio headquarters. I started with Matco in May of 1988. In my capacity, my duties include writing and/or approving the various programs, processes and SOPS for our Distributors and Field Management, as well as being the Compliance Officer. I also have access to the distributor agreements into which Matco has entered with its California-based distributors and am familiar with Matco's California-based distributors. In addition, my responsibilities require me to be familiar with the organizational and operational structure of Matco.

3. Matco, which is headquartered in Stow, Ohio, markets high quality, durable and innovative mechanic repair tools, diagnostic equipment and toolboxes. Matco contracts with franchisees who sell Matco's products in designated geographic areas through their "mobile stores." Prior to June 3, 2016, Matco was known as NMTC Inc., d/b/a Matco Tools ("NMTC"). Fortive Corporation, which is headquartered in Everett, Washington, is the corporate parent of Matco.

4. John Fleming entered into a distributorship agreement with NMTC in July 2012. A true and correct copy of Mr. Fleming's July 2012 distributorship agreement is attached hereto as Exhibit 1. Mr. Fleming's July 2012 distributorship agreement was amended in October 2013 and November 2016. A true and correct copy of the October 2013 and November 2016 amendments to Mr. Fleming's July 2012 distributorship agreement is attached hereto as Exhibit 2. Mr. Fleming's July 2012 distributorship agreement was not amended, modified or extended after December 31, 2016. Mr. Fleming terminated his July 2012 distributorship agreement in December 2018.

5. Mr. Fleming entered into an additional distributorship agreement with NMTC in October 2013. A true and correct copy of Mr. Fleming's October 2013 distributorship agreement is attached hereto as Exhibit 3. Mr. Fleming terminated his October 2013 distributorship agreement in September 2015.

6. Mr. Fleming completed a document called a "Distributor Disclosure Questionnaire" in connection with each of his Distributorship Agreements. True and correct copies of Mr. Fleming's 2012 and 2013 Distributor Disclosure Questionnaires are attached hereto as Exhibits 4 and 5 respectively.

7. Both of Mr. Fleming's distributorships operated in the Monterey, California area. All of Mr. Fleming's customers and potential customers were based in California. In connection with the operation of his distributorships, Mr. Fleming purchased tools from NMTC (and its successor entity, Matco) which he then sold to his customers.

I declare under the penalty of perjury under the laws of the State of Ohio and the United States of

America that the foregoing is true and correct. Executed this 19th day of February, 2019, in Stow, Ohio.

DocuSigned by:

Mike Swanson
/s/ Mike Swanson

EXHIBIT 1

MATCO TOOLS
DISTRIBUTORSHIP AGREEMENT

This Distributorship Agreement (this "Agreement") is entered into by and between NMTC, Inc. d/b/a Matco Tools ("Matco"), a Delaware corporation, and John M. Fleming (the "Distributor" or "you").

RECITALS

Matco is the manufacturer and distributor of quality tools, tool boxes, and service equipment, and has developed a distinctive business system relating to the establishment and operation of Matco mobile distributorships that sell tools, tool boxes, service equipment, and other goods and services, including, without limitation, apparel, model cars and other collectible items, and consumables (such as mechanic's hand soaps), and such other items that Matco may in its sole discretion offer (collectively, the "Products") to professional mechanics and other businesses which operate from a single location and purchase tools for their own use (the "Business System").

The Business System is identified by means of certain trade names, service marks, trademarks, logos, and emblems, including, the trademarks and service marks "MATCO®" and MATCO® TOOLS (the "Marks").

Matco desires to appoint the Distributor as an authorized Matco mobile distributor to sell and service the Products in a certain geographic area and the Distributor desires to serve in such capacity.

The Distributor desires to operate a Matco mobile distributorship in accordance with the Business System and the other standards and specifications established by Matco, including requirements for regular weekly

customer sales calls, minimum inventory and sales levels, communications and computer software usage and other operating requirements.

In consideration of the mutual promises contained in this Agreement, the Distributor and Matco agree and contract as follows:

ARTICLE 1

APPOINTMENT OF DISTRIBUTOR

1.1 Grant of Distributorship. Matco grants the Distributor the right, and the Distributor undertakes the obligation, on the terms and conditions set forth in this Agreement, to purchase, resell, and service the Products as a Matco mobile distributor under the Business System (the "Distributorship").

1.2 List of Calls and Potential Customer List. The Distributor will operate the Distributorship only at those locations identified as potential stops along the Distributor's proposed route (the "List of Calls") and in the list of Potential Customers (defined in Section 13.6) (the "Potential Customer List"). The List of Calls and Potential Customer List are identified and attached to this Agreement as Exhibit A. Unless the List of Calls and Potential Customer List is adjusted or modified by Matco and the Distributor, the Distributor may not offer or sell Products to any person, business, entity or other Potential Customer, other than those identified in the List of Calls. The Distributor acknowledges that: (A) as of the date of this Agreement there are a minimum of three hundred twenty-five (325) Potential Customers, the location of which will be identified on the List of Calls, (B) there can be no assurance that the Potential Customers identified in the List of Calls will actually become Customers (defined in Section 13.6) of the Distributor, and (C) the

number of Potential Customers identified on the List of Calls may increase or decrease after the date of this Agreement due to a variety of reasons, which may include economic changes, competition, sales and service from the Distributor, businesses that close or reduce staffing levels, and other reasons. Matco is under no obligation to supplement the List of Calls with additional stops or Potential Customers in the event the number of Potential Customers declines. It is important that you review your List of Calls to make sure you are satisfied with it before you sign your Distributorship Agreement. We therefore encouraged you to ride through your List of Calls and identify all of your shops and Potential Customers before you signed this Agreement. It is and was your responsibility to perform this due diligence. However, if you requested, a Matco representative was made available to ride with you to assist with this process and answer any questions you might have had. Prior to or in conjunction with your signing this Agreement, you also must sign a Ride Along Acknowledgement that you either did a ride through of your List of Calls or chose not to do so.

1.3 Exclusive Rights. The Distributorship is a business which operates principally from a vehicle, and which is authorized to resell the Products to potential purchasers identified on the List of Calls with Potential Customers. Except as permitted under Section 1.4, and for so long as the Distributor is in compliance with this Agreement, Matco will not operate, or grant a license or franchise to operate, a Matco mobile distributorship that will be authorized to sell Products to any Potential Customers identified on the Distributor's List of Calls, if such Customers purchase Products at or from the business located and identified on the List of Calls.

1.4 Rights Reserved by Matco. The Distributor acknowledges and agrees that except for the rights expressly granted to the Distributor and provided herein, Matco retains all rights to sell, and license or authorize others to sell, Products to any customers, at any location, and through any channels or methods of distribution. Without limiting the foregoing, Matco retains the following rights, on any terms and conditions Matco deems advisable, and without granting Distributor any rights therein:

1.4.1 Matco, and any affiliates, licensees or franchisees of Matco, if authorized by Matco, will have the absolute right to sell the Products, directly or indirectly, or through non-mobile distributors, including commercial sales representatives, (A) to industrial customers, industrial accounts, and owners of vehicle repair businesses (including businesses, entities, governmental agencies, and others, including those which may be listed on the Distributor's List of Calls, but excluding the Potential Customers) who (i) have central purchasing functions, or (ii) may purchase and/or acquire special order products designed for multiple-party use, which are not included as part of Matco's regular or special purchase inventory list, or (iii) may purchase Products through a bidding process, such as railroads, airlines, manufacturers, governmental agencies and schools, (B) to industrial and multiple-line and multiple brand wholesale distributors who may resell such Products to any potential purchaser or customer, including the Customers; and (C) to vocational and training schools and programs, and to the students and employees of such schools and programs.

1.4.2 Matco, and any affiliates, licensees or franchisees of Matco, if authorized by Matco, will

have the absolute right to sell the Products through (A) mail orders, telephone orders, and the use of catalogs distributed to potential customers (including Distributor's Potential Customers and Customers), (B) any current or future means of electronic commerce, including the Internet and Matco's website, and (C) at special and/or temporary venues (including race tracks, and other motor sports events).

1.4.3 Matco, and any present or future affiliates of Matco, may manufacture and/or sell products that are the same as or similar to the Products, and Matco's present or future affiliates may sell such products directly, or indirectly through wholesalers, suppliers, distributors or others, to potential customers who are the same as or similar to the Distributor's Potential Customers and Customers. Matco and the Distributor acknowledge and agree that Matco has no control over the sales or distribution methods or operations of its affiliates, and that Matco has no liability or obligations to the Distributor due to any sales or distribution activities of Matco's affiliates.

1.5 Understandings and Acknowledgments. Matco and the Distributor acknowledge and agree that Matco shall have no liability or obligation to the Distributor if any Customer or Potential Customer of the Distributor purchases or receives Products or competitive products through any method or channel of distribution described in Section 1.4, or otherwise reserved to Matco. Further, the Distributor and Matco acknowledge and agree that notwithstanding Section 1.3, Matco has in the past granted (A) distributorships that do not have any territorial restrictions or limitations on the distributor, and (B) distributorships that have territories in which the distributor is not limited to

selling Products to a specified number of customers. Matco shall use its reasonable efforts to deter such distributors, and other distributors, from selling Products to Potential Customers on the List of Calls, but Matco cannot and does not provide the Distributor with any guaranty or assurance that such distributors will not offer and sell Products to the Distributor's Potential Customers.

1.6 Spouse. Matco, Distributor, and Spouse (defined below) acknowledge and agree that Matco has granted the rights under this Distributorship Agreement to Distributor based in part on Distributor's application and Distributor's promise and covenant that the person identified on the signature page of this Agreement as "Distributor," will operate the Mobile Store and conduct the daily operations of the Distributorship. Distributor has designated the person identified on the signature page of this Agreement as "Spouse," as the person who will assist Distributor with certain aspects of the operation of the Distributorship. Matco, Distributor, and Spouse further acknowledge and agree that both Distributor and Spouse are liable for the financial obligations and debts of Distributor and the Distributorship, and are responsible individually for compliance with this Agreement and for causing Distributor to comply with this Agreement. Without limiting the foregoing, Distributor and Spouse acknowledge and agree to be 'individually bound by all of the terms of this Agreement, including, in particular, those contained in Section 3.11, Article 9, Section 11.9, and Article 12.

ARTICLE 2

TERM OF AGREEMENT; DISTRIBUTOR'S OPTION TO REACQUIRE DISTRIBUTORSHIP

2.1 Term. The term of this Agreement will be for ten years, commencing on the date of this Agreement (the "Term"). This Agreement will not be enforceable until it has been signed by both the Distributor and Matco.

2.2 Distributor's Option to Reacquire Distributorship. At the end of the Term of this Agreement, the Distributor will have the right, at his option, to reacquire the Matco Distributorship, and execute a successor Distributorship Agreement, to serve the existing Customers identified in Exhibit A, for an additional ten year period, provided the Distributor complies in all respects with the following conditions: (A) the Distributor has given Matco written notice at least one hundred eighty days, but not more than one year, prior to the end of the Term of ibis Agreement of his intention to reacquire the Matco Distributorship; (B) the Distributor has complied with all of the material terms and conditions of this Agreement, has materially complied with Matco's operating and quality standards and procedures, and has timely paid all monetary obligations owed to Matco throughout the Term of this Agreement; (C) the Distributor has been in strict compliance with this Agreement and the policies and procedures prescribed by Matco for (i) the six-month period prior to the Distributor's notice of its intent to reacquire a successor Matco Distributorship, and (ii) the six-month period prior to the expiration of the Term of this Agreement; (D) the Distributor has agreed, in writing, to make the reasonable capital expenditures necessary to update, modernize, and/or replace the Mobile Store and equipment used by him in his Matco business to meet the then-current

specifications and the general image portrayed by the Matco Business System; (E) the Distributor agrees to sign and comply with the then-current standard Distributorship Agreement then being offered to new distributors by Matco at the time the Distributor elects to exercise his option to reacquire the Matco Distributorship; and (F) the Distributor and Matco have signed a joint and mutual general release of all claims each may have against the other.

ARTICLE 3

DISTRIBUTOR'S DUTIES AND OBLIGATIONS

3.1 Promotion of Distributorship. The Distributor will on a full-time basis diligently promote, market, and work to increase Product sales, to increase the Customer base, and to provide quality service and warranty support to the Customers.

3.2 Restrictions on Sales. The Distributor will only sell Products and other merchandise approved by Matco, and will not sell any products, tools, equipment or other merchandise which are competitive with any of the Products, except for items that are traded-in by the Distributor's Customers, without Matco's prior written consent. Further, the Distributor shall not offer for sale, sell, or distribute any product not approved in advance by Matco (including, for example, hazardous materials, pornographic materials, or products not related to the Distributor's business) and shall discontinue the offer, sale, or distribution of products promptly upon notice from Matco. The Distributor may not operate the Distributorship or sell any Products to any person, entity, or business, or at any location not identified on the Potential Customer List, even if such Potential Customer or location is adjacent to, or near, a location on the Distributor's List of Calls or Potential

Customer List, nor may the Distributor sell Products to any Customer of the Distributor who moves to a location or business not identified on the Potential Customer List.

3.3 Inventory. The Distributor will (i) at all times maintain a minimum inventory of Products equal to or in excess of the New Distributor Starter Inventory; (ii) on a weekly basis, purchase Products from Matco in an amount not less than (a) 80% of the "National Distributor Purchase Average" (or "NDPA"), or (b) 80% of the "District Distributor Purchase Average" (or "DDPA") for the Distributor's district, whichever is lower, based on Distributor's 12-month rolling average, or, if Distributor has been operating the Distributorship for less than 12 months, based on Distributor's year-to-date average; and (iii) maintain a minimum of a 60% ratio of a calculation of the Distributor' s year-to-date purchase average divided by the Distributor's year-to-date sales average.

3.4 Weekly Customer Sales Calls and Sales Meetings. To ensure high quality service, the Distributor will make personal sales calls to each of the stops, shops or locations on the Distributor's List of Calls every week. The Distributor will also attend at least 80% of district sales meetings that Matco schedules in or for Distributor's district each year for its distributors and district managers. Matco expects to schedule a district sales meeting approximately once every five weeks, provided, however, that Matco may modify the frequency and timing of the meetings upon prior notice. Failure to comply with the weekly sales calls requirements or sales meeting requirements described in this Section 3.4 shall be a material default under this Agreement, and shall be grounds for termination under Section 11.3. If the Distributor fails to make personal sales

calls to each shop, stop, or location on the List of Calls at least weekly, or if the Distributor fails to attend at least 80% of the district sales meetings in any 12-month period, then Matco may, in lieu of termination of this Agreement, terminate, reduce, or modify in all respects the Distributor's exclusive rights under Section 1.3 of this Agreement, immediately upon written notice from Matco to Distributor, and Matco will have the absolute right to adjust the territory, the List of Calls or Potential Customers accordingly or appoint or permit one or more other distributors to sell Products to the Distributor's Potential Customers, or to sell directly or indirectly, itself or through affiliate, Products to the Distributor's Potential Customers.

3.5 Time Payment Reserve Account. Matco acknowledges having received from the Distributor a deposit for the Distributor's Time Payment Reserve Account in the amount designated by Matco, which will be administered in accordance with Matco's Time Payment Reserve Account policies.

3.6 Mobile Store; Uniforms. The Distributor must purchase or lease a Mobile Store, of the type and from a dealer or supplier approved by Matco, prior to beginning operations of the Distributorship. The Distributor will use the name MATCO TOOLS®, the approved logo and all colors and graphics commonly associated with the Matco Business System on the Mobile Store in accordance with Matco's specifications. The Distributor will keep the interior and exterior of the Mobile. Store in a clean condition and will keep the Mobile Store in good mechanical condition. The Mobile Store must be used solely for the operation of the Distributor's Matco business. The Distributor must wear Matco-approved uniforms, as prescribed by Matco periodically, while operating the Distributorship. The

Distributor is required to maintain a professional appearance at all times and be clean and well groomed while making calls on Potential Customers.

3.7 Computer; Software; Data. The Distributor will purchase or lease a new (not previously owned or refurbished) computer system that complies with the specifications established by Matco (and that Matco may update periodically), will sign the Matco Distributor Business System Software License, Maintenance and Support Agreement (the "Software License Agreement") (Exhibit O) as may be modified from time to time, and will pay the required software license fees and annual maintenance support fee set forth in the Software License Agreement. The Distributor shall comply with all of Matco's standards and specifications for computer hardware, software, and communications, and the Distributor shall update its computer hardware, software, and communications to comply with any new or changed standards or specifications established by Matco. The Distributor agrees to use all of the features of the Matco software in operating the Distributorship, including, without limitation, the order entry, inventory, accounts receivable and reporting features. The Distributor will communicate with Matco, and will transmit to, and receive documents from, Matco, electronically, in the manner specified by Matco in the Manual (defined below) or as directed by Matco through the Matco Distributor Business System. Except for the Matco Distributor Business System software, the Distributor will have sole and complete responsibility for: (a) the acquisition, operation, maintenance and upgrading of the computer system in order to maintain compliance with Matco's current standards as they may be modified from time to time; (b) obtaining and maintaining access to the Internet through a subscription with an Internet ser-

vice provider or a then-current technologically capable equivalent in accordance with Matco' s standards (which is currently high-speed Internet access through cable, DSL, or high-speed cellular); (c) the manner in which the Distributor's system interfaces with Matco's computer system and those of other third parties; and (d) any and all consequences that may arise if the Distributor's system is not properly operated, maintained, and upgraded. All data provided by the Distributor, uploaded to Matco's system from the Distributor's system, and/or downloaded from the Distributor's system to the Matco system is and will be owned exclusively by Matco, and Matco will have the right to use such data ,in any manner that Matco deems appropriate without compensation to the Distributor. In addition, all other data created or collected by Distributor in connection with the Matco Distributor Business System, or in connection with the Distributor's operation of the business, is and will be owned exclusively by Matco during the term of, and following termination or expiration of, the Agreement. Copies and/or originals of such data must be provided to Matco upon Matco's request.

3.8 Matco Business System Training (MBST) Program. The Distributor must successfully complete the "Matco Business System Training (MBST) Program," as defined in Section 4.1, before operating the Distributorship. If the Distributor owns more than one Matco Distributorship, then the Matco Business System Training (MBST) Program must be successfully completed by the Operator who will operate the Distributorship to which this Agreement relates before the Distributorship opens for business. Matco may provide additional training and certification for its distributors from time to time and the Distributor (and the Operator, if applicable) will attend this

training and will complete the certification procedures designated by Matco. At its option, Matco may require distributors to pay all or some portion of the cost of providing any such future additional training and/or certification procedures.

3.9 Compliance with Laws. The Distributor and all of his employees will comply with all federal, state and local laws, ordinances, rules, orders and regulations applicable to the operation of the Distributorship, including all traffic and safety regulations. The Distributor will file all federal and state tax returns and will timely pay all federal withholding taxes, federal insurance contribution taxes, and all other federal, state, and local income, sales and other taxes.

3.10 Compliance with Manual. The Distributor will operate the Distributorship in conformity with the operating procedures and policies established in the Matco Confidential Operating Manual (the "Manual"), or otherwise in writing. Matco will loan the Distributor a copy of the Manual when the Distributor begins the Matco Business System Training (MBST) Program. Matco reserves the right to provide the Manual electronically or in an electronic or computer-readable format, for example, via the Matco Distributor Business System or another method, or on a CD.

3.11 Payment Obligations. The Distributor will timely pay all amounts owed to Matco for Product purchases and under any credit agreement, promissory note, or other agreement relating to the Distributorship. All payments shall be made in accordance with Matco's instructions and Operations Manual, including payments by telephone and electronic funds transfer, as described in Section 6.4 below.

3.12 Management of Distributorship. The Distributor will be responsible for managing all aspects of the Matco Business, including sales, collection of accounts receivable, purchases, inventory management, and hiring of Operators, if permitted by Matco. The Distributor may not hire Operators, managers or drivers, or delegate any of his/her duties and obligations under this Agreement, unless approved in writing, in advance, by Matco. Notwithstanding our Business System standards, some of which address safety, security, and related matters, these matters are solely within the Distributor's control, and the Distributor retains all responsibility for these matters in the operation of the Distributorship.

3.13 Matco's Inspection Rights. The Distributor will: (A) permit Matco and its agents to inspect the Distributor's Mobile Store and observe the Distributor's business operations at any time during normal business hours, (B) cooperate with Matco during any inspections by rendering such assistance as Matco may reasonably request, and (C) immediately, upon written notice from Matco, take the steps necessary to correct any deficiencies in the Distributor's business operations.

3.14 Use of the Internet. The Distributor specifically acknowledges and agrees that any Website (as defined below) will be deemed "advertising" under this Agreement, and will be subject to (among other things) Matco's approval under Section 7.4 below. (As used in this Agreement, the term "Website" means an interactive electronic document, contained in a network of computers linked by communications software, that the Distributor operates or authorizes others to operate and that refers to the Distributorship, the Marks, Matco, and/or the Business System. The term Website

includes, but is not limited to, Internet and World Wide Web home pages.) In connection with any Website, the Distributor agrees to the following:

3.14.1 Before establishing the Website, the Distributor will submit to Matco a sample of the Website format and information in the form and manner Matco may reasonably require.

3.14.2 The Distributor may not establish or use the Website without Matco's prior written approval.

3.14.3 In addition to any other applicable requirements, the Distributor must comply with Matco's standards and specifications for Websites as prescribed by Matco from time to time in the Manual or otherwise in writing. If required by Matco, the Distributor will establish its Website as part of Matco's Website and/or establish electronic links to Matco's Website. As of the date of this Agreement, Matco has established a Website for the entire system, and has offered Distributor a web page (or subpage) on Matco's Website. Distributor shall execute Matco's "Matco Tools Web Page Agreement" (attached as Exhibit Q hereto), which permits Distributor to have its own subpage on Matco's website. Distributor shall pay all appropriate fees under the Matco Tools Web Page Agreement, and shall comply with Matco's web policies as they may be modified from time to time.

3.14.4 If the Distributor proposes any material revision to the Website or any of the information contained in the Website, the Distributor must submit each such revision to Matco for Matco's prior written approval as provided above.

3.15 Substance Abuse and Drug Testing. The Distributor acknowledges and agrees that driving a

Mobile Store in an unsafe manner, or under the influence of alcohol or illegal drugs is potentially hazardous to the Distributor and to third parties, may cause physical injury to the Distributor and/or to third parties, and is a violation of law and a violation of Matco policies. In addition, such actions, and/or illegal or unauthorized operation of the Mobile Store and/or the Distributorship, may injure or harm the Marks and the goodwill associated with the Marks. The Distributor agrees not to drive or operate the Mobile Store under the influence of alcohol or illegal drugs and not to use or ingest illegal drugs at any time. Matco may, from time to time, upon notice to the Distributor and subject to compliance with applicable law, require that the Distributor submit to, and undergo periodic or random drug and/or alcohol testing at a facility, clinic, hospital or laboratory specified by Matco, at a reasonable distance from the Distributor's home, within the time period specified by Matco, which shall not be less than two (2) days, nor more than five (5) days following Matco's notice. Matco will bear the cost of any testing or lab fees. The Distributor's failure to submit to the testing, or the failure to pass the testing and analysis, will be grounds for immediate termination of the Distributorship, upon notice from Matco.

3.16 Computer Transactions. The Distributor must use his/her/its best efforts to timely and accurately enter and maintain, in its entirety, all business pertinent data on the MDBS business system relative to the operation of the Distributorship, including but not limited to customer data, product data, sales, returns, warranty and payments. Transactions must be completed in strict compliance with Matco's standards, specifications and procedures, and any unauthorized adjustments, or non-compliant use or recordation of

transactions (or failure to accurately record transactions), are prohibited.

3.17 Document Processing. In consideration of Matco's time and expense to prepare franchise and financial documents in connection with Distributor's execution of this Agreement and related documents, and if necessary, for Matco to file such documents with appropriate government agencies, Distributor must pay Matco a document processing fee of $99, on or before signing the Agreement.

3.18 Late Fee. The Distributor must pay for all Product purchases, and all charges, fees and other amounts in a timely manner, as required by this Agreement and any related or ancillary documents or agreements. Product purchases and other fees and charges will be charged to the Distributor's Open Purchase Account ("OPA"). If the Distributor fails to make a payment within 21 days of the date of an invoice from Matco, Distributor's OPA will be deemed delinquent. Matco may assess a late fee of 5% of the overdue balance per week, with a maximum late fee, per week, of $100.

ARTICLE 4

MATCO'S DUTIES

4.1 Matco Business System Training (MBST) Program. Matco will provide a classroom training program to the Distributor and, if applicable, the Operator, in Stow, Ohio, or at such other location as may be designated by Matco, to educate, familiarize and acquaint the Distributor and the Operator with the Matco Business Systems. The training will include instruction (and, in some instances, may include training by videotape, computer-based training modules, or interactive video) on basic business procedures, pur-

chasing, selling and marketing techniques, customer relations, basic computer operations, and other business and marketing topics selected by Matco. After completion of the classroom training, hands-on training on the Distributor's Mobile Store will be provided by Matco. The classroom training at Stow, or other designated location, together with the on-the-truck training comprises Matco's "'Matco Business System Training (MBST) Program." The Distributor and the Operator must successfully complete the classroom training prior to commencing business operations. The classroom training will be scheduled by Matco in its sole discretion and will be for a minimum of seventy hours. The Distributor must pay lodging and travel costs for attendance at the classroom training program. Currently, Matco has negotiated group lodging and meal accommodations and rates for distributors while attending the classroom training program. Lodging is located near Matco's headquarters, Cleveland Hopkins International Airport, and/or Akron-Canton Regional Airport. The Distributor will be responsible for all expenses (except for scheduled travel to and from the airport and for daily travel to and from Matco's headquarters) incurred during classroom training programs. Lodging and meal costs will be billed directly to the Distributor's Open Purchase Account. If the Distributor or initial Operator elects to bring their respective Spouse, Matco will charge a flat fee in the amount of two hundred ninety-five dollars ($295.00) for food, lodging, and local transportation. The Distributor will pay all other expenses incurred by the Distributor, the Operator, and, if applicable, their Spouse(s), in connection with the attendance and/or participation of the Distributor and the Operator in Matco's Matco Business System Training (MBST) Program, including the Operator's salary and fringe benefits.

4.2 Field Training. Following the Distributor's successful completion of the classroom portion of Matco's Matco Business System Training (MBST) Program, a regional trainer, and/or a regional or district manager designated by Matco (the 'Designated Trainer") will assist and advise the Distributor in the operation of his Matco business for a minimum of eighty hours over a six-week period. This assistance may include approximately one week of training prior to or after the Distributor's classroom training, approximately one week of training during the period that the Distributor commences sales activity, in conjunction with the Distributor's initial sales calls to Potential Customers and locations identified on the List of Calls and Potential Customer List, and a final phase of training during a period following the Distributor's first week of operations. The Designated Trainer will make sales calls with the Distributor and will provide training and assistance to the Distributor relating to purchasing, selling and marketing techniques, customer relations, computer operations, Product knowledge and other topics relating to the Distributor's operation of the Distributorship.

4.3 Periodic Meetings. Matco will schedule periodic meetings with Matco personnel and other distributors for additional training, Product updates and business seminars. The Distributor must attend at least 80% of the Matco-scheduled district sales meetings for its district in any 12-month period.

4.4 Hiring of New Operator. In the event the Distributor desires to hire an Operator to operate an additional Mobile Store, the Distributor must notify Matco of such intent, and obtain Matco's prior written authorization and approval to hire or engage an Operator. If the new Operator has not successfully

completed the Matco Business System Training (MBST) Program prior to hiring by the Distributor, then the new Operator will be required to successfully complete the Matco Business System Training (MBST) Program prior to operating the Distributorship. Matco will not charge a training fee for training the new Operator, but the Distributor will pay all travel, room and board, living and other expenses in connection with the new Operator's attendance and/or participation in Matco's Matco Business System Training (MBST) Program. Additionally, the Distributor will pay the Operator's salary and fringe benefits.

ARTICLE 5

THE PARTIES' RELATIONSHIP

5.1 Independent Contractor. The Distributor is and will hold himself out to be an independent contractor, and not an agent or employee of Matco. The Distributor is not authorized: (A) to sign in the name of Matco (or on its behalf) any contract, check, note, or written instrument; (B) to pledge the credit of Matco; (C) to bind or obligate Matco in any way; or (D) to make any promise, warranty, or representation on Matco's behalf with respect to the Products or any other matter, except as expressly authorized in writing by Matco.

5.2 Financial Records and Reports. The Distributor will keep complete and accurate books, records, and accounts of all financial and business transactions and activities relating to the Distributorship, and will permit Matco and its representatives to audit the books, records and accounts during regular business hours during the Term of this Agreement and for one year after termination or expiration of this Agreement. The Distributor's books, records and accounts will be in the form designated by Matco, and

the Distributor will use the chart of accounts designated by Matco for all financial statements. The Distributor will submit to Matco, on a weekly basis, such business reports as Matco may designate in writing. Matco may request that the Distributor provide to Matco, within 90 days of the Distributor's fiscal year end, a physical inventory which must be verified by a Matco District Manager, and an annual financial statement prepared in a format that Matco may designate. Once a physical inventory is completed, Distributor must adjust his books and MDBS reports to reflect the verified physical inventory numbers. Matco may require that the financial statements include a profit and loss statement, a balance sheet, a cash flow statement and/or other information. Depending upon Distributor's overall business health and compliance with the terms and conditions of this Agreement, Matco may waive this physical inventory requirement and/or may extend the frequency to a bi-annual basis. The Distributor must properly register for its/his/her sales tax filing in its/his/her appropriate state and provide Matco with a properly executed exemption certificate.

5.3 Insurance. The Distributor will purchase and maintain comprehensive general liability insurance covering bodily injury and property damage with minimum coverage of $2,000,000, and vehicle liability insurance coverage for the Mobile Store with minimum coverage of S2,000,000, insuring both the Distributor and Matco against any loss, liability, damage, claim or expense of any kind whatsoever, including claims for bodily injury, personal injury and property damage resulting from the operation of the Distributorship or the operation of the Mobile Store or any other vehicle used in connection with the Distributorship. In addition, the Distributor will purchase and maintain all risk

inland marine insurance coverage with limits of at least "replacement" cost for the Mobile Store and the Products, cargo, computer system and equipment used in connection with the Distributorship, and will purchase and pay for any and all other insurance required by law. All insurance policies maintained by the Distributor will: (A) name Matco as an additional named insured, (B) provide that Matco will receive copies of all notices of cancellation, nonrenewal or coverage change at least thirty days prior to the effective date, and (C) require the insurance company to provide and pay for legal counsel to defend any claims or actions brought against the Distributor or Matco. Additional requirements concerning the insurance to be obtained and maintained by the Distributor, if any, may be designated by Matco from time to time in writing. If Distributor does not obtain and maintain the proper insurance coverage, Matco may purchase said insurance on Distributor's behalf and charge Distributor's Open Purchase Account for the premium paid.

5.4 Indemnification. The Distributor will indemnify and hold Matco harmless from any claims, damages, judgments and losses, including attorney's fees, arising out of, from, in connection with, or as a result of the Distributor's operation of the Distributorship and the business conducted under this Agreement, the Distributor's breach of this Agreement, the Distributor's negligence, or any acts or omissions of the Distributor in connection with the operation of the Distributorship including, without limitation, claims, damages, judgments and losses arising from any unauthorized statements, representations or warranties made by the Distributor with respect to the Products, and those alleged to be caused by Matco's negligence, unless (and then only to the extent that) the claims, damages,

judgments, and losses are determined to be caused solely by Matco's gross negligence or willful misconduct according to a final, unappealable ruling issued by a court or arbitrator of competent jurisdiction.

5.5 Exercise of Matco's Judgment. Matco has the right to operate, develop, and change the Business System in any manner that is not specifically precluded by this Agreement. Whenever Matco has reserved in this Agreement a right to take or withhold an action, or to grant or decline to grant the Distributor a right to take or omit an action, except as otherwise expressly and specifically provided in this Agreement, Matco may make its decision or exercise its rights on the basis of the information readily available to it, and Matco's judgment of what is in its best interests and/or in the best interests of its franchise network, at the time the decision is made, without regard to whether other reasonable or even arguably preferable alternative decisions could have been made by Matco and without regard to whether Matco's decision or the action Matco takes promotes its financial or other individual interest.

ARTICLE 6

PRODUCTS

6.1 Sale and Purchase of Products. Matco will sell and the Distributor will buy the Products from Matco at the prices and on the terms established and published by Matco from time to time. Distributor will not purchase or attempt to purchase any products, including Products, directly from vendors supplying products to Matco, or from vendors or other sources that may or May not sell to or supply products to Matco or its distributors. Prices and terms applicable to each order placed by the Distributor will be those in

effect on the date the order is accepted by Matco. Matco reserves the right to add or delete Products, make changes to the Products, increase Product prices, and adjust the prices, terms, and discounts for the Products, without notice or liability to the Distributor, at any time.

6.2 Prices of Products. The Distributor will have the absolute right to determine the prices at which the Products are sold to the Distributor's Customers. If Matco institutes and implements a discount program, incentive program, coupon program, or other product sales or marketing program, the Distributor must comply with the program, and honor all authorized coupons, gift cards, gift certificates, and incentives.

6.3 Initial Inventory. Upon execution of this Agreement, the Distributor will place an order with Matco for the New Distributor Starter Inventory. The Distributor will pay Matco for the New Distributor Starter Inventory upon execution of this Agreement. Shipment of the New Distributor Starter Inventory will be made to the Distributor within 28 days of the date of this Agreement.

6.4 Electronic Funds Transfers. All payments to Matco by the Distributor on any promissory note or for the purchase of Products and other goods and services will be made by electronic funds transfers in accordance with the instructions by Global Payment Systems contained in the Manual. The Distributor will, from time to time during the Term of this Agreement, sign such documents as Matco may request to authorize the Distributor's bank to transfer the payment amounts designated by the Distributor to Matco's bank.

6.5 Standard Payment Terms. Matco's standard payment terms for Products sold to the Distributor

are "payment due upon receipt of invoice." If the Distributor fails to make any payment to Matco for Products in a timely manner, then Matco may require full or partial payment in advance or seek other assurances of performance, including, but not limited to, reducing credit limits and/or placing the Distributor on credit hold prior to shipping any additional Products to the Distributor. Matco may assess late fees on the overdue amounts, as provided for in Section 3.18 above.

6.6 Security. The Distributor hereby grants Matco a security interest in all of the Distributor's Products, accounts receivable and other assets to secure any unpaid credit or financing provided to the Distributor and the Distributor will sign such security agreements, financing statements and other documents as Matco may request to legally perfect its security interest.

6.7 Shipment. The Distributor will be entitled to one qualifying shipment of Products per week from Matco's warehouse, freight prepaid by Matco, if the Distributor has complied with Matco's rules and policies regarding the placement and payment of orders for Products. Matco will ship Products "FOB" from Matco's warehouse, freight prepaid, but the title to the Products, and the risk of loss, will pass to Distributor as soon as the Products are delivered to the carrier at Matco's warehouse. Prepaid freight shipments will not accumulate if the Distributor fails to request a shipment for any particular week. Additional shipments, special orders, shipments to addresses other than the Distributor's normal business address, and orders not made in compliance with Matco's standard order input procedures, will be shipped from Matco's

warehouse, freight collect, unless otherwise agreed to in writing by Matco.

6.8 No Right To Withhold or Offset. The Distributor will not withhold any payment due to Matco because of any damage to the Products caused during transportation from Matco to the Distributor or as a result of any legal or other claims the Distributor may allege against Matco. The Distributor will not deduct any charges for services, parts, or other items from any payments due to Matco until such charges have been agreed to in writing by Matco.

6.9 Acceptance of Orders/Force Majeure. All Product orders placed by the Distributor will be subject to acceptance by Matco. Matco will, with reasonable diligence and subject to Section 6.5, execute all accepted Product orders received from the Distributor. However, Matco expressly reserves the right at any time to defer, postpone or forego any shipments of Products on account of procedures or priorities established by any state, federal or local government or because of production failures, strikes or other labor disturbances, inability or delay in obtaining raw materials or other supplies, floods, fires, accidents, wars, incidents of terrorism or other causes or conditions beyond the control of Matco, and Matco will not be liable to the Distributor for any damages or loss of profits caused by such delay in executing or failing to execute such orders.

6.10 Taxes. The Distributor will pay, in addition to the prices specified for the Products pursuant to Matco's then current price list, all applicable federal, state, local and governmental taxes applicable to the Distributor's purchase of the Products.

6.11 Risk of Loss. After any Products ordered by the Distributor have been identified in such order, the risk of loss will at all times be borne by the Distributor. The Distributor will be responsible for making all claims against the carrier for damages to the Products and for all other losses.

ARTICLE 7

TRADEMARKS, TRADE NAMES AND PATENTS

7.1 Grant of License. Matco grants to the Distributor a non-exclusive, non-transferable right and license to use the Marks in the normal course of operating the Distributorship. The Distributor will only use the Marks in connection with the sale of the Products sold pursuant to the Business System and the terms of this Agreement.

7.2 Rights of Matco. The Distributor will not take any action which is adverse to Matco's right, title or interest in the Marks or Matco's pending or issued patents for various inventions and Products. The Distributor will not register or attempt to register the Marks or apply for any patent rights for the Products. The Distributor further agrees that nothing in this Agreement will give the Distributor any right, title or interest in the patent rights or Marks other than the right of use in accordance with the terms of this Agreement. The Distributor acknowledges, the validity and Matco's exclusive ownership of the Marks and the patent rights and agrees that any improvements made by the Distributor relating to the Marks or the Business System, as well as any and all goodwill resulting from the Distributor's use of the Marks pursuant to this Agreement, will inure solely to the benefit of Matco.

7.3 Conditions to Use of Marks. The Distributor will not have the right to sublicense, assign or transfer its license to use the Marks. The Distributor will not use the Marks as part of its corporate or other legal name, or as part of any e-mail address, domain name, or other identification of the Distributor in any electronic medium. The Distributor will use the Marks only in the form and manner and with the appropriate legends as prescribed from time to time by Matco. The Distributor will modify its use of the Marks from time to time in the manner designated in writing by Matco. The Distributor will sign all documents deemed necessary by Matco to obtain or maintain protection for the Marks.

7.4 Approval of Printed Materials. The Distributor will obtain Matco's prior written approval for the use of the Marks in any advertising, promotional or other printed materials.

7.5 Defense of Actions. The Distributor will give Matco immediate written notice of any claim made by any party relating to the Marks or the Business System and will, without compensation, cooperate in all respects with Matco in any legal proceedings involving the Marks or the Business System. Matco will have the sole and absolute right to determine whether it will commence or defend any litigation involving the Marks or the Business System, and will, at its expense, control and conduct any litigation involving the Marks. If the Distributor is named as a defendant in any action involving the Marks or the Business System solely because the plaintiff is alleging that the Distributor does not have the right to use the Marks, then if the Distributor gives Matco written notice of the action within ten days after the Distributor receives notice of the claim, Matco will

assume the defense of the action and will indemnify and hold the Distributor harmless from any and all damages assessed against the Distributor in connection with the action.

ARTICLE 8

WARRANTY AND TOOL RETURNS

8.1 Warranty Policy. All Matco Products are subject to the warranty and liability limitations of the written Product warranty of Matco (the "Matco Warranty"). Matco's Warranty policy, which may change over time, provides, generally, that any Product that is branded with the "Matco" name is warranted against defects in materials and workmanship. Matco, or one of its authorized representatives, will, at Matco's option, repair or replace any tool or part that is subject to the warranty without charge, if the defect or malfunctioning tool or part is returned to Matco or its representative, shipping prepaid. There are certain limitations under the Matco Warranty, and the Distributor must read and understand the warranty policies. The Distributor must follow Matco's policies and procedures regarding returning tools for warranty claims. Among the procedures that the Distributor must follow is the requirement to send back the products with the appropriate paperwork, product specifications, codes and other required information. In addition, the Distributor must pay all freight and shipping charges to send the defective product to Matco. In most cases, Matco will pay the shipping and freight costs to send the Distributor a new or repaired tool, part or product.

Also, there are certain warranty service functions that the Distributor must perform. Currently, the Distributor warranty responsibilities and functions

include the following: "in the field" repair of ratchets and toolboxes. For ratchet repairs, the Distributor must purchase repair kits, which currently range in price from $10 to $40 per kit and must pay the shipping/freight charges to return the defective part to Matco. Upon return of the defective parts to Matco, Matco will credit the cost of the ratchet repair kit. Matco intends to include ratchet repair instructions on its website for distributors. You, as the distributor, are not compensated for your time to make these repairs. The Distributor is also currently responsible to perform minor warranty repairs on toolboxes within the List of Calls, such as drawer slides, casters (wheels), trim and/or drawer replacement if needed. Warranty repairs are handled on a case-by-case basis after contacting Matco's Customer Service and/or Matco's toolbox manufacturing facility. There are no repair kits for toolboxes, and you are not required to purchase items to repair toolboxes under warranty.

The Matco Warranty may be amended or revised by Matco at any time in its sole discretion. Matco will have the right to adjust and resolve all warranty claims, either directly with the Customer or through the Distributor, as Matco in its sole discretion may determine, and any action by Matco with respect to warranty claims will be binding upon the Distributor.

8.2 Tool Return Policy. Matco will make its then-current tool return policy available to the Distributor. The current policy provides that during the term of the Distributorship Agreement or after its expiration or termination, the Distributor may return for credit to its Open Purchase Account any eligible Matco Products purchased from Matco and listed in the then current Matco Tools Price List, excluding special order and high obsolescence electronic products. The current

tool return policy specifies that the tools and other products that are eligible for return for credit are new, unused, and not abused products that are in saleable condition, and in their original packaging. The products returned must be on the current inventory list and cannot be discontinued items. Matco generally tries to give distributors at least 180 days notice following an announcement that a product has been discontinued to return the product for credit. The Distributor may take advantage of the tool return policy at any time, such as if the Distributor has overstocked items, or wishes to rotate or adjust the product mix in its inventory. Matco will credit the Distributor's Open Purchase Account for the eligible returned Products less a restocking fee, which in most cases is 15% of the original purchase price of the product. A good faith effort will be made by Matco to issue credit within 90 days of acceptance of the returned Products. The specific criteria for products that are eligible for return for credit is stated in Matco's tool return policy. The Distributor must pay for the packaging and shipping of such Products to Matco. Matco may revise its tool return policy at such times as it may determine, and will inform the Distributor in writing. of any changes when made.

ARTICLE 9

CONFIDENTIALITY

The Distributor will not, during the Term of this Agreement or thereafter, communicate, divulge or use for the benefit of any other person or entity any confidential information, knowledge or know-how concerning the methods of operation of a Matco Distributorship which may be communicated to the Distributor by any employees of Matco, or which arises by virtue of this Agreement. The Distributor will

divulge such confidential information only to his employees who must have access to it in order to operate the Distributorship. The Operations Manual and any and all other information, knowledge and know-how including, without limitation, drawings, materials, equipment, technology, methods, procedures, specifications, techniques, computer software programs, computer software source codes, systems and other data which Matco designates as confidential or proprietary will be deemed confidential and proprietary for the purposes of this Agreement. The obligations of confidentiality shall survive termination or expiration of this Agreement for any reason.

ARTICLE 10

TRANSFER OF INTEREST

10.1 Transfer of Distributorship Interest. Neither the Distributor nor any individual, partnership, or corporation which owns any interest in the Distributor will transfer any interest in this Agreement, in the Distributor, in any capital or common stock in the Distributor, or in all or substantially all of the assets of the Distributorship, including the Mobile Store (the "Distributorship Interest"), without the prior written consent of Matco.

10.2 Conditions for Transfer. Matco will not unreasonably withhold its consent to any transfer, if the following conditions are met: the Distributor is not in default under any provision of this Agreement, including payment of any financial obligations to Matco; the Distributor and Matco have signed a mutual general release of any and all claims against each other and their respective affiliates; it has been demonstrated to Matco's sole satisfaction that the transferee exhibits the ability to operate the Distributorship, possesses

an acceptable credit rating, has adequate financial resources and capital to operate the Distributorship in accordance with Matco's requirements, and is not involved, directly or indirectly, in any business that is in any way competitive with a Matco Distributorship; the transferee-distributor successfully completes the Matco Business System Training (MBST) Program; and the Distributor and transferee-distributor sign the legal documents necessary to transfer this Agreement to the transferee-distributor. Distributor and Spouse acknowledge and agree that (a) any proposed assignment or transfer to Spouse of this Agreement, the rights and responsibilities under this Agreement, or any Distributorship Interest, or (b) any proposed delegation of duties of Distributor under this Agreement, to Spouse, by contract, by operation of law, or otherwise, shall not be effective unless approved in advance, in writing by Matco, and Matco may rely on the conditions described in this Section 10.2, and/or any other reasonable conditions and qualifications, in determining to grant or withhold its consent of or approval to any such transfer, assignment, or delegation to Spouse.

10.3 Transfer to Corporation. The Distributor may transfer this Agreement to a corporation formed for the convenience of ownership upon prior written notice to Matco, provided the Distributor owns 100% of the capital stock of the corporation and personally guarantees, in a written guaranty satisfactory to Matco, to make all payments and to fulfill all obligations and conditions required under this Agreement.

10.4 Security Interest. The Distributor will not grant a security interest in the Distributorship or this Agreement without Matco's prior written consent. Matco will have the right as a condition of its consent,

to require the secured party to agree that if the Distributor defaults under any security interest, then Matco will have the right and option (but not the obligation) to be substituted for the Distributor as the obligor to the secured party and to cure any default of the Distributor without the acceleration of any indebtedness due from the Distributor.

10.5 Transfer by Matco. Matco will have the right to transfer or assign this Agreement and all or any part of its rights or obligations herein to any person or legal entity without notice to the Distributor.

10.6 Non-Competition and Non-Solicitation Following a Transfer. In addition, to the covenants regarding non-competition and non-solicitation of Distributor, Spouse and others as specified in Section 11.9 below, Matco encourages Distributor (if obtaining the distributorship by virtue of a transfer) to obtain a non-competition agreement from the previous distributor that serviced the List of Calls, and Matco expects that it will encourage any new distributor that acquires the business, the route, the accounts or the distributorship of the Distributor to obtain a noncompetition agreement from the outgoing or transferring Distributor. The noncompetition agreement may assist in preventing competition from the previous distributor, previous distributor's spouse, and immediate family members for a continuous uninterrupted period of one (1) year from the date of a transfer permitted under Section 10 above, or expiration or termination of the previous distributor's Distributorship Agreement (regardless of the cause for termination). Competition includes, but is not limited to, selling or attempting to sell any Products or any products the same as or similar to the Products to (i) any existing Customer on the Distributor's List of Calls who purchased one or

more Products from the previous distributor during the 12-month period immediately preceding the dates referred to in this Section 10.6, or (ii) any Potential Customer on the Distributor's List of Calls and Potential Customer List, located on, or identified in, the previous distributor's List of Calls and Potential Customer List, as such lists may have been amended as provided for in the previous distributor's Distributorship Agreement and in accordance with Matco's policies, if the previous distributor had visited or made one or more sales calls to such Potential Customer, List of Calls, or person or business identified on the Potential Customer List during the 12-month period immediately preceding the date referred to in this Section 10.6.

ARTICLE 11

DEFAULT AND TERMINATION

11.1 Termination by Distributor. The Distributor may terminate this Agreement, at any time, with or without cause, by giving forty-five days prior written notice to Matco.

11.2 Termination by Distributor During First Six Months. If the Distributor terminates this Agreement for any reason within six months after the date of this Agreement, and if the Distributor has not failed to operate the Distributorship for more than six (6) "business days" in total, or more than three (3) consecutive business days during that six month period, then Matco will (i) accept for return all new Products purchased by the Distributor through or from Matto during that 6-month period, and will credit to the Distributor's open purchase account an amount equal to 100% of the Distributor's purchase price for the returned Products, and (ii) credit the Distributor's

open purchase account for the lesser of (a) $2,700, (b) an amount equal to two months of payments under the Distributor's Matco Truck lease or purchase agreement, or (c) the amount required to terminate the truck lease if less than two payments. The Distributor and Matco will sign a joint and mutual release of all claims that each of the parties and their affiliates, employees and agents may have against the other in such form as Matco may specify; however, the Distributor will remain liable for any indebtedness to Matco under this Agreement or the operation of the Distributorship and any such indebtedness will be excluded from the mutual release. A "business day" is a weekday in which the shops or locations on the List of Calls are open for business. "Failed to operate" means not performing the typical and required route functions, such as customer visits, product sales and promotion, and collection of money owed.

11.3 Matco's Termination Rights. Matco will have the right to terminate this Agreement if the Distributor (A) violates any material term, provision, obligation, representation or warranty contained in this Agreement or any other agreements entered into with Matco including, but not limited to, agreements regarding participation in the Matco Tools PSA Program, (B) makes an assignment for the benefit of creditors or if a voluntary or involuntary proceeding is instituted by or against the Distributor in bankruptcy or under any other insolvency or similar law, (C) attempts to assign or transfer this Agreement without Matco's written consent, (D) abandons the Distributorship, (E) fails to timely make any payment due to Matco under this Agreement or under any other agreement, promissory note or contract, or (F) refuses to perform a physical inventory if required by Matco

or refuses to permit Matco to audit his books and records in accordance with Section 5.2.

11.4 Notice; Cure Periods. Matco will not have the right to terminate this Agreement unless and until: (A) written notice setting forth the alleged breach giving rise to the termination has been delivered to the Distributor in accordance with the terms of Section 13.2, and (13) the Distributor fails to correct the breach within the period of time specified by law. If applicable law does not specify a time period to correct the breach, then the Distributor will have thirty days to correct the breach except where the written notice states that the Distributor is delinquent in any payment due to Matco under this Agreement in which case the Distributor will have ten days to make full payment to Matco.

11.5 Immediate Termination Rights. Notwithstanding Section 11.4, Matco will have the right to immediately terminate this Agreement by giving the Distributor written notice of termination, if the Distributor: (A) abandons the Distributorship, including voluntary or involuntary abandonment, and/or abandonment due to repossession of the Matco Tools Mobile Store and inventory, (B) is convicted of or pleads guilty to a gross misdemeanor or felony, (C) is involved in any conduct or act which materially impairs the goodwill associated with Matco, the Business System, or the Marks, (D) refuses to permit Matco to audit his books and records in accordance with Section 5.2, (E) has been found to have submitted a fraudulent credit application, (F) commits any fraudulent act in connection with any of his/her agreements with Matco, (G) fails to comply with Section 3.2 of this Agreement by offering to sell or selling any products to customers at any location not identified on the distributor's List

of Calls or Potential Customer List without Matco's express written authorization, (H) is disabled to the extent Distributor cannot perform Distributor's obligations hereunder for a period of (6) six consecutive months, or for any (6) six months within a period of (18) eighteen consecutive months, (1) dies, (J) after curing a default pursuant to Sections 11.3 and 11.4, commits the same default again within a twelve (12) month period of the previous default, whether or not cured after notice, (K) commits the same or different default under this Agreement, three or more times within any twelve (12) month period, whether or not cured after notice, (L) makes an assignment for the benefit of creditors or if a voluntary or involuntary proceeding is instituted against the Distributor in bankruptcy or under any other insolvency or similar law, or (M) fails to submit to or undergo a drug and/or alcohol test if required by Matco, or fails the drug and/or alcohol test required by Matco.

11.6 Obligations Upon Termination. Upon the termination or expiration of this Agreement, the Distributor will: pay Matco all amounts owed by the Distributor to Matco including interest charged on distributor's Open Purchase Account balance at a rate of 22.5% annually or the maximum rate permitted by law, whichever is lower; provide Matco with the inventory amounts and financial information of the Distributorship for the preceding twelve months; immediately cease using all of the Marks and the Business System; provide Matco with all Customer lists and other information relating to the Customers of the Distributorship; return to Matco by pre-paid U.S. mail the Manual and all other manuals, software, catalogs, brochures, pamphlets, decals, signs, and other materials provided to the Distributor by Matco, and/or destroy all electronic versions of such materials and provide verification of

such destruction to Matco; and remove all Marks, logos, graphics and insignias indicating a relationship with Matco from the Mobile Store and all other property of the Distributor. In addition, Matco may assess Distributor a late fee of $25 per week for each week that the Distributor fails to pay the balance owed on the Open Purchase Account following termination.

11.7 Return of Products. Within thirty days following: (A) the expiration or non-renewal of this Agreement, or (B) termination of this Agreement by Matco or by Distributor, Matco will, in accordance with Matco's then-current Product return policy, permit the Distributor to return the new and unused Products purchased by the Distributor from Matco, and the amount of the Products returned will be credited to the Distributor's open purchase account, subject to any restocking fees or other fees or charges in accordance with Matco's then-current Product return policy.

11.8 Warranty Returns. During the thirty day period following termination of this Agreement, Matco will accept Products returned to it by the Distributor for warranty claim processing in accordance with Matco's then existing Warranty policy.

11.9 Non-Solicitation of Customers; Covenant Against Competition. Distributor and Spouse, if applicable, individually covenant that each of Distributor, Spouse, Distributor's employees, and the immediate family members of Distributor and Spouse, except as otherwise approved in writing by Matco:

11.9.1 shall not, during the term of this Agreement, either directly or indirectly, for itself, or through, on behalf of, or in conjunction with any person, persons, partnership, limited liability company,

or corporation, own, maintain, operate, engage in, or have any interest in any business which is the same as or similar to a Matco mobile tool distributorship business, including without limitation, a business that manufactures, sells, and/or distributes any products that are the same as or similar to the Products (referred to herein as a "Competitive Business");

11.9.2 shall not, during the term of this Agreement, either directly or indirectly, for itself, or through, on behalf of, or in conjunction with any person, persons, partnership, limited liability company, or corporation, sell or attempt to sell to any customers or Potential Customers of the Distributorship any products that are the same or similar to the Products;

11.9.3 shall not for a continuous uninterrupted period of one (1) year from the date of: (A) a transfer permitted under Article 10, above; (B) expiration or termination of this Agreement (regardless of the cause for termination); or (C) a final order of a duly authorized arbitrator, panel of arbitrators, or court of competent jurisdiction (after all appeals have been taken) with respect to any of the foregoing or with respect to the enforcement of this Section 11.9, either directly or indirectly, for itself, or through, on behalf of, or in conjunction with any persons, partnership, limited liability company, or corporation, sell or attempt to sell any Products or any products the same as or similar to the Products to (i) any Customer who purchased one or more Products from Distributor during the 12-month period immediately preceding the dates referred to in subclauses (A), (B), or (C) of this Section 11.9.3, or (ii) any Potential Customer, located on, or identified in, the Distributor's List of Calls, as such list

may have been amended as provided for in this Agreement and in accordance with Matco's policies, if Distributor had visited or made one or more sales calls to such Potential Customer, List of Calls, or person or business identified on the List of Calls during the 12-month period immediately preceding the date referred to in subclauses (A), (B), or (C) of this Section 11.9.3.

11.10 Action in Lieu of Termination. In the event Distributor is in default under this Agreement for failure to comply with any of the terms or conditions of this Agreement, and/or for failure to comply with Matco's policies, procedures or standards, including, without limitation, the lesser of 80% of the National Distributor Purchase Average requirement or 80% of the District Distributor Purchase Average requirement (as described in Section 3.3) or the purchase average to sales average ratio, as described in Section 3.3, and Matco has the right to terminate this Agreement as provided for in this Article 11, then Matco may, at its sole discretion and in lieu of termination, take any one or more of the following actions (as applied to the Distributor): modify payment or shipping terms; impose new or different or increased interest charges or fees; limit or restrict Distributor's access to special or additional services or products from Matco; modify product return and warranty benefits; and/or take such other action as Matco, in its sole discretion, deems appropriate. Matco may discontinue these adjustments at any time. In addition, so long as Distributor continues to be in default and/or if Distributor subsequently is in default under this Agreement, Matco may pursue any remedy available under this Agreement, as permitted by law, including termination of the Agreement, as provided for in this Article 11.

ARTICLE 12

DISPUTE RESOLUTION

12.1 Arbitration. Except as expressly provided in Section 12.5 of this Agreement, all breaches, claims, causes of action, demands, disputes and controversies (collectively referred to as "breaches" or "breach") between the Distributor, including his/her Spouse, immediate family members, heirs, executors, successors, assigns, shareholders, partners or guarantors, and Matco, including its employees, agents, officers or directors and its parent, subsidiary or affiliated companies, whether styled as an individual claim, class action claim, private attorney general claim or otherwise, arising from or related to this Agreement, the offer or sale of the franchise and distribution rights contained in this Agreement, the relationship of Matco and Distributor, or Distributor's operation of the Distributorship, including any allegations of fraud, mis-representation, and violation of any federal, state or local law or regulation, will be determined exclusively by binding arbitration on an individual, non-class basis only in accordance with the Rules and Regulations of the American Arbitration Association ("Arbitration").

12.2 Notice of Dispute; Cure Period. The party alleging the breach must provide the other party with written notice setting forth the facts of the breach in detail, and neither party will have the right to commence any Arbitration hearing until such written notice is given. The party alleged to have breached this Agreement will have thirty days from receipt of the written notice to correct the alleged breach. If the alleged breach is not corrected within the thirty day period and subject to Section 12.6 below, then either party will have the right to request Arbitration as

provided herein to determine their rights under this Agreement.

12.3 Limitation of Actions; Waiver of Claims. UNLESS THIS PROVISION IS PROHIBITED BY APPLICABLE LAW, ANY AND ALL CLAIMS AND ACTIONS, BROUGHT BY ANY PERSON OR PARTY, ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE RELATIONSHIP OF MATCO AND DISTRIBUTOR, THE OFFER OR SALE OF THE FRANCHISE AND DISTRIBUTION RIGHTS CONTAINED IN THIS AGREEMENT, OR DISTRIBUTOR'S OPERATION OF THE DISTRIBUTORSHIP, INCLUDING ANY ARBITRATION PROCEEDING, OR ANY CLAIM IN ARBITRATION (INCLUDING ANY DEFENSES AND ANY CLAIMS OF SET-OFF OR RECOUPMENT), MUST BE BROUGHT OR ASSERTED BEFORE THE EXPIRATION OF THE EARLIER OF (A) THE TIME PERIOD FOR BRINGING AN ACTION UNDER ANY APPLICABLE STATE OR FEDERAL STATUTE OF LIMITATIONS; (B) ONE (1) YEAR AFTER THE DATE UPON WHICH A PARTY DISCOVERED, OR SHOULD HAVE DISCOVERED, THE FACTS GIVING RISE TO AN ALLEGED CLAIM; OR (C) EIGHTEEN (18) MONTHS AFTER THE FIRST ACT OR OMISSION GIVING RISE TO AN ALLEGED CLAIM; OR IT IS EXPRESSLY ACKNOWLEDGED AND AGREED BY ALL PARTIES THAT SUCH CLAIMS OR ACTIONS SHALL BE IRREVOCABLY BARRED. CLAIMS OF THE PARTIES FOR INDEMNIFICATION SHALL BE SUBJECT ONLY TO THE APPLICABLE STATE OR FEDERAL STATUTE OF LIMITATIONS.

12.4 Powers of Arbitrator. The arbitrator shall have the full authority to make a finding, judgment, decision and award relating to the claims made in the

demand for arbitration, as provided for in Section 12.1 above, and subject to the limitations in this Section 12.4. The Federal Rules of Evidence (the "Rules") will apply to all Arbitration hearings and the introduction of all evidence, testimony, records, affidavits, documents and memoranda in any Arbitration hearing must comply in all respects with the Rules and the legal precedents interpreting the Rules. Both parties will have the absolute right to cross-examine any person who testifies against them or in favor of the other party. The arbitrator has the right to award, or include in his or her award, any relief authorized by law which he or she deems proper in the circumstances, including, without limitation, money damages (with interest on unpaid amounts from the date due), specific performance, injunctive relief, and attorneys' fees and costs, provided that the arbitrator will not have the right or authority to declare any Mark generic or otherwise invalid or to award any damages waived by Section 12.8 below. The arbitrator will have no authority to add to, delete or modify the terms and provisions of this Agreement. All findings, judgments, decisions and awards of the arbitrator will be limited to the dispute or controversy set forth in the written demand for Arbitration, and the arbitrator will have no authority to decide any other issues. All findings, judgments, decisions and awards by the arbitrator will be in writing, will be made within ninety days after the Arbitration hearing has been completed, and will be final and binding on Matco and the Distributor (including the Distributor's Spouse, immediate family members, owners, heirs, executors, successors, assigns, shareholders, partners or guarantors (as applicable)). Notwithstanding Section 12.10, the written decision of the arbitrator will be deemed to be an order, judgment and decree and may be entered as such in any Court

of competent jurisdiction by either party in any jurisdiction. The arbitrator's findings and awards may not be used to collaterally estop Matco, the Distributor or any other party from raising any like or similar issue, claim or defense in any other or subsequent Arbitration, litigation, court hearing or other proceeding involving third parties or other Distributors.

12.5 Disputes not Subject to Arbitration. The following disputes and controversies between the Distributor and Matco will not be subject to Arbitration: any dispute or controversy involving the Marks or which arises under or as a result of Article 7 of this Agreement, any dispute or controversy involving immediate termination of this Agreement by Matco pursuant to Section 11.5 this Agreement, and any dispute or controversy involving enforcement of the covenants not to compete contained in this Agreement.

12.6 Mediation. Before any breach, claim, demand, dispute, cause of action, or other controversy regarding or pertaining to the termination or non-renewal of this Agreement may be filed or submitted in any arbitration proceeding under Section 12.1, such claim, demand, cause of action, or controversy shall first be submitted to non-binding mediation, administered by an established, neutral mediation service. This Section 12.6 shall apply to Matco, Distributor, and any person in privity with or claiming through, on behalf of, or in the name of, Distributor. All parties must sign a confidentiality agreement prior to participating in any mediation proceeding. The mediation must take place at a location agreed to by Matco and Distributor or, if no agreement can be reached and unless prohibited by applicable law, in a city within thirty (30) miles of Matco's principal place of business at the

time of the submission to mediation. The parties shall mutually agree upon a mediator or neutral within twenty-one (21) days after the demand for mediation is made by one party to the other. If the parties cannot agree upon a mediator, a mediator shall be appointed in accordance with the rules of the mediation service. The mediator or neutral shall have experience in franchising or distribution matters. The mediation shall be conducted within thirty (30) days of the selection of a mediator. The parties shall share equally the cost of the mediator and the mediation services and related expenses, but the parties shall bear their own costs to attend and participate in the mediation, including each party's respective attorney's fees and travel costs.

12.7 No Class Actions. No party except 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 (as applicable)) may join in or become a party to any Arbitration proceeding arising under this Agreement, and the arbitrator will not be authorized to permit any person or entity that is not a party to this Agreement or identified in this paragraph to be involved in or to participate in any Arbitration conducted pursuant to this Agreement. 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.

12.8 Limitation of Damages. UNLESS THIS LIMITATION IS PROHIBITED BY APPLICABLE

LAW, EACH OF THE PARTIES (INCLUDING DISTRIBUTOR'S OWNERS, AND SPOUSE IF APPLICABLE) HEREBY AGREES THAT THE OTHER PARTY WILL NOT BE LIABLE FOR PUNITIVE, EXEMPLARY, INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS OF FUTURE PROFITS, ARISING OUT OF ANY CAUSE WHATSOEVER, WHETHER BASED ON CONTRACT, TORT, STRICT LIABILITY, OR STATUTE OR ORDINANCE, AND AGREES THAT IN THE EVENT OF A DISPUTE, THE RECOVERY OF EITHER PARTY WILL BE LIMITED TO THE RECOVERY OF ANY ACTUAL DAMAGES SUSTAINED BY IT.

12.9 Waiver of Jury Trials. UNLESS THE WAIVER IS PROHIBITED BY LAW, IF ANY DISPUTE IS NOT SUBJECT TO ARBITRATION UNDER THIS AGREEMENT, THEN EACH OF THE PARTIES AGREES THAT THE TRIAL OF ANY LEGAL ACTION ARISING UNDER THIS AGREEMENT OR THE RELATIONSHIP OF THE PARTIES WILL BE HEARD AND DETERMINED BY A JUDGE WHO WILL SIT WITHOUT A JURY. THE PARTIES ACKNOWLEDGE THAT THEY HAVE OBTAINED INDEPENDENT LEGAL ADVICE AS TO THE EFFECT OF THIS JURY WAIVER PROVISION, AND FURTHER ACKNOWLEDGE. THAT THEY HAVE READ AND UNDERSTAND THE EFFECT OF THIS JURY WAIVER PROVISION. EITHER PARTY MAY FILE AN ORIGINAL OR COPY OF THIS AGREEMENT WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT BY THE PARTIES TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.

12.10 Venue and Jurisdiction. 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 in 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.

12.11 Injunctive Relief. Nothing herein contained shall bar Matco's or Distributor's right to obtain injunctive relief against threatened conduct that will cause it loss or damages, under the usual equity rules,

including the applicable rules for obtaining restraining orders and preliminary injunctions.

12.12 Severability. 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 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 any such breaches.

ARTICLE 13

MISCELLANEOUS

13.1 Waiver. The failure of Matco to enforce at any time any provision of this Agreement will in no way affect the validity or act as a waiver of this Agreement, or any part, or the right of Matco thereafter to enforce it. The Distributor acknowledges that Matco operates a large and diverse distributorship network and that

Matco is not obligated to enforce each distributorship agreement in a uniform manner with respect to the other distributors.

13.2 Notices. Any notice required under this Agreement will be deemed to have been duly given if it is addressed to the party entitled to receive it at the address set forth on the cover page of this Agreement and it is personally served on the party, is sent by pre-paid United States certified mail, return receipt requested, or is sent by a recognized overnight carrier (Federal Express, UPS, Purolator) that requires a signature acknowledging delivery.

13.3 Governing Law. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio, and the substantive law of Ohio will govern the rights and obligations of and the relationship between the parties.

13.4 Severability. If any term or provision of this Agreement is determined to be void, invalid, or unenforceable, such provision will automatically be voided and will not be part of this Agreement, but the enforceability or validity of the remainder of this Agreement will not be affected thereby.

13.5 Entire Agreement. This Agreement, including all exhibits and addenda, supersedes all prior verbal and written agreements between the parties. Subject to our right to modify the Manual and the Business System standards, no change, amendment or modification to this Agreement will be effective unless made in writing and signed by both the Distributor and an officer of Matco. Nothing in this Agreement or in any related agreement, however, is intended to disclaim the representations Matco made in the Franchise Disclosure Document that Matco furnished to you.

13.6 Definitions. For purposes of this Agreement, the following words will have the following definitions:

(A) "Abandon" will mean the conduct of the Distributor, including acts of omission as well as commission, indicating the willingness, desire or intent of the Distributor to discontinue operating the Distributorship in accordance with the Business System and the standards and requirements set forth in the Manual and this Agreement.

(B) "Customer" will mean, at any time during the Term of this Agreement, or upon termination, a person or business that has purchased Products from the Distributor within the immediately preceding twelve-month period.

(C) "Mobile Store" will mean the truck used by the Distributor solely in connection with the operation of his Distributorship. The Mobile Store will at all times during the Term of this Agreement comply with all of Matco's standards and requirements as to color, size, engine size, storage capacity, graphics, on-board technology and design.

(D) "New Distributor Starter Inventory" will mean the initial inventory of Matco Products required to be purchased by the Distributor.

(E) "Operator" will mean the individual engaged or employed by the Distributor for purposes of operating the Distributorship under the terms of any program authorized by Matco to permit the hiring, by a Distributor, of another person to operate an additional Mobile Store for the Distributorship.

(F) "Potential Customer" will mean a full time professional mechanic or other individual in the automotive after-market and related markets who

in the normal course of business is required to use and furnish his/her own tools.

ARTICLE 14

REPRESENTATIONS BY THE DISTRIBUTOR

14.1 Receipt of Completed Agreement and Disclosure Documents. The Distributor acknowledges that he received Matco's Franchise Disclosure Document at least 14 calendar days prior to the date this Agreement was signed by him, and that he signed the acknowledgement of receipt attached to the Franchise Disclosure Document.

14.2 Investigation by Distributor. The Distributor acknowledges that he: has read this Agreement in its entirety; has had full and adequate opportunity to discuss the terms and conditions of this Agreement with legal counsel or other advisors of the Distributor's own choosing; has had ample opportunity to investigate the Matco Business System; has had ample opportunity to consult with current Matco distributors; has had ample opportunity to conduct due diligence on the Distributor's List of Calls and list of Potential Customers; and has had all questions relating to the Distributorship, including those of any advisor, answered to the Distributor's satisfaction.

14.3 Truth and Accuracy of Representations. The Distributor and its Spouse represent and warrant to Matco that (a) all statements, documents, materials, and information, including the application, submitted by the Distributor or its Spouse to Matco are true, correct, and complete in all material respects; and (b) neither the Distributor nor its Spouse, nor any of its or their funding sources, is or has ever been a terrorist or suspected terrorist, or a person or entity described in Section 1 of U.S. Executive Order 13244, issued

September 23, 2001, as such persons and entities are further described at the Internet website www.ustreas.gov/offices/enforcement/ofac. The Distributor agrees to promptly advise Matco of any material change in the information or statements submitted to Matco. The Distributor acknowledges and understands that Matco has entered into this Agreement in reliance on the statements and information submitted to Matco by the Distributor and its Spouse, and that any material breach or inaccuracy is grounds for Matco's termination of this Agreement.

14.4 No Representations. Except as may be disclosed in Matco's Franchise Disclosure Document, the Distributor has not received from either Matco, or anyone acting on behalf of Matco, any representation of the Distributor's potential sales, income, profit, or loss which may be derived from the Distributorship. The Distributor understands that Matco will not be bound by any unauthorized representations, including those made by other Matco distributors or by lending institutions based on information given to them to assist in their evaluation of Matco's business opportunity.

14.5 No Warranty of Success. The Distributor understands that Matco makes no express or implied warranties or representations that the Distributor will achieve any degree of financial or business success in the operation of the Distributorship. While Matco will provide the Distributor with training, advice, consultation, and a list of Potential Customers, success in the operation of the Distributorship depends ultimately on the Distributor's efforts and abilities and on other factors beyond Matco's control, including, but not limited to, economic conditions and competition.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed on the date set

forth above. The Distributor further acknowledges that this Agreement will become effective and binding only upon acceptance and execution by Matco in the State of Ohio.

DISTRIBUTOR:

By: /s/ John M. Fleming
Name: John M. Fleming
Title: Distributor
Date: 7/6/12

DISTRIBUTOR'S SPOUSE:

By: /s/ Rae J. Fleming
Name: Rae J. Fleming
Title: Spouse
Date: 7/6/12

NMTC, INC. d/b/a MATCO TOOLS

By: /s/ [Illegible]
Name: [Illegible]
Title: SR U.P. Sales
Date: 7/16/12

EXHIBIT 3

MATCO TOOLS
DISTRIBUTORSHIP AGREEMENT

This Distributorship Agreement (this "Agreement") is entered into by and between NMTC, Inc. d/b/a Matco Tools ("Matco"), a Delaware corporation, and John M. Fleming (the "Distributor" or "you").

RECITALS

Matco is the manufacturer and distributor of quality tools, tool boxes, and service equipment, and has developed a distinctive business system relating to the establishment and operation of Matco mobile distributorships that sell tools, tool boxes, service equipment, and other goods and services, including, without limitation, apparel, model cars and other collectible items, and consumables (such as mechanic's hand soaps), and such other items that Matco may in its sole discretion offer (collectively, the "Products") to professional mechanics and other businesses which operate from a single location and purchase tools for their own use (the "Business System").

The Business System is identified by means of certain trade names, service marks, trademarks, logos, and emblems, including, the trademarks and service marks "MATCO®" and MATCO® TOOLS (the "Marks").

Matco desires to appoint the Distributor as an authorized Matco mobile distributor to sell and service the Products in a certain geographic area and the Distributor desires to serve in such capacity.

The Distributor desires to operate a Matco mobile distributorship in accordance with the Business System and the other standards and specifications established by Matco, including requirements for regular weekly

customer sales calls, minimum inventory and sales levels, communications and computer software usage and other operating requirements.

In consideration of the mutual promises contained in this Agreement, the Distributor and Matco agree and contract as follows:

ARTICLE 1

APPOINTMENT OF DISTRIBUTOR

1.1 Grant of Distributorship. Matco grants the Distributor the right, and the Distributor undertakes the obligation, on the terms and conditions set forth in this Agreement, to purchase, resell, and service the Products as a Matco mobile distributor under the Business System (the "Distributorship").

1.2 List of Calls and Potential. Customer List. The Distributor will operate the Distributorship only at those locations identified as potential stops along the Distributor's proposed route (the "List of Calls") and in the list of Potential Customers (defined in Section 13.6) (the "Potential Customer List"). The List of Calls and Potential Customer List are identified and attached to this Agreement as Exhibit A. Unless the List of Calls and Potential Customer List is adjusted or modified by Matco and the Distributor, the Distributor may not offer or sell Products to any person, business, entity or other Potential Customer, other than those identified in the List of Calls. The Distributor acknowledges that: (A) as of the date of this Agreement there are a minimum of three hundred twenty-five (325) Potential Customers, the location of which will be identified on the List of Calls, (B) there can be no assurance that the Potential Customers identified in the List of Calls will actually become Customers (defined in Section 13.6) of the Distributor,

and (C) the number of Potential Customers identified on the List of Calls may increase or decrease after the date of this Agreement due to a variety of reasons, which may include economic changes, competition, sales and service from the Distributor, businesses that close or reduce staffing levels, and other reasons. Matco is under no obligation to supplement the List of Calls with additional stops or Potential Customers in the event the number of Potential Customers declines. It is important that you review your List of Calls to make sure you are satisfied with it before you sign your Distributorship Agreement. We therefore encouraged you to ride through your List of Calls and identify all of your shops and Potential Customers before you signed this Agreement. It is and was your responsibility to perform this due diligence. However, if you requested, a Matco representative was made available to ride with you to assist with this process and answer any questions you might have had. Prior to or in conjunction with your signing this Agreement, you also must sign a Ride Along Acknowledgement that you either did a ride through of your List of Calls or chose not to do so.

1.3 Exclusive Rights. The Distributorship is a business which operates principally from a vehicle, and which is authorized to resell the Products to potential purchasers identified on the List of Calls with Potential Customers. Except as permitted under Section 1.4, and for so long as the Distributor is in compliance with this Agreement, Matco will not operate, or grant a license or franchise to operate, a Matco mobile distributorship that will be authorized to sell Products to any Potential Customers identified on the Distributor's List of Calls, if such Customers purchase Products at or from the business located and identified on the List of Calls.

1.4 Rights Reserved by Matco. The Distributor acknowledges and agrees that except for the rights expressly granted to the Distributor and provided herein, Matco retains all rights to sell, and license or authorize others to sell, Products to any customers, at any location, and through any channels or methods of distribution. Without limiting the foregoing, Matco retains the following rights, on any terms and conditions Matco deems advisable, and without granting Distributor any rights therein:

1.4.1 Matco, and any affiliates, licensees or franchisees of Matco, if authorized by Matco, will have the absolute right to sell the Products, directly or indirectly, or through non-mobile distributors, including commercial sales representatives, (A) to industrial customers, industrial accounts, and owners of vehicle repair businesses (including businesses, entities, governmental agencies, and others, including those which may be listed on the Distributor's List of Calls, but excluding the Potential Customers) who (i) have central purchasing functions, or (ii) may purchase and/or acquire special order products designed for multiple-party use, which are not included as part of Matco's regular or special purchase inventory list, or (iii) may purchase Products through a bidding process, such as railroads, airlines, manufacturers, governmental agencies and schools, (B) to industrial and multiple-line and multiple brand wholesale distributors who may resell such Products to any potential purchaser or customer, including the Customers; and (C) to vocational and training schools and programs, and to the students and employees of such schools and programs.

1.4.2 Matco, and any affiliates, licensees or franchisees of Matco, if authorized by Matco, will have

the absolute right to sell the Products through (A) mail orders, telephone orders, and the use of catalogs distributed to potential customers (including Distributor's Potential Customers and Customers), (B) any current or future means of electronic commerce, including the Internet and Matco's website, and (C) at special and/or temporary venues (including race tracks, and other motor sports events).

1.4.3 Matco, and any present or future affiliates of Matco, may manufacture and/or sell products that are the same as or similar to the Products, and Matco's present or future affiliates may sell such products directly, or indirectly through wholesalers, suppliers, distributors or others, to potential customers who are the same as or similar to the Distributor's Potential Customers and Customers. Matco and the Distributor acknowledge and agree that Matco has no control over the sales or distribution methods or operations of its affiliates, and that Matco has no liability or obligations to the Distributor due to any sales or distribution activities of Matco's affiliates.

1.5 Understandings and Acknowledgments. Matco and the Distributor acknowledge and agree that Matco shall have no liability or obligation to the Distributor if any Customer or Potential Customer of the Distributor purchases or receives Products or competitive products through any method or channel of distribution described in Section 1.4, or otherwise reserved to Matco. Further, the Distributor and Matco acknowledge and agree that notwithstanding Section 1.3, Matco has in the past granted (A) distributorships that do not have any territorial restrictions or limitations on the distributor, and (B) distributorships that have territories in which the distributor is not limited to selling Products to a specified number of

customers. Matco shall use its reasonable efforts to deter such distributors, and other distributors, from selling Products to Potential Customers on the List of Calls, but Matco cannot and does not provide the Distributor with any guaranty or assurance that such distributors will not offer and sell Products to the Distributor's Potential Customers.

1.6 Spouse. Matco, Distributor, and Spouse (defined below) acknowledge and agree that Matco has granted the rights under this Distributorship Agreement to Distributor based in part on Distributor's application and Distributor's promise and covenant that the person identified on the signature page of this Agreement as "Distributor," will operate the Mobile Store and conduct the daily operations of the Distributorship. Distributor has designated the person identified on the signature page of this Agreement as "Spouse," as the person who will assist Distributor with certain aspects of the operation of the Distributorship. Matco, Distributor, and Spouse further acknowledge and agree that both Distributor and Spouse are liable for the financial obligations and debts of Distributor and the Distributorship, and are responsible individually for compliance with this Agreement and for causing Distributor to comply with this Agreement. Without limiting the foregoing, Distributor and Spouse acknowledge and agree to be individually bound by all of the terms of this Agreement, including, in particular, those contained in Section 3.11, Article 9, Section 11.9, and Article 12.

ARTICLE 2

TERM OF AGREEMENT; DISTRIBUTOR'S OPTION TO REACQUIRE DISTRIBUTORSHIP

2.1 Term. The term of this Agreement will be for ten (10) years, commencing on the date of this Agreement (the "Term"). This Agreement will not be enforceable until it has been signed by both the Distributor and Matco.

2.2 Distributor's Option to Reacquire Distributorship. At the end of the Term of this Agreement, the Distributor will have the right, at his option, to reacquire the Matco Distributorship, and execute a successor Distributorship Agreement, to serve the existing Customers identified in Exhibit A, for an additional ten (10) year period, provided the Distributor complies in all respects with the following conditions: (A) the Distributor has given Matco written notice at least one hundred eighty (180) days, but not more than one (1) year, prior to the end of the Term of this Agreement of his intention to reacquire the Matco Distributorship; (B) the Distributor has complied with all of the material terms and conditions of this Agreement, has materially complied with Matco's operating and quality standards and procedures, and has timely paid all monetary obligations owed to Matco throughout the Term of this Agreement; (C) the Distributor has been in strict compliance with this Agreement and the policies and procedures prescribed by Matco for (i) the six (6) month period prior to the Distributor's notice of its intent to reacquire a successor Matco Distributorship, and (ii) the six (6) month period prior to the expiration of the Term of this Agreement; (D) the Distributor has agreed, in writing, to make the reasonable capital expenditures necessary to update, modernize, and/or replace the Mobile Store

and equipment used by him in his Matco business to meet the then-current specifications and the general image portrayed by the Matco Business System; (E) the Distributor agrees to sign and comply with the then-current standard Distributorship Agreement then being offered to new distributors by Matco at the time the Distributor elects to exercise his option to reacquire the Matco Distributorship; and (F) the Distributor and Matco have signed a joint and mutual general release of all claims each may have against the other.

ARTICLE 3

DISTRIBUTOR'S DUTIES AND OBLIGATIONS

3.1 Promotion of Distributorship. The Distributor will, on a full-time basis, diligently promote, market, and work to increase Product sales, to increase the Customer base, and to provide quality service and warranty support to the Customers.

3.2 Restrictions on Sales. The Distributor will only sell Products and other merchandise approved by Matco, and will not sell any products, tools, equipment or other merchandise which are competitive with any of the Products, except for items that are traded-in by the Distributor's Customers, without Matco's prior written consent. Further, the Distributor shall not offer for sale, sell, or distribute any product not approved in advance by Matco (including, for example, hazardous materials, pornographic materials, or products not related to the Distributor's business) and shall discontinue the offer, sale, or distribution of products promptly upon notice from Matco. The Distributor may not operate the Distributorship or sell any Products to any person, entity, or business, or at any location not identified on the Potential Customer

List, even if such Potential Customer or location is adjacent to, or near, a location on the Distributor's List of Calls or Potential Customer List, nor may the Distributor sell Products to any Customer of the Distributor who moves to a location or business not identified on the Potential Customer List.

3.3 Inventory. The Distributor will (i) at all times maintain a minimum inventory of Products equal to or in excess of the New Distributor Starter Inventory; (ii) on a weekly basis, purchase Products from Matco in an amount not less than (a) eighty percent (80%) of the "National Distributor Purchase Average" (or "NDPA"), or (b) eighty percent (80%) of the "District Distributor Purchase Average" (or "DDPA") for the Distributor's district, whichever is lower, based on Distributor's twelve (12) month rolling average, or, if Distributor has been operating the Distributorship for less than twelve (12) months, based on Distributor's year-to-date average; and (iii) maintain a minimum of a sixty percent (60%) ratio of a calculation of the Distributor's year-to-date purchase average divided by the Distributor's year-to-date sales average.

3.4 Weekly Customer Sales Calls and Sales Meetings. To ensure high quality service, the Distributor will make personal sales calls to each of the stops, shops or locations on the Distributor's List of Calls every week. The Distributor will also attend at least eighty percent (80%) of district sales meetings that Matco schedules in or for Distributor's district each year for its distributors and district managers. Matco expects to schedule a district sales meeting approximately once every five (5) weeks, provided, however, that Matco may modify the frequency and timing of the meetings upon prior notice. Failure to comply with the weekly sales calls requirements or sales meeting requirements described

in this Section 3.4 shall be a material default under this Agreement, and shall be grounds for termination under Section 11.3. If the Distributor fails to make personal sales calls to each shop, stop, or location on the List of Calls at least weekly, or if the Distributor fails to attend at least eighty percent (80%) of the district sales meetings in any twelve (12) month period, then Matco may, in lieu of termination of this Agreement, terminate, reduce, or modify in all respects the Distributor's exclusive rights under Section 1.3 of this Agreement, immediately upon written notice from Matco to Distributor, and Matco will have the absolute right to adjust the territory, the List of Calls or Potential Customers accordingly or appoint or permit one or more other distributors to sell Products to the Distributor's Potential Customers, or to sell directly or indirectly, itself or through affiliate, Products to the Distributor's Potential Customers.

3.5 Time Payment Reserve Account Matco acknowledges having received from the Distributor a deposit for the Distributor's Time Payment Reserve Account in the amount designated by Matco, which will be administered in accordance with Matco's Time Payment Reserve Account policies.

3.6 Mobile Store; Uniforms. The Distributor must purchase or lease a Mobile Store, of the type and from a dealer or supplier approved by Matco, prior to beginning operations of the Distributorship. The Distributor will use the name MATCO TOOLS®, the approved logo and all colors and graphics commonly associated with the Matco Business System on the Mobile Store in accordance with Matco's specifications. The Distributor will keep the interior and exterior of the Mobile Store in a clean condition and will keep the Mobile Store in good mechanical condition. The Mobile

Store must be used solely for the operation of the Distributor's Matco business. If the Distributor desires to change its Mobile Store or operate a different Mobile Store during the Term of this Agreement, the Distributor must obtain the prior written authorization of Matco's Vice President of Sales before doing so. The Distributor must wear Matco-approved uniforms, as prescribed by Matco periodically, while operating the Distributorship. The Distributor is required to maintain a professional appearance at all times and be clean and well groomed while making calls on Potential Customers.

3.7 Computer; Software; Data. The Distributor will purchase or lease a new (not previously owned or refurbished) computer system that complies with the specifications established by Matco (and that Matco may update periodically), will sign the Matco Distributor Business System Software License, Maintenance and Support Agreement (the "Software License Agreement") (Exhibit 0) as may be modified from time to time, and will pay the required software license fees and annual maintenance support fee set forth in the Software License Agreement. The Distributor shall comply with all of Matco's standards and specifications for computer hardware, software, and communications, and the Distributor shall update its computer hardware, software, and communications to comply with any new or changed standards or specifications established by Matco. The Distributor agrees to use all of the features of the Matco software in operating the Distributorship, including, without limitation, the order entry, inventory, accounts receivable and reporting features. The Distributor will communicate with Matco, and will transmit to, and receive documents from, Matco, electronically, in the manner specified by Matco in the Manual (defined below) or as directed by Matco

through the Matco Distributor Business System. Except for the Matco Distributor Business System software, the Distributor will have sole and complete responsibility for: (a) the acquisition, operation, maintenance and upgrading of the computer system in order to maintain compliance with Matco's current standards as they may be modified from time to time: (b) obtaining and maintaining access to the Internet through a subscription with an Internet service provider or a then-current technologically capable equivalent in accordance with Matco's standards (which is currently high-speed Internet access through cable, DSL, or high-speed cellular); (c) the manner in which the Distributor's system interfaces with Matco's computer system and those of other third parties; and (d) any and all consequences that may arise if the Distributor's system is not properly operated, maintained, and upgraded. All data provided by the Distributor, uploaded to Matco's system from the Distributor's system, and/or downloaded from the Distributor's system to the Matco system is and will be owned exclusively by Matco, and Matco will have the right to use such data in any manner that Matco deems appropriate without compensation to the Distributor. In addition, all other data created or collected by Distributor in connection with the Matco Distributor Business System, or in connection with the Distributor's operation of the business, is and will be owned exclusively by Matco during the term of, and following termination or expiration of, the Agreement. Copies and/or originals of such data must be provided to Matco upon Matco's request.

3.8 Matco Business System Training (MBST) Program. The Distributor must successfully complete the "Matco Business System Training (MBST) Program," as defined in Section 4.1, before operating the Distrib-

utorship. If the Distributor owns more than one (1) Matco Distributorship, then the Matco Business System Training (MBST) Program must be successfully completed by the Operator who will operate the Distributorship to which this Agreement relates before the Distributorship opens for business. Matco may provide additional training and certification for its distributors from time to time and the Distributor (and the Operator, if applicable) will attend this training and will complete the certification procedures designated by Matco. At its option, Matco may require distributors to pay all or some portion of the cost of providing any such future additional training and/or certification procedures.

3.9 Compliance with Laws. The Distributor and all of his employees will comply with all federal, state and local laws, ordinances, rules, orders and regulations applicable to the operation of the Distributorship, including all traffic and safety regulations. The Distributor will file all federal and state tax returns and will timely pay all federal withholding taxes, federal insurance contribution taxes, and all other federal, state, and local income, sales and other taxes.

3.10 Compliance with Manual. The Distributor will operate the Distributorship in conformity with the operating procedures and policies established in the Matco Confidential Operating Manual (the "Manual"), or otherwise in writing. Matco will loan the Distributor a copy of the Manual when the Distributor begins the Matco Business System Training (MBST) Program. Matco reserves the right to provide the Manual electronically or in an electronic or computer-readable format, for example, via the Matco Distributor Business System or another method, or on a CD.

3.11 Payment Obligations. The Distributor will timely pay all amounts owed to Matco for Product

purchases and under any credit agreement, promissory note, or other agreement relating to the Distributorship. All payments shall be made in accordance with Matco's instructions and Operations Manual, including payments by telephone and electronic funds transfer, as described in Section 6.4 below.

3.12 Management of Distributorship. The Distributor will be responsible for managing all aspects of the Matco Business, including sales, collection of accounts receivable, purchases, inventory management, and hiring of Operators, if permitted by Matco. The Distributor may not hire Operators, managers or drivers, or delegate any of his/her duties and obligations under this Agreement unless approved in writing, in advance, by Matco. Notwithstanding our Business System standards, some of which address safety, security, and related matters, these matters are solely within the Distributor's control, and the Distributor retains all responsibility for these matters in the operation of the Distributorship.

3.13 Matco's Inspection Rights. The Distributor will: (A) permit Matco and its agents to inspect the Distributor's Mobile Store and observe the Distributor's business operations at any time during normal business hours, (B) cooperate with Matco during any inspections by rendering such assistance as Matco may reasonably request, and (C) immediately, upon written notice from Matco, take the steps necessary to correct any deficiencies in the Distributor's business operations.

3.14 Use of the Internet. The Distributor specifically acknowledges and agrees that any Website (as defined below) will be deemed "advertising" under this Agreement, and will be subject to (among other things) Matco's approval under Section 7.4 below. (As used

in this Agreement, the term "Website" means an interactive electronic document, contained in a network of computers linked by communications software, that the Distributor operates or authorizes others to operate and that refers to the Distributorship, the Marks, Matco, and/or the Business System. The term Website includes, but is not limited to, Internet and World Wide Web home pages.) In connection with any Website, the Distributor agrees to the following:

3.14.1 Before establishing the Website, the Distributor will submit to Matco a sample of the Website format and information in the form and manner Matco may reasonably require.

3.14.2 The Distributor may not establish or use the Website without Matco's prior written approval.

3.14.3 In addition to any other applicable requirements, the Distributor must comply with Matco's standards and specifications for Websites as prescribed by Matco from time to time in the Manual or otherwise in writing. If required by Matco, the Distributor will establish its Website as part of Matco's Website and/or establish electronic links to Matco's Website. As of the date of this Agreement, Matco has established a Website for the entire system, and has offered Distributor a web page (or subpage) on Matco's Website. Distributor shall execute Matco's "Matco Tools Web Page Agreement" (attached as Exhibit Q hereto), which permits Distributor to have its own subpage on Matco's website. Distributor shall pay all appropriate fees under the Matco Tools Web Page Agreement, and shall comply with Matco's web policies as they may be modified from time to time.

3.14.4 If the Distributor proposes any material revision to the Website or any of the information contained in the Website, the Distributor must submit each such revision to Matco for Matco's prior written approval as provided above.

3.15 Substance Abuse and Drug Testing. The Distributor acknowledges and agrees that driving a Mobile Store in an unsafe manner, or under the influence of alcohol or illegal drugs is potentially hazardous to the Distributor and to third parties, may cause physical injury to the Distributor and/or to third parties, and is a violation of law and a violation of Matco policies. In addition, such actions, and/or illegal or unauthorized operation of the Mobile Store and/or the Distributorship, may injure or harm the Marks and the goodwill associated with the Marks. The Distributor agrees not to drive or operate the Mobile Store under the influence of alcohol or illegal drugs and not to use or ingest illegal drugs at any time. Matco may, from time to time, upon notice to the Distributor and subject to compliance with applicable law, require that the Distributor submit to, and undergo periodic or random drug and/or alcohol testing at a facility, clinic, hospital or laboratory specified by Matco, at a reasonable distance from the Distributor's home, within the time period specified by Matco, which shall not be less than two (2) days, nor more than five (5) days following Matco's notice. Matco will bear the cost of any testing or lab fees. The Distributor's failure to submit to the testing, or the failure to pass the testing and analysis, will be grounds for immediate termination of the Distributorship, upon notice from Matco. The Distributor must implement a drug-free workplace policy, which may include a drug testing-policy for the Distributor's employees (if any), consistent with Matco's policy and consistent with and in compliance with applicable

laws. During the Term of this Agreement, Matco may periodically require that the Distributor certify that the Distributor and any employees are in compliance with the Distributor's drug-free workplace policy, consistent with and in compliance with applicable local, state and federal laws.

3.16 Computer Transactions. The Distributor must use his/her/its best efforts to timely and accurately enter and maintain, in its entirety, all business pertinent data on the MDBS business system relative to the operation of the Distributorship, including but not limited to customer data, product data, sales, returns, warranty, credit card transactions, and payments. Transactions must be completed in strict compliance with Matco's and industry standards, specifications and procedures, and any unauthorized adjustments, or non-compliant use or recordation of transactions (or failure to accurately record transactions or protect customer information), are prohibited.

3.17 Document Processing. In consideration of Matco's time and expense to prepare franchise and financial documents in connection with Distributor's execution of this Agreement and related documents, and if necessary, for Matco to file such documents with appropriate government agencies, Distributor must pay Matco a document processing fee of ninety-nine dollars ($99), on or before signing the Agreement.

3.18 Late Fee. The Distributor must pay for all Product purchases, and all charges, fees and other amounts in a timely manner, as required by this Ageement and any related or ancillary documents or agreements. Product purchases and other fees and charges will be charged to the Distributor's Open Purchase Account ("OPA"). If the Distributor fails to make a payment within twenty-one (21) days of the

date of an invoice from Matco, Distributor's OPA will be deemed delinquent. Matco may assess a late fee of five percent (5%) of the overdue balance per week, with a maximum late fee, per week, of one hundred dollars ($100).

ARTICLE 4

MATCO'S DUTIES

4.1 Matco Business System Training (MBST) Program. Matco will provide a classroom training program to the Distributor and, if applicable, the Operator, in Stow, Ohio, or at such other location as may be designated by Matco, to educate, familiarize and acquaint the Distributor and the Operator with the Matco Business Systems. The training will include instruction (and, in some instances, may include training by videotape, computer-based training modules, or interactive video) on basic business procedures, purchasing, selling and marketing techniques, customer relations, basic computer operations, and other business and marketing topics selected by Matco. After completion of the classroom training, hands-on training on the Distributor's Mobile Store will be provided by Matco. The classroom training at Stow, or other designated location, together with the on-the-truck training comprises Matco's "Matco Business System Training (MBST) Program." The Distributor and the Operator must successfully complete the classroom training prior to commencing business operations. The classroom training will be scheduled by Matco in its sole discretion and will be for a minimum of seventy hours. The Distributor must pay lodging and travel costs for attendance at the classroom training program. Currently, Matco has negotiated group lodging and meal accommodations and rates for distributors while attending the classroom training program. Lodging is located

near Matco's headquarters, Cleveland Hopkins International Airport, and/or Akron-Canton Regional Airport. The Distributor will be responsible for all expenses (except for scheduled travel to and from the airport and for daily travel to and from Matco's headquarters) incurred during classroom training programs. Lodging and meal costs will be billed directly to the Distributor's Open Purchase Account. If the Distributor or initial Operator elects to bring their respective Spouse, Matco will charge a flat fee in the amount of two hundred ninety-five dollars ($295) for food, lodging, and local transportation. The Distributor will pay all other expenses incurred by the Distributor, the Operator, and, if applicable, their Spouse(s), in connection with the attendance and/or participation of the Distributor and the Operator in Matco' s Matco Business System Training (MBST) Program, including the Operator's salary and fringe benefits.

4.2 Field Training. Following the Distributor's successful completion of the classroom portion of Matco's Matco Business System Training (MBST) Program, a field instructor, and/or a regional or district manager designated by Matco (the "Designated Trainer") will assist and advise the Distributor in the operation of his Matco business for a minimum of eighty hours over a six (6) week period. This assistance may include approximately one (1) week of training prior to or after the Distributor's classroom training, approximately one (1) week of training during the period that the Distributor commences sales activity, in conjunction with the Distributor's initial sales calls to Potential Customers and locations identified on the List of Calls and Potential Customer List, and a final phase of training during a period following the Distributor's first week of operations. The Designated Trainer will make sales calls with the Distributor and will provide

training and assistance to the Distributor relating to purchasing, selling and marketing techniques, customer relations, computer operations, Product knowledge and other topics relating to the Distributor's operation of the Distributorship.

4.3 Periodic Meetings. Matco will schedule periodic meetings with Matco personnel and other distributors for additional training, Product updates and business seminars. The Distributor must attend at least eighty percent (80%) of the Matco-scheduled district sales meetings for its district in any twelve (12) month period.

4.4 Hiring of New Operator. In the event the Distributor desires to hire an Operator to operate an additional Mobile Store, the Distributor must notify Matco of such intent, and obtain. Matco's prior written authorization and approval to hire or engage an Operator. If the new Operator has not successfully completed the Matco Business System Training (MBST) Program prior to hiring by the Distributor, then the new Operator will be required to successfully complete the Matco Business System Training (MBST) Program prior to operating the Distributorship. Matco will not charge a training fee for training the new Operator, but the Distributor will pay all travel, room and board, living and other expenses in connection with the new Operator's attendance and/or participation in Matco's Matco Business System Training (MBST) Program. Additionally, the Distributor will pay the Operator's salary and fringe benefits.

ARTICLE 5

THE PARTIES' RELATIONSHIP

5.1 Independent Contractor. The Distributor is and will hold himself out to be an independent contractor, and not an agent or employee of Matco. The Distribu-

tor is not authorized: (A) to sign in the name of Matco (or on its behalf) any contract, check, note, or written instrument; (B) to pledge the credit of Matco; (C) to bind or obligate Matco in any way; or (D) to make any promise, warranty, or representation on Matco's behalf with respect to the Products or any other-matter, except as expressly authorized in writing by Matco.

5.2 Financial Records and Reports. The Distributor will keep complete and accurate books, records, and accounts of all financial and business transactions and activities relating to the Distributorship, and will permit Matco and its representatives to audit the books, records and accounts during regular business hours during the Term of this Agreement and for one (1) year after termination or expiration of this Agreement. The Distributor's books, records and accounts will be in the form designated by Matco, and the Distributor will use the chart of accounts designated by Matco for all financial statements. The Distributor will submit to Matco, on a weekly basis, such business reports as Matco may designate in writing. Matco may request that the Distributor provide to Matco, within ninety (90) days of the Distributor's fiscal year end, a physical inventory which must be verified by a Matco District Manager, and an annual financial statement prepared in a format that Matco may designate. Once a physical inventory is completed, Distributor must adjust his books and MDBS reports to reflect the verified physical inventory numbers. Matco may require that the financial statements include a profit and loss statement, a balance sheet, a cash flow statement and/or other information. Depending upon Distributor's overall business health and compliance with the terms and conditions of this Agreement, Matco may waive this physical inventory requirement and/or may extend the frequency to a biannual basis. The Distributor

must properly register for its/his/her sales tax filing in its/his/her appropriate state and provide Matco with a properly executed exemption certificate.

5.3 Insurance. The Distributor will purchase and maintain comprehensive general liability insurance covering bodily injury and property damage with minimum coverage of two million dollars ($2,000,000), and vehicle liability insurance coverage for the Mobile Store with minimum coverage of two million dollars ($2,000,000), insuring both the Distributor and Matco against any loss, liability, damage, claim or expense of any kind whatsoever, including claims for bodily injury, personal injury and property damage resulting from the operation of the Distributorship or the operation of the Mobile Store or any other vehicle used in connection with the Distributorship. In addition, the Distributor will .purchase and maintain all risk inland marine insurance coverage with limits, of at least "replacement" cost for the Mobile Store and the Products, cargo, computer system and equipment used in connection with the Distributorship, and will purchase and pay for any and all other insurance required by law. All insurance policies maintained by the Distributor will: (A) name Matco as an additional named insured, (B) provide that Matco will receive copies of all notices of cancellation, nonrenewal or coverage change at least thirty (30) days prior to the effective date, and (C) require the insurance company to provide and pay for legal counsel to defend any claims or actions brought against the Distributor or Matco. Additional requirements concerning the insurance to be obtained and maintained by the Distributor, if any, may be designated by Matco from time to time in writing. If Distributor does not obtain and maintain the proper insurance coverage, Matco may purchase said insurance on Distributor's behalf and charge

Distributor's Open Purchase Account for the premium paid.

5.4 Indemnification. The Distributor will indemnify and hold Matco harmless from any claims, damages, judgments and losses, including attorney's fees, arising out of, from, in connection with, or as a result of the Distributor's operation of the Distributorship and the business conducted under this Agreement, the Distributor's breach of this Agreement, the Distributor's negligence, or any acts or omissions of the Distributor in connection with the operation of the Distributorship including, without limitation, claims, damages, judgments and losses arising from any unauthorized statements, representations or warranties made by the Distributor with respect to the Products, arid those alleged to be caused by Matco's negligence, unless (and then only to the extent that) the claims, damages, judgments, and losses are determined to be caused solely by Matco's gross negligence or willful misconduct according to a final, unappealable ruling issued by a court or arbitrator of competent jurisdiction.

5.5 Exercise of Matco's Judgment. Matco has the right to operate, develop, and change the Business System in any manner that is not specifically precluded by this Agreement. Whenever Matco has reserved in this Agreement a right to take or withhold an action, or to grant or decline to grant the Distributor a right to take or omit an action, except as otherwise expressly and specifically provided in this Agreement, Matco may make its decision or exercise its rights on the basis of the information readily available to it, and Matco's judgment of what is in its best interests and/or in the best interests of its franchise network, at the time the decision is made, without regard to whether other reasonable or even arguably preferable alternative

decisions could have been made by Matco and without regard to whether Matco's decision or the action Matco takes promotes its financial or other individual interest.

ARTICLE 6

PRODUCTS

6.1 Sale and Purchase of Products. Matco will sell and the Distributor will buy the Products from Matco at the prices and on the terms established and published by Matco from time to time. Distributor will not purchase or attempt to purchase any products, including Products, directly from vendors supplying products to Matco, or from vendors or other sources that may or may not sell to or supply products to Matco or its distributors. Prices and terms applicable to each order placed by the Distributor will be those in effect on the date the order is accepted by Matco. Matco reserves the right to add or delete Products, make changes to the Products, increase Product prices, and adjust the prices, terms, and discounts for the Products, without notice or liability to the Distributor, at any time.

6.2 Prices of Products. The Distributor will have the absolute right to determine the prices at which the Products are sold to the Distributor's Customers. If Matco institutes and implements a discount program, incentive program, coupon program, or other product sales or marketing program, the Distributor must comply with the program, and honor all authorized coupons, gift cards, gift certificates, and incentives.

6.3 Initial Inventory. Upon execution of this Agreement, the Distributor will place an order with Matco for the New Distributor Starter Inventory. The Distributor will pay Matco for the New Distributor Starter Inventory upon execution of this. Agreement. Shipment

of the New Distributor Starter Inventory will be made to the Distributor within twenty-eight (28) days of the date of this Agreement.

6.4 Electronic Funds Transfers. All payments to Matco by the Distributor on any promissory note or for the purchase of Products and other goods and services will be made by electronic funds transfers in accordance with the instructions by Global Payment Systems contained in the Manual. The Distributor will, from time to time during the Term of this Agreement, sign such documents as Matco may request to authorize the Distributor's bank to transfer the payment amounts designated by the Distributor to Matco's bank.

6.5 Standard Payment Terms. Matco's standard payment terms for Products sold to the Distributor are "payment due upon receipt of invoice." If the Distributor fails to make any payment to Matco for Products in a timely manner, then Matco may require full or partial payment in advance or seek other assurances of performance, including, but not limited to, reducing credit limits and/or placing the Distributor on credit hold prior to shipping any additional Products to the Distributor. Matco may assess late fees on the overdue amounts, as provided for in Section 3.18 above.

6.6 Security. The Distributor hereby grants Matco a security interest in all of the Distributor's Products, accounts receivable and other assets to secure any unpaid credit or financing provided to the Distributor and the Distributor will sign such security agreements, financing statements and other documents as Matco may request to legally perfect its security interest.

6.7 Shipment. The Distributor will be entitled to one (1) qualifying shipment of Products per week from Matco's warehouse, freight prepaid by Matco, if the Distributor has complied with Matco's rules and policies regarding the placement and payment of orders for Products. Matco will ship Products "FOB" from Matco's warehouse, freight prepaid, but the title to the Products, and the risk of loss, will pass to Distributor as soon as the Products are delivered to the carrier at Matco's warehouse. Prepaid freight shipments will not accumulate if the Distributor fails to request a shipment for any particular week. Additional shipments, special orders, shipments to addresses other than the Distributor's normal business address, and orders not made in compliance with Matco's standard order input procedures, will be shipped from Matco's warehouse, freight collect, unless otherwise agreed to in writing by Matco.

6.8 No Right To Withhold or Offset. The Distributor will not withhold any payment due to Matco because of any damage to the Products caused during transportation from Matco to the Distributor or as a result of any legal or other claims the Distributor may allege against Matco. The Distributor will not deduct any charges for services, parts, or other items from any payments due to Matco until such charges have been agreed to in writing by Matco.

6.9 Acceptance of Orders/Force Majeure. All Product orders placed by the Distributor will be subject to acceptance by Matco. Matco will, with reasonable diligence and subject to Section 6.5, execute all accepted Product orders received from the Distributor. However, Matco expressly reserves the right at any time to defer, postpone or forego any shipments of Products on account of procedures or priorities established by any

state, federal or local government or because of production failures, strikes or other labor disturbances, inability or delay in obtaining raw materials or other supplies, floods, fires, accidents, wars, incidents of terrorism or other causes or conditions beyond the control of Matco, and Matco will not be liable to the Distributor for any damages or loss of profits caused by such delay in executing or failing to execute such orders.

6.10 Taxes. The Distributor will pay, in addition to the prices specified for the Products pursuant to Matco's then current price list, all applicable federal, state, local and governmental taxes applicable to the Distributor's purchase of the Products.

6.11 Risk of Loss. After any Products ordered by the Distributor have been identified in such order, the risk of loss will at all times be borne by the Distributor. The Distributor will be responsible for making all claims against the carrier for damages to the Products and for all other losses.

ARTICLE 7

TRADEMARKS, TRADE NAMES AND PATENTS

7.1 Grant of License. Matco grants to the Distributor a non-exclusive, non-transferable right and license to use the Marks in the normal course of operating the Distributorship. The Distributor will only use the Marks in connection with the sale of the Products sold pursuant to the Business System and the terms of this Agreement.

7.2 Rights of Matco. The Distributor will not take any action which is adverse to Matco's right, title or interest in the Marks or Matco's pending or issued patents for various inventions and Products. The Distributor will not register or attempt to register the

Marks or apply for any patent rights for the Products. The Distributor further agrees that nothing in this Agreement will give the Distributor any right, title or interest in the patent rights or Marks other than the right of use in accordance with the terms of this Agreement. The Distributor acknowledges the validity and Matco's exclusive ownership of the Marks and the patent rights and agrees that any improvements made by the Distributor relating to the Marks or the Business System, as well as any and all goodwill resulting from the Distributor's use of the Marks pursuant to this Agreement, will inure solely to the benefit of Matco.

7.3 Conditions to Use of Marks. The Distributor will not have the right to sublicense, assign or transfer its license to use thc Marks. The Distributor will not use the Marks as part of its corporate or other legal name, or as part of any e-mail address, domain name, or other identification of the Distributor in any electronic medium. The Distributor will use the Marks only in the form and manner and with the appropriate legends as prescribed from time to time by Matco. The Distributor will modify its use of the Marks from time to time in the manner designated in writing by Matco. The Distributor will sign all documents deemed necessary by Matco to obtain or maintain protection for the Marks.

7.4 Approval of Printed Materials. The Distributor will obtain Matco' s prior written approval for the use of the Marks in any advertising, promotional or other printed materials.

7.5 Defense of Actions. The Distributor will give Matco immediate written notice of any claim made by any party relating to the Marks or the Business System and will, without compensation, cooperate in

all respects with Matco in any legal proceedings involving the Marks or the Business System. Matco will have the sole and absolute right to detcrminc whether it will commence or defend any litigation involving the Marks or the Business System, and will, at its expense, control and conduct any litigation involving the Marks. If the Distributor is named as a defendant in any action involving the Marks or the Business System solely because the plaintiff is alleging that the Distributor does not have the right to use the Marks, then if the Distributor gives Matco written notice of the action within ten (10) days after the Distributor receives notice of the claim, Matco will assume the defense of the action and will indemnify and hold the Distributor harmless from any and all damages assessed against the Distributor in connection with the action.

ARTICLE 8

WARRANTY AND TOOL RETURNS

8.1 Warranty Policy. All Matco Products are subject to the warranty and liability limitations of the written Product warranty of Matco (the "Matco Warranty"). Matco's Warranty policy, which may change over time, provides, generally, that any Product that is branded with the "Matco" name is warranted against defects in materials and workmanship. Matco, or one of its authorized representatives, will, at Matco's option, repair or replace any tool or part that is subject to the warranty without charge, if the defect or malfunctioning tool or part is returned to Matco or its representative, shipping prepaid. There are certain limitations under the Matco Warranty, and the Distributor must read and understand the warranty policies. The Distributor must follow Matco's policies and procedures regarding returning tools for warranty

claims. Among the procedures that the Distributor must follow is the requirement to send back the products with the appropriate paperwork, product specifications, codes and other required information. In addition, the Distributor must pay all freight and shipping charges to send the defective product to Matco. In most cases, Matco will pay the shipping and freight costs to send the Distributor a new or repaired tool, part or product.

Also, there are certain warranty service functions that the Distributor must perform. Currently, the Distributor warranty responsibilities and functions include the following: "in the field" repair of ratchets and toolboxes. For ratchet repairs, the Distributor must purchase repair kits, which currently range in price from ten dollars ($10) to fourty dollars ($40) per kit and must pay the shipping/freight charges to return the defective part to Matco. Upon return of the defective parts to Matco, Matco will credit the cost of the ratchet repair kit. Matco intends to include ratchet repair instructions on its website for distributors. You, as the distributor, are not compensated for your time to make these repairs. The Distributor is also currently responsible to perform minor warranty repairs on toolboxes within the List of Calls, such as drawer slides, casters (wheels), trim and/or drawer replacement if needed. Warranty repairs are handled on a case-by-case basis after contacting Matco's Customer Service and/or Matco's toolbox manufacturing facility. There are no repair kits for toolboxes, and you are not required to purchase items to repair toolboxes under warranty.

The Matco Warranty may be amended or revised by Matco at any time in its sole discretion. Matco will have the right to adjust and resolve all warranty

claims, either directly with the Customer or through the Distributor, as Matco in its sole discretion may determine, and any action by Matco with respect to warranty claims will be binding upon the Distributor.

8.2 Tool Return Policy. Matco will make its then-current tool return policy available to the Distributor. The current policy provides that during the term of the Distributorship Agreement or after its expiration or termination, the Distributor may return for credit to its Open Purchase Account any eligible Matco Products purchased from Matco and listed in the then current Matco Tools Price List, excluding special order and high obsolescence electronic products. The current tool return policy specifies that the tools and other products that are eligible for return for credit are new, unused, and not abused products that are in saleable condition, and in their original packaging. The products returned must be on the current inventory list and cannot be discontinued items. Matco generally tries to give distributors at least one hundred eighty (180) days' notice following an announcement that a product has been discontinued to return the product for credit. The Distributor may take advantage of the tool return policy at any time, such as if the Distributor has overstocked items, or wishes to rotate or adjust the product mix in its inventory. Matco will credit the Distributor's Open Purchase Account for the eligible returned Products less a restocking fee, which in most cases is fifteen percent (15%) of the original purchase price of the product. A good faith effort will be made by Matco to issue credit within ninety (90) days of acceptance of the returned Products. The specific criteria for products that are eligible for return for credit is stated in Matco's tool return policy. The Distributor must pay for the packaging and shipping of such Products to Matco. Matco may revise its tool

return policy at such times as it may determine, and will inform the Distributor in writing of any changes when made.

ARTICLE 9

CONFIDENTIALITY

The Distributor will not, during the Term of this Agreement or thereafter, communicate, divulge or use for the benefit of any other person or entity any confidential information, knowledge or know-how concerning the methods of operation of a Matco Distributorship which may be communicated to the Distributor by any employees of Matco, or which arises by virtue of this Agreement. The Distributor will divulge such confidential information only to his employees who must have access to it in order to operate the Distributorship. The Operations Manual and any and all other information, knowledge and know-how including, without limitation, drawings, materials, equipment, technology, methods, procedures, specifications, techniques, computer software programs, computer software source codes, systems and other data which Matco designates as confidential or proprietary will be deemed confidential and proprietary for the purposes of this Agreement. The obligations of confidentiality shall survive termination or expiration of this Agreement for any reason.

ARTICLE 10

TRANSFER OF INTEREST

10.1 Transfer of Distributorship Interest. Neither the Distributor nor any individual, partnership, or corporation which owns any interest in the Distributor will transfer any interest in this Agreement, in the Distributor, in any capital or common stock in the

Distributor, or in all or substantially all of the assets of the Distributorship, including the Mobile Store (the. "Distributorship Interest"), without the prior written consent of Matco.

10.2 Conditions for Transfer. Matco will not unreasonably withhold its consent to any transfer, if the following conditions are met: the Distributor is not in default under any provision of this Agreement, including payment of any financial obligations to Matco; the Distributor and Matco have signed a mutual general release of any and all claims against each other and their respective affiliates; it has been demonstrated to Matco's sole satisfaction that the transferee exhibits the ability to operate the Distributorship, possesses an acceptable credit rating, has adequate financial resources and capital to operate the Distributorship in accordance with Matco's requirements, and is not involved, directly or indirectly, in any business that is in any way competitive with a Matco Distributorship; the transferee-distributor successfully completes the Matco Business System Training (MBST) Program; and the Distributor and transferee-distributor sign the legal documents necessary to transfer this Agreement to the transferee-distributor. Distributor and Spouse acknowledge and agree that (a) any proposed assignment or transfer to Spouse of this Agreement, the rights and responsibilities under this Agreement, or any Distributorship Interest, or (b) any proposed delegation of duties of Distributor under this Agreement, to Spouse, by contract, by operation of law, or otherwise, shall not be effective unless approved in advance, in writing by Matco, and Matco may rely on the conditions described in this Section 10.2, and/or any other reasonable conditions and qualifications, in determining to grant or withhold its consent of or approval to any such transfer, assignment, or delegation to Spouse.

10.3 Transfer to Corporation. The Distributor may transfer this Agreement to a corporation formed for the convenience of ownership upon prior written notice to Matco, provided the Distributor owns one hundred percent (100%) of the capital stock of the corporation and personally guarantees, in a written guaranty satisfactory to Matco, to make all payments and to fulfill all obligations and conditions required under this Agreement.

10.4 Security Interest. The Distributor will not grant a security interest in the Distributorship or this Agreement without Matco's prior written consent. Matco will have the right as a condition of its consent, to require the secured party to agree that if the Distributor defaults under any security interest, then Matco will have the right and option (but not the obligation) to be substituted for the Distributor as the obligor to the secured party and to cure any default of the Distributor without the acceleration of any indebtedness due from the Distributor.

10.5 Transfer by Matco. Matco will have the right to transfer or assign this Agreement and all or any part of its rights or obligations herein to any person or legal entity without notice to the Distributor.

10.6 Non-Competition and Non-Solicitation Following a Transfer. In addition, to the covenants regarding non-competition and non-solicitation of Distributor, Spouse and others as specified in Section 11.9 below, Matco encourages Distributor (if obtaining the distributorship by virtue of a transfer) to obtain a noncompetition agreement from the previous distributor that serviced the List of Calls, and Matco expects that it will encourage any new distributor that acquires the business, the route, the accounts or the distributorship of the Distributor to obtain a noncompetition

agreement from the outgoing or transferring Distributor. The noncompetition agreement may assist in preventing competition from the previous distributor, previous distributor's spouse, and immediate family members for a continuous uninterrupted period of one (1) year from the date of a transfer permitted under Section 10 above, or expiration or termination of the previous distributor's Distributorship Agreement (regardless of the cause for termination). Competition includes, but is not limited to, selling or attempting to sell any Products or any products the same as or similar to the Products to (i) any existing Customer on the Distributor's List of Calls who purchased one or more Products from the previous distributor during the twelve (12) month period immediately preceding the dates referred to in this Section 10.6, or (ii) any Potential Customer on the Distributor's List of Calls and Potential Customer List, located on, or identified in, the previous distributor's List of Calls and Potential Customer List, as such lists may have been amended as provided for in the previous distributor's Distributorship Agreement and in accordance with Matco's policies, if the previous distributor had visited or made one or more sales calls to such Potential Customer, List of Calls, or person or business identified on the Potential Customer List during the twelve (12) month period immediately preceding the date referred to in this Section 10.6.

ARTICLE 11

DEFAULT AND TERMINATION

11.1 Termination by Distributor. The Distributor may terminate this Agreement, at any time, with or without cause, by giving forty-five (45) days prior written notice to Matco.

11.2 Termination by Distributor During First Six Months. If the Distributor terminates this Agreement for any reason within six (6) months after the date of this Agreement, and if the Distributor has not failed to operate the Distributorship for more than six (6) "business days" in total, or more than three (3) consecutive business days during that six (6) month period, then Matco will (i) accept for return all new Products purchased by the Distributor through or from Matco during that six (6) month period, and will credit to the Distributor's open purchase account an amount equal to one hundred percent (100%) of the Distributor's purchase price for the returned Products, and (ii) credit the Distributor's open purchase account for the lesser of (a) two thousand seven hundred dollars ($2,700), (b) an amount equal to two (2) months of payments under the Distributor's Matco Truck lease or purchase agreement, or (c) the amount required to terminate the truck lease if less than two (2) payments. The Distributor and Matco will sign a joint and mutual release of all claims that each of the parties and their affiliates, employees and agents may have against the other in such form as Matco may specify; however, the Distributor will remain liable for any indebtedness to Matco under this Agreement or the operation of the Distributorship and any such indebtedness will be excluded from the mutual release. A "business day" is a weekday in which the shops or locations on the List of Calls are open for business. "Failed to operate" means not performing the typical and required route functions, such as customer visits, product sales and promotion, and collection of money owed. The opportunity to terminate this Agreement within the first six (6) months of operations pursuant to this Section 11.2, shall not be applicable to, nor available to, the Distributor if this Agreement is not

the Distributor's first Distributorship, and shall not be available for any additional Distributorship or any renewal, extension or successor Distributorship Agreement.

11.3 Matco's Termination Rights. Matco will have the right to terminate this Agreement if the Distributor: (A) violates any material term, provision, obligation, representation or warranty contained in this Agreement or any other agreements entered into with Matco including, but not limited to, agreements regarding participation in the Matco Tools PSA Program, (B) makes an assignment for the benefit of creditors or if a voluntary or involuntary proceeding is instituted by or against the Distributor in bankruptcy or under any other insolvency or similar law, (C) attempts to assign or transfer this Agreement without Matco's written consent, (D) abandons the Distributorship, (E) fails to timely make any payment due to Matco under this Agreement or under any other agreement, promissory note or contract, or (F) refuses to perform a physical inventory if required by Matco or refuses to permit Matco to audit his books and records in accordance with Section 5.2.

11.4 Notice; Cure Periods. Matco will not have the right to terminate this Agreement unless and until: (A) written notice setting forth the alleged breach giving rise to the termination has been delivered to the Distributor in accordance with the terms of Section 13.2, and (B) the Distributor fails to correct the breach within the period of time specified by law. If applicable law does not specify a time period to correct the breach, then the Distributor will have thirty (30) days to correct the breach except where the written notice states that the Distributor is delinquent in any payment due to Matco under this Agreement in which

case the Distributor will have ten (10) days to make full payment to Matco.

11.5 Immediate Termination Rights. Notwithstanding Section 11.4, Matco will have the right to immediately terminate this Agreement by giving the Distributor written notice of termination, if the Distributor: (A) abandons the Distributorship, including voluntary or involuntary abandonment, and/or abandonment due to repossession of the Matco Tools Mobile Store and inventory, (B) is convicted of or pleads guilty to a gross misdemeanor or felony, (C) is involved in any conduct or act which materially impairs the goodwill associated with Matco, the Business System, or the Marks, (D) refuses to permit Matco to audit his books and records in accordance with Section 5.2, (E) has been found to have submitted a fraudulent credit application, (F) commits any fraudulent act in connection with any of his/her agreements with Matco, (G) fails to comply with Section 3.2 of this Agreement by offering to sell or selling any products to customers at any location not identified on the distributor's List of Calls or Potential Customer List without Matco's express written authorization, (H) is disabled to the extent Distributor cannot perform Distributor's obligations hereunder for a period of six (6) consecutive months, or for any six (6) months within a period of eighteen (18) consecutive months, (I) dies, (J) after curing a default pursuant to Sections 11.3 and 11.4, commits the same default again within a twelve (12) month period of the previous default, whether or not cured after notice, (K) commits the same or different default under this Agreement, three or more times within any twelve (12) month period, whether or not cured after notice, (L) makes an assignment for the benefit of creditors or if a voluntary or involuntary proceeding is instituted against the Distributor in

bankruptcy or under any other insolvency or similar law, or (M) fails to submit to or undergo a drug and/or alcohol test if required by Matco, or fails the drug and/or alcohol test required by Matco.

11.6 Obligations Upon Termination. Upon the termination or expiration of this Agreement, the Distributor will: pay Matco all amounts owed by the Distributor to Matco including interest charged on distributor's Open Purchase Account balance at a rate of twenty-two and one-half percent (22.5%) annually or the maximum rate permitted by law, whichever is lower; provide Matco with the inventory amounts and financial information of the Distributorship for the preceding twelve (12) months; immediately cease using all of the Marks and the Business System; provide Matco with all Customer lists and other information relating to the Customers of the Distributorship; return to Matco by pre-paid U.S. mail the Manual and all other manuals, software, catalogs, brochures, pamphlets, decals, signs, and other materials provided to the Distributor by Matco, and/or destroy all electronic versions of such materials and provide verification of such destruction to Matco; and remove all Marks, logos, graphics and insignias indicating a relationship with Matco from the Mobile Store and all other property of the Distributor. In addition, Matco may assess Distributor a late fee of twenty-five dollars ($25) per week for each week that the Distributor fails to pay the balance owed on the Open Purchase Account following termination. The Distributor acknowledges and understands that an uncured default and/or the termination of the Distributorship Agreement may also be a default under notes, financing, or agreements that the Distributor may have with third parties, including, by way of example, the lease for the Mobile Store, and such termination of this Agreement may cause an

acceleration of payments under a note or lease and for forfeiture of the Mobile Store or repossession of the Mobile Store by the lessor or financing entity.

11.7 Return of Products. Within thirty (30) days following: (A) the expiration or non-renewal of this Agreement, or (B) termination of this Agreement by Matco or by Distributor, Matco will, in accordance with Matco's then-current Product return policy, permit the Distributor to return the new and unused Products purchased by the Distributor from Matco, and the amount of the Products returned will be credited to the Distributor's open purchase account, subject to any restocking fees or other fees or charges in accordance with Matco's then-current Product return policy.

11.8 Warranty Returns. During the thirty (30) day period following termination of this Agreement, Matco will accept Products returned to it by the Distributor for warranty claim processing in accordance with Matco's then existing Warranty policy.

11.9 Non-Solicitation of Customers: Covenant Against Competition. Distributor and Spouse, if applicable, individually covenant that each of Distributor, Spouse, Distributor's employees, and the immediate family members of Distributor and Spouse, except as otherwise approved in writing by Matco:

11.9.1 shall not, during the term of this Agreement, either directly or indirectly, for itself, or through, on behalf of, or in conjunction with any person, persons, partnership, limited liability company, or corporation, own, maintain, operate, engage in, or have any interest in any business which is the same as or similar to a Matco mobile tool distributorship business, including without limitation, a business

that manufactures, sells, and/or distributes any products that are the same as or similar to the Products (referred to herein as a "Competitive Business");

11.9.2 shall not, during the term of this Agreement, either directly or indirectly, for itself, or through, on behalf of, or in conjunction with any person, persons, partnership, limited liability company, or corporation, sell or attempt to sell to any customers or Potential Customers of the Distributorship any products that are the same or similar to the Products;

11.9.3 shall not for a continuous uninterrupted period of one (1) year from the date of: (A) a transfer permitted under Article 10, above; (B) expiration or termination of this Agreement (regardless of the cause for termination); or (C) a final order of a duly authorized arbitrator, panel of arbitrators, or court of competent jurisdiction (after all appeals have been taken) with respect to any of the foregoing or with respect to the enforcement of this Section 11.9, either directly or indirectly, for itself, or through, on behalf of, or in conjunction with any persons, partnership, limited liability company, or corporation, sell or attempt to sell any Products or any products the same as or similar to the Products to (i) any Customer who purchased one or more Products from Distributor during the twelve (12) month period immediately preceding the dates referred to in subclauses (A), (B), or (C) of this Section 11.9.3, or (ii) any Potential Customer, located on, or identified in, the Distributor's List of Calls, as such list may have been amended as provided for in this Agreement and in accordance with Matco's policies, if Distributor had visited or made one or more sales calls to such Potential Customer, List of Calls, or

person or business identified on the List of Calls during the twelve (12) month period immediately preceding the date referred to in subclauses (A), (B), or (C) of this Section 11.9.3.

11.10 Action in Lieu of Termination. In the event Distributor is in default under this Agreement for failure to comply with any of the terms or conditions of this Agreement, and/or for failure to comply with Matco's policies, procedures or standards, including, without limitation, the lesser of eighty percent (80%) of the National Distributor Purchase Average requirement or eighty percent (80%) of the District Distributor Purchase Average rcquirement (as described in Section 3.3) or the purchase average to sales average ratio, as described in Section 3.3, and Matco has the right to terminate this Agreement as provided for in this Article 11, then Matco may, at its sole discretion and in lieu of termination, take any one or more of the following actions (as applied to the Distributor): modify payment or shipping terms; impose new or different or increased interest charges or fees; limit or restrict Distributor's access to special or additional services or products from Matco; modify product return and warranty benefits; and/or take such other action as Matco, in its sole discretion, deems appropriate. Matco may discontinue these adjustments at any time. In addition, so long as Distributor continues to be in default and/or if Distributor subsequently is in default under this Agreement, Matco may pursue any remedy available under this Agreement, as permitted by law, including termination of the Agreement, as provided for in this Article 11.

ARTICLE 12

DISPUTE RESOLUTION

12.1 Arbitration. Except as expressly provided in Section 12.5 of this Agreement, all breaches, claims, causes of action, demands, disputes and controversies (collectively referred to as "breaches" or "breach") between the Distributor, including his/her Spouse, immediate family members, heirs, executors, successors, assigns, shareholders, partners or guarantors, and Matco, including its employees, agents, officers or directors and its parent, subsidiary or affiliated companies, whether styled as an individual claim, class action claim, private attorney general claim or otherwise, arising from or related to this Agreement, the offer or sale of the franchise and distribution rights contained in this Agreement, the relationship of Matco and Distributor, or Distributor's operation of the Distributorship, including any allegations of fraud, misrepresentation, and violation of any federal, state or local law or regulation, will be determined exclusively by binding arbitration on an individual, non-class basis only in accordance with the Rules and Regulations of the American Arbitration Association ("Arbitration").

12.2 Notice of Dispute: Cure Period. The party alleging the breach must provide the other party with written notice setting forth the facts of the breach in detail, and neither party will have the right to commence any Arbitration hearing until such written notice is given. The party alleged to have breached this Agreement will have thirty (30) days from receipt of the written notice to correct the alleged breach. If the alleged breach is not corrected within the thirty (30) day period and subject to Section 12.6 below, then either party will have the right to request Arbitration

as provided herein to determine their rights under this Agreement.

12.3 Limitation of Actions: Waiver of Claims. UNLESS THIS PROVISION IS PROHIBITED BY APPLICABLE LAW, ANY AND ALL CLAIMS AND ACTIONS, BROUGHT BY ANY PERSON OR PARTY, ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE RELATIONSHIP OF MATCO AND DISTRIBUTOR, THE OFFER OR SALE OF THE FRANCHISE AND DISTRIBUTION RIGHTS CONTAINED IN THIS AGREEMENT, OR DISTRIBUTOR'S OPERATION OF THE DISTRIBUTORSHIP, INCLUDING ANY ARBITRATION PROCEEDING, OR ANY CLAIM IN ARBITRATION (INCLUDING ANY DEFENSES AND ANY CLAIMS OF SET-OFF OR RECOUPMENT), MUST BE BROUGHT OR ASSERTED BEFORE THE EXPIRATION OF THE EARLIER OF (A) THE TIME PERIOD FOR BRINGING AN ACTION UNDER ANY APPLICABLE STATE OR FEDERAL STATUTE OF LIMITATIONS; (B) ONE (1) YEAR AFTER THE DATE UPON WHICH A PARTY DISCOVERED, OR SHOULD HAVE DISCOVERED, THE FACTS GIVING RISE TO AN ALLEGED CLAIM; OR (C) EIGHTEEN (18) MONTHS AFTER THE FIRST ACT OR OMISSION GIVING RISE TO AN ALLEGED CLAIM; OR IT IS EXPRESSLY ACKNOWLEDGED AND AGREED BY ALL PARTIES THAT SUCH CLAIMS OR ACTIONS SHALL BE IRREVOCABLY BARRED. CLAIMS OF THE PARTIES FOR INDEMNIFICATION SHALL BE SUBJECT ONLY TO THE APPLICABLE STATE OR FEDERAL STATUTE OF LIMITATIONS.

12.4 Powers of Arbitrator. The arbitrator shall have the full authority to make a finding, judgment,

decision and award relating to the claims made in the demand for arbitration, as provided for in Section 12.1 above, and subject to the limitations in this Section 12.4. The Federal Rules of Evidence (the "Rules") will apply to all Arbitration hearings and the introduction of all evidence, testimony, records, affidavits, documents and memoranda in any Arbitration hearing must comply in all respects with the Rules and the legal precedents interpreting the Rules. Both parties will have the absolute right to cross-examine any person who testifies against them or in favor of the other party. The arbitrator has the right to award, or include in his or her award, any relief authorized by law which he or she deems proper in the circumstances, including, without limitation, inoney damages (with interest on unpaid amounts from the date due), specific performance, injunctive relief, and attorneys' fees and costs, provided that the arbitrator will not have the right or authority to declare any Mark generic or otherwise invalid or to award any damages waived by Section 12.8 below. The arbitrator will have no authority to add to, delete or modify the terms and provisions of this Agreement. All findings, judgments, decisions and awards of the arbitrator will be limited to the dispute or controversy set forth in the written demand for Arbitration, and the arbitrator will have no authority to decide any other issues. All findings, judgments, decisions and awards by the arbitrator will be in writing, will be made within ninety (90) days after the Arbitration hearing has been completed, and will be final and binding on Matco and the Distributor (including the Distributor's Spouse, immediate family members, owners, heirs, executors, successors, assigns, shareholders, partners or guarantors (as applicable)). Notwithstanding Section 12.10, the written decision of the arbitrator will be deemed to be an order, judgment

and decree and may be entered as such in any Court of competent jurisdiction by either party in any jurisdiction. The arbitrator's findings and awards may not be used to collaterally estop Matco, the Distributor or any other party from raising any like or similar issue, claim or defense in any other or subsequent Arbitration, litigation, court hearing or other proceeding involving third parties or other Distributors.

12.5 Disputes not Subject to Arbitration. The following disputes and controversies between the Distributor and Matco will not be subject to Arbitration: any dispute or controversy involving the Marks or which arises under or as a result of Article 7 of this Agreement, any dispute or controversy involving immediate termination of this Agreement by Matco pursuant to Section 11.5 this Agreement, and any dispute or controversy involving enforcement of the covenants not to compete contained in this Agreement.

12.6 Mediation. Before any breach, claim, demand, dispute, cause of action, or other controversy regarding or pertaining to the termination or non-renewal of this Agreement may be filed or submitted in any arbitration proceeding under Section 12.1, such claim, demand, cause of action, or controversy shall first be submitted to non-binding mediation, administered by an established, neutral mediation service. This Section 12.6 shall apply to Matco, Distributor, and any person in privity with or claiming through, on behalf of, or in the name of, Distributor. All parties must sign a confidentiality agreement prior to participating in any mediation proceeding. The mediation must take place at a location agreed to by Matco and Distributor or, if no agreement can be reached and unless prohibited by applicable law, in a city within thirty (30) miles of Matco's principal place of business at the time of the

submission to mediation. The parties shall mutually agree upon a mediator or neutral within twenty-one (21) days after the demand for mediation is made by one party to the other. If the parties cannot agree upon a mediator, a mediator shall be appointed in accordance with the rules of the mediation service. The mediator or neutral shall have experience in franchising or distribution matters. The mediation shall be conducted within thirty (30) days of the selection of a mediator. The parties shall share equally the cost of the mediator and the mediation services and related expenses, but the parties shall bear their own costs to attend and participate in the mediation, including each party's respective attorney's fees and travel costs.

12.7 No Class Actions. No party except 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 (as applicable)) may join in or become a party to any Arbitration proceeding arising under this Agreement, and the arbitrator will not be authorized to permit any person or entity that is not a party to this Agreement or identified in this paragraph to be involved in or to participate in any Arbitration conducted pursuant to this Agreement. No matter how styled by the party bringing the claim, any claim or dispute is to bc 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.

12.8 Limitation of Damages. UNLESS THIS LIMITATION IS PROHIBITED BY APPLICABLE LAW,

EACH OF THE PARTIES (INCLUDING DISTRIBUTOR'S OWNERS, AND SPOUSE IF APPLICABLE) HEREBY AGREES THAT THE OTHER PARTY WILL NOT BE LIABLE FOR PUNITIVE, EXEMPLARY, INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS OF FUTURE PROFITS, ARISING OUT OF ANY CAUSE WHATSOEVER, WHETHER BASED ON CONTRACT, TORT, STRICT LIABILITY, OR STATUTE OR ORDINANCE, AND AGREES THAT IN THE EVENT OF A DISPUTE, THE RECOVERY OF EITHER PARTY WILL BE LIMITED TO THE RECOVERY OF ANY ACTUAL DAMAGES SUSTAINED BY IT.

12.9 Waiver of Jury Trials. UNLESS THE WAIVER IS PROHIBITED BY LAW, IF ANY DISPUTE IS NOT SUBJECT TO ARBITRATION UNDER THIS AGREEMENT, THEN EACH OF THE PARTIES AGREES THAT THE TRIAL OF ANY LEGAL ACTION ARISING UNDER THIS AGREEMENT OR THE RELATIONSHIP OF THE PARTIES WILL BE HEARD AND DETERMINED BY A JUDGE WHO WILL SIT WITHOUT A JURY. THE PARTIES ACKNOWLEDGE THAT THEY HAVE OBTAINED INDEPENDENT LEGAL ADVICE AS TO THE EFFECT OF THIS JURY WAIVER PROVISION, AND FURTHER ACKNOWLEDGE THAT THEY HAVE READ AND UNDERSTAND THE EFFECT OF THIS JURY WAIVER PROVISION. EITHER PARTY MAY FILE AN ORIGINAL OR COPY OF THIS AGREEMENT WITH ANY COURT AS WRITTEN EVIDENCE OF THE; CONSENT BY THE PARTIES TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.

12.10 Venue and Jurisdiction. 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 in 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.

12.11 Injunctive Relief. Nothing herein contained shall bar Matco's or Distributor's right to obtain injunctive relief against threatened conduct that will cause it loss or damages, under the usual equity rules,

including the applicable rules for obtaining restraining orders and preliminary injunctions.

12.12 Severability. 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 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 any such breaches.

ARTICLE 13

MISCELLANEOUS

13.1 Waiver. The failure of Matco to enforce at any time any provision of this Agreement will in no way affect the validity or act as a waiver of this Agreement, or any part, or the right of Matco thereafter to enforce it. The Distributor acknowledges that Matco operates a large and diverse distributorship network and that

Matco is not obligated to enforce each distributorship agreement in a uniform manner with respect to the other distributors.

13.2 Notices. Any notice required under this Agreement will be deemed to have been duly given if it is addressed to the party entitled to receive it at the address set forth on the cover page of this Agreement and it is personally served on the party, is sent by prepaid United States certified mail, return receipt requested, or is sent by a recognized overnight carrier (Federal Express, UPS, Purolator) that requires a signature acknowledging delivery.

13.3 Governing Law. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio, and the substantive law of Ohio will govern the rights and obligations of and the relationship between the parties.

13.4 Severability. If any term or provision of this Agreement is determined to be void, invalid, or unenforceable, such provision will automatically be voided and will not be part of this Agreement, but the enforceability, or validity of the remainder of this Agreement will not be affected thereby.

13.5 Entire Agreement. This Agreement, including all exhibits and addenda, supersedes all prior verbal and written agreements between the parties. Subject to our right to modify the Manual and the Business System standards, no change, amendment or modification to this Agreement will be effective unless made in writing and signed by both the Distributor and an officer of Matco. Nothing in this Agreement or in any related agreement, however, is intended to disclaim the representations Matco made in the Franchise Disclosure Document that Matco furnished to you.

13.6 Definitions. For purposes of this Agreement, the following words will have the following definitions:

(A) "Abandon" will mean the conduct of the Distributor, including acts of omission as well as commission, indicating the willingness, desire or intent of the Distributor to discontinue operating the Distributorship in accordance with the Business System and the standards and requirements set forth in the Manual and this Agreement.

(B) "Customer" will mean, at any time during the Term of this Agreement, or upon termination, a person or business that has purchased Products from the Distributor within the immediately preceding twelve (12) month period.

(C) "Mobile Store" will mean the truck used by the Distributor solely in connection with the operation of his Distributorship. The Mobile Store will at all times during the Term of this Agreement comply with all of Matco's standards and requirements as to color, size, engine size, storage capacity, graphics, on-board technology and design.

(D) "New Distributor Starter Inventory" will mean the initial inventory of Matco Products required to be purchased by the Distributor.

(E) "Operator" will mean the individual engaged or employed by the Distributor for purposes of operating the Distributorship under the terms of any program authorized by Matco to permit the hiring, by a Distributor, of another person to operate an additional Mobile Store for the Distributorship.

(F) "Potential Customer" will mean a full time professional mechanic or other individual in the automotive after-market and related markets who

in the normal course of business is required to use and furnish his/her own tools.

ARTICLE 14

REPRESENTATIONS BY THE DISTRIBUTOR

14.1 Receipt of Completed Agreement and Disclosure Documents. The Distributor acknowledges that he received Matco's Franchise Disclosure Document at least fourteen (14) calendar days prior to the date this Agreement was signed by him, and that he signed the acknowledgement of receipt attached to the Franchise Disclosure Document.

14.2 Investigation by Distributor. The Distributor acknowledges that he: has read this Agreement in its entirety; has had full and adequate opportunity to discuss the terms and conditions of this Agreement with legal counsel or other advisors of the Distributor's own choosing; has had ample opportunity to investigate the Matco Business System; has had ample opportunity to consult with current Matco distributors; has had ample opportunity to conduct due diligence on the Distributor's List of Calls and list of Potential Customers; and has had all questions relating to the Distributorship, including those of any advisor, answered to the Distributor's satisfaction.

14.3 Truth and Accuracy of Representations. The Distributor and its Spouse represent and warrant to Matco that (a) all statements, documents, materials, and information, including the application, submitted by the Distributor or its Spouse to Matco are true, correct, and complete in all material respects; and (b) neither the Distributor nor its Spouse, nor any of its or their funding sources, is or has ever been a terrorist or suspected terrorist, or a person or entity described in Section 1 of U.S. Executive Order 13244,

issued September 23, 2001, as such persons and entities are further described at the Internet website www.ustreas.gov/offices/enforcement/ofac. The Distributor agrees to promptly advise Matco of any material change in the information or statements submitted to Matco. The Distributor acknowledges and understands that Matco has entered into this Agreement in reliance on the statements and information submitted to Matco by the Distributor and its Spouse, and that any material breach or inaccuracy is grounds for Matco's termination of this Agreement.

14.4 No Representations. Except as may be disclosed in Matco's Franchise Disclosure Document, the Distributor has not received from either Matco, or anyone acting on behalf of Matco, any representation of the Distributor's potential sales, income, profit, or loss which may be derived from the Distributorship. The Distributor understands that Matco will not be bound by any unauthorized representations, including those made by other Matco distributors or by lending institutions based on information given to them to assist in their evaluation of Matco's business opportunity.

14.5 No Warranty of Success. The Distributor understands that Matco makes no express or implied warranties or representations that the Distributor will achieve any degree of financial or business success in the operation of the Distributorship. While Matco will provide the Distributor with training, advice, consultation, and a list of Potential Customers, success in the operation of the Distributorship depends ultimately on the Distributor's efforts and abilities and on other factors beyond Matco's control, including, but not limited to, economic conditions and competition.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed on the date set

forth above. The Distributor further acknowledges that this Agreement will become effective and binding only upon acceptance and execution by Matco in the State of Ohio.

DISTRIBUTOR:

By: /s/ John M. Fleming
Name: John M. Fleming
Title: Distributor
Date: 10/22/13

DISTRIBUTOR'S SPOUSE:

By: /s/ Rae J. Fleming
Name: Rae J. Fleming
Title: Spouse
Date: 10-23-13

NMTC, INC. d/b/a MATCO TOOLS

By: /s/ Thomas M. Hill
Name: ~~Timothy J. Gilmore~~ Thomas M. Hill
Title: ~~President~~ V.P. FINANCE
Date: 10/24/13

APPENDIX K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:19-cv-00463-WHO

JOHN FLEMING, on behalf of himself and all others similarly situated,

Plaintiff,

v.

MATCO TOOLS CORPORATION, a Delaware corporation; NMTC, Inc. d/b/a MATCO TOOLS, a Delaware corporation; FORTIVE CORPORATION, a Delaware corporation; and DOES 1-20, inclusive,

Defendants.

Date: April 3, 2019

Time: 2:00 p.m.

Dept.: Courtroom 2, 17th Floor

Judge: Hon. William Orrick

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER VENUE TO THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES Page(s)

FEDERAL STATUTES

STATE CASES

STATE STATUTES

OTHER

I. INTRODUCTION

The motion of Defendants Matco Tools Corporation, NMTC Inc., and Fortive Corporation ("Matco") to dismiss or in the alternative transfer this action to the Northern District of Ohio must be denied. Matco predicates its motion primarily on the existence of a forum selection clause that is void and unenforceable under controlling law. Specifically, Matco's Ohio forum selection clause undermines California's strong public policies as reflected in two statutes: California Labor Code Section 925 (which renders void as against public policy a choice of non-California forum selection clause in an employment agreement covering California-based workers) and California Business and Professions Code Section 20040.5 (which prohibits such forum selection clauses in franchise agreements). Matco relegates its discussion of Section 925 to a one-sentence footnote, but the venue-specific statute is applicable by its express terms and voids Matco's Ohio selection clause. Further, the Ninth Circuit has already held that forum selection clauses like Matco's are unenforceable under BPC Section 20040.5. *Jones v. GNC Franchising, Inc*., 211 F.3d 495, 497–98 (9th Cir. 2000) (forum selection clause invalid because California policy at issue under California Business and Professions Code section 20040.5 specifically provided that California franchisees were entitled to a California venue). *Jones* alone disposes of Matco's motion.

Matco trots out several arguments to avoid the application of *Jones* and BPC Section 20040.5, but none is persuasive. First, Matco claims that BPC Section 20040.5 is preempted by the Federal Arbitration Act. Mot. at 10-11. It is hard to overstate the irony of this contention. Matco opens its motion claiming

that it seeks "to hold Plaintiff to the bargains he struck and intend move [sic] to compel arbitration in Ohio." Mot. at 2. However, Matco neglects to point out to the Court that the parties' deal includes a provision that *expressly voids the arbitration agreement in its entirety* if a companion provision of the agreement (Fleming's waiver of representative claims under California's Labor Code Private Attorneys General Act) is deemed unenforceable. Because the PAGA waiver is indeed void under the Ninth Circuit decision in *Sakkab v. Luxottica Retai N. Am., Inc.*, 803 F.3d 425, 440, 449 (9th Cir. 2015), there is no agreement to arbitrate in this case, and no basis to apply preemptive principles of the FAA. In other words, holding Matco to its bargain in this case means finding that no agreement to arbitrate exists. It also means giving effect to Matco's decision to carve-out from the arbitration agreement claims like those of Plaintiff John Fleming ("Fleming") here, which involve Matco's Marks. Finally, even if an agreement to arbitrate these claims existed, it would be unenforceable because Matco's arbitration clause is permeated by unconscionable terms. Because any agreement to arbitrate would be invalid, there is no legal basis to find that the FAA preempts application of Section 20040.5.

Matco's remaining arguments against Section 20040.5 are frivolous. Matco says that Section 20040.5 unconstitutionally discriminates against out of state franchisors, but Matco's interpretation is contrary to the plain language of Section 20040.5 (which applies to both in state and out of state franchisors) and unsupported by dormant commerce clause jurisprudence. Meanwhile, Matco's equitable estoppel argument is factually wrong and unsupported by case law. Fleming is not claiming any benefit of the contracts he executed—he is seeking statutorily owed unpaid

wages, unreimbursed business expenses, and penalties. The weakness in Matco's argument is underscored by the fact that the one case it cites *does not even address Section 20040.5*. If Matco's legal theory were correct, every misclassification decision issued by this Court and the Ninth Circuit would have been wrongly decided.

Finally, because no valid and enforceable forum selection clause exists, there is no basis to either dismiss or transfer this case to the Northern District of Ohio. All private and public factors under 28 U.S.C. § 1404(a) weigh in favor of retaining venue in the Northern District of California.

II. FACTS

Matco manufactures and distributes mechanics tools and service equipment. Dkt. 1 at ¶ 5. It relies on workers like Fleming to carry out its business by making weekly sales and service calls to existing and prospective Matco customers through mobile distributorship stores. *Id.* at ¶ 15.

In order to work for Matco, Fleming was required to sign a form franchise agreement with Matco. *Id.* at ¶ 9; Fleming Decl., ¶ 4, Ex. 1. The franchise agreement, also referred to as a "Distribution Agreement" or "DA," contained an arbitration clause and a forum selection clause. Dkt. 16-2 (referred to herein as "DA") at ¶¶ 12.1, 12.10. Fleming did not negotiate its terms and was not represented by counsel at the time he signed the DA. Fleming Decl. ¶ 6.

After signing the DA, Fleming worked a Matco sales and distribution route in Salinas Valley, California and regularly worked 40-60 hours a week. Dkt. 1 at ¶ 9. Indeed, the DA required Fleming to work full-time. *Id.* at ¶ 15. The DA also imposed numerous other

requirements and restrictions on Fleming. It provided that he could "only sell Products and other merchandise approved by Matco" and was prohibited from "sell[ing] any products, tools, equipment or other merchandise which are competitive with" Matco's Products. *Id.* at ¶ 17 (quoting DA, ¶ 3.2). Fleming was further prohibited from selling "any product not approved in advance by Matco." *Id.* Meanwhile, Matco retained the right to sell to the same customers to whom Fleming sold by using Matco's commercial sales representatives, mail, internet, telephone orders, and Matco affiliates. *Id.* at ¶ 18. Matco retained extensive control over Fleming's work, including, but not limited to:

- Requiring Fleming to attend the 70-hour Matco Business Systems Training (MBST) Program before he started working his route, which included "business and marketing topics selected by Matco." Dkt. 1 at ¶ 23(f);
- Requiring Fleming to participate in an eighty hour "field training" whereby a trainer assisted and advised Fleming on how to perform his work. *Id.*;
- Restricting Fleming's route stops to only those customers and potential customers on his pre-approved, Matco "List of Calls." *Id.* at ¶ 23(a);
- Establishing Fleming's truck inventory levels. *Id.* at ¶ 23(c);
- Requiring that Fleming make personal sales calls every week to each of the stops, shops, or locations on Fleming's List of Calls. *Id.* at ¶ 23(d);

- Requiring Fleming to attend at least 80% of the district sales meetings that Matco scheduled. *Id.* at ¶ 23(d);
- Requiring Fleming to "purchase or lease a Mobile Store of the type and from a dealer or supplier approved by Matco;" "use the name MATCO TOOLS, the approved logo and all colors and graphics commonly associated with the Matco Business System on the Mobile Store in accordance with Matco's specifications;" "keep the interior and exterior of the Mobile Store in a clean condition;" and "keep the Mobile Store in good mechanical condition." *Id.* at ¶ 24 (quoting DA ¶ 3.6);
- Requiring that Fleming "wear Matco-approved uniforms," "maintain a professional appearance," and "be clean and well-groomed while making calls on Potential Customers." *Id.* at ¶ 26 (quoting DA ¶ 3.6);
- Retaining the right to require Fleming to "submit to, and undergo periodic or random drug and/or alcohol testing at a facility, clinic, hospital or laboratory specified by Matco." *Id.* at ¶ 23(g);
- Requiring Fleming to "operate the Distributorship in conformity with the operating procedures and policies established in the Matco Confidential Operating Manual (the "Manual"), or otherwise in writing." *Id.* at ¶ 23(h).
- Requiring that Fleming maintain his "books, records and accounts" in "the form designated by Matco" and to "submit to

> Matco, on a weekly basis, such business reports as Matco may designate in writing." *Id.* at ¶ 23(k).

On January 25, 2019, Fleming filed a Class Action and a Representative Private Attorneys General Act Action alleging that by misclassifying Fleming and similarly situated Distributors as independent contractors, Matco sought to avoid various duties and obligations owed to employees under California's Labor Code and Industrial Welfare Commission ("IWC") wage orders, including overtime compensation, expense reimbursement, meal and rest period premium payments, and other claims. *Id.* at ¶ 6.

III. MATCO'S FORUM SELECTION CLAUSE IS UNENFORCEABLE

Matco's motion to dismiss should be denied because there is no enforceable forum selection clause warranting transfer of this case to Ohio. No matter how this Court views Matco's contract with Fleming—either as an employment agreement or a franchise agreement (and it is both)—California law and Ninth Circuit precedent require a finding that the forum selection clause is unenforceable. Here, two separate venue-specific statutes—Labor Code Section 925 and Business and Professions Code Section 20040.5—reflect California's strong public policy in favor of resolving this dispute in California.

Under federal law, forum selection clauses may be found unenforceable for at least three reasons, including "if enforcement would contravene a strong public policy of the forum in which suit is brought." *Petersen v. Boeing Co.*, 715 F.3d 276, 280 (9th Cir. 2013).[1] While

[1] The other two grounds for invaliding forum selection clauses are "(1) if the inclusion of the clause in the agreement was the

the mere fact that a substantive statutory right embodies a state's strong public policy is not alone grounds to refuse to enforce a forum selection clause, where that underlying policy is specific to *venue,* courts have found that forum selection clauses contravene a strong public policy. *Rowen v. Soundview Communs., Inc.*, No. 14-cv-05530-WHO, 2015 U.S. Dist. LEXIS 24986, at *10 (N.D. Cal. Mar. 2, 2015) (Orrick, J.) ("absent a total foreclosure of remedy in the transferee forum, courts tether their policy analysis to the forum selection clause itself, finding the forum selection clause unreasonable only when it contravenes a policy specifically related to venue."); *compare Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083–85 (9th Cir. 2009) (reversing the district court and finding a non-California forum selection clause unenforceable where the transferee state court would not be able to provide class action procedures and remedies under the California consumer law). That is, where the state law in question is venue-related and reflective of a strong policy in favor of the local adjudication of a dispute, a forum selection clause is unenforceable. *See, e.g., Jones,* 211 F.3d at 497–98 (finding forum selection clause invalid because California policy at issue under section 20040.5 specifically provided that California franchisees were entitled to a California venue).

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product of fraud or overreaching; (2) if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced'" *Petersen*, 715 F.3d at 280. These also apply to the present facts. Plaintiff would not have his day in Court if this action were transferred to Ohio, as proceeding in Ohio would be financially overwhelming for Fleming. Fleming Decl., ¶ 13. And Matco's inclusion of a non-California forum selection clause in Fleming's DA was an overreach, as it was prohibited by California law under Labor Code Section 925 and Business and Professions Code Section 20040.5.

Indeed, *Jones* controls this case: Fleming entered into a franchise agreement with Matco that included a non-California forum selection clause; *Jones* holds that such forum selection clauses in franchise agreements are unenforceable. And as Judge Alsup recently found in *Karl v. Zimmer Biomet Holdings, Inc.*, No. C 18-04176 WHA, 2018 U.S. Dist. LEXIS 189997, at *6–9 (N.D. Cal. Nov. 6, 2018), California Labor Code Section 925 is analogous to Section 20040.5. The reasoning in *Jones* extends to Section 925 and makes non-California forum selection clauses unenforceable in employment agreements. *Id.* at *3–6. Both Labor Code Section 925 and Business and Professions Code Section 20040.5 make Matco's forum selection clause unenforceable as a matter of strong California public policy.

A. Matco's Forum Selection Clause Is Void Under Labor Code Section 925

California Labor Code Section 925(a) ("Section 925") provides:

> An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:
>
> (1) Require the employee to adjudicate outside of California a claim arising in California.
>
> (2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

Section 925 applies to contracts "entered into, modified, or extended on or after January 1, 2017." Labor Code section 925(f).

Matco all but ignores Section 925, claiming in a footnote that the Labor Code does not apply to "franchisor-franchisee dispute[s]" and that Fleming's employment contract was not "entered into, modified or extended on or after January 1, 2017." Mot. at 10 n. 5. Matco is incorrect on both counts. Section 925 voids Matco's forum selection clause.

1. Section 925 Applies Where, As Here, Fleming Has Alleged That He And Other Similarly Situated Distributors Were Misclassified As Independent Contractors

Fleming alleges that while he and other similarly situated Distributors were classified as independent contractor franchisees, they were actually Matco's employees under California law. The California tests for employment status presume that Fleming is an employee unless Matco can meet a rigorous test that shows that Fleming was a bona fide independent contractor. *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 955 (2018) ("The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions"); *see also Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) (under the *Borello* analysis "once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee. . . . The burden [then shifts to the employer, which may prove, if it can, that the pre-

sumed employee was an independent contractor"). If Fleming has alleged a plausible claim for independent contractor misclassification, Section 925 applies. *Karl,* 2018 U.S. Dist. LEXIS 189997, at *6–9 (finding where the plaintiff asserted a plausible claim for independent contractor misclassification, Section 925 applied to choice of forum clause in question).

Here, Fleming has alleged a plausible misclassification claim under both the IWC Wage Orders and *Borello*. First, Fleming and other Distributors were not free from Matco's control, either by contract or in fact. *Dynamex*, 4 Cal. 5th at 955 (Prong A); *see also* Dkt. 1 at ¶¶ 20–33. Second, Fleming is engaged in work—sales and distribution of Matco tools—that is within the usual course of Matco's business. *Id.* (Prong B). Third, Fleming was not engaged in an independent trade or business of the same nature as the work performed. *Id.* at 955–56 (Prong C) ("An individual operates an independent business where they have decided through "incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like."). In fact, Matco required Fleming to work full-time, prohibited him from selling products competing with Matco products, and restricted his ability to sell non-Matco products without Matco's approval. Dkt. 1 at ¶¶ 15, 17.

Fleming has also alleged he was misclassified as an independent contractor under *Borello*. Matco retained "all necessary control" over the work that Fleming performed. *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 357 (1989); *see Alexander v. FedEx Ground Sys. Inc.*, 765 F.3d 981, 997 (9th Cir. 2014) (FedEx's detailed job requirements, including training, operating standards, and structured work-

loads, and Fedex's detailed equipment and appearance requirements, including truck appearance and uniforms, gave FedEx all necessary control over the work that drivers performed).

The *Borello* secondary factors either cut towards a finding of employment status or are neutral. As described above, Fleming's work—the selling and distribution of tools—was within Matco's regular business. *Alexander*, 765 F.3d at 996 ("The work that the drivers perform, the pickup and delivery of packages, is 'essential to FedEx's core business.'") (quoting *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal.Rptr.3d 327, 334 (Ct. App. 2007)). Fleming was not engaged in work distinct from his work with Matco. *Id.* at 995 (factor favored employment status where worked performed by drivers was wholly integrated into FedEx's operation, drivers looked and acted like FedEx's employees, the customers were FedEx's, and drivers' business expansion was only available subject to FedEx's business needs). Fleming's work was performed under Matco's training, supervision, and direction. *Id.* (factor favored drivers, despite freedom in their work, where FedEx also closely supervised drivers through various methods). Matco's agreements were for 10-year periods, and Fleming worked for Matco for over six years. DA, ¶ 2.1. *Id.* at 996 (length of term of one to three years, subject to renewal, indicative of employment status). Fleming's work for Matco did not require any particular skill. Fleming Decl., ¶ 3. And while Fleming bore most of the costs for Matco's business, it was done so through vendors that were required or recommended by Matco. Dkt.1, at ¶¶ 24, 26, 28, 30. *Ruiz v. Affinity*, 754 F.3d 1093, 1104 (9th Cir. 2014) (where Affinity advanced drivers costs of leasing and maintain their tools, and where Affinity required drivers to use a specific type of phone and

deducted the expense from drivers' paychecks, this factor favored drivers). Matco also retained a broad right to discharge Fleming, including for violating any material contract term, failing to make personal sales calls at least weekly to each stop on the Fleming's route, and failing to submit to a drug and/or alcohol test. Dkt. 1 at ¶ 32.

Because Fleming has alleged a plausible claim for independent contractor misclassification and seeks protections under the California Labor Code, Section 925 applies to this dispute. *Karl*, 2018 U.S. Dist. LEXIS 189997, at *6–9. Indeed, to find otherwise would reward employers for the wrongful conduct of misclassifying their employees as independent contractors in order to circumvent the Labor Code, *including Section 925*.

2. Fleming Entered Into and Extended His Employment Agreement With Matco On Or After January 1, 2017.

Matco is incorrect that Fleming's employment agreement was not "entered into, modified or extended on or after January 1, 2017." Mot. at 10 n. 5. In fact, Fleming modified and extended his agreement with Matco every year through August 2018. Accordingly, Section 925 applies here.

While Matco included Fleming's DA with its motion, it did not attach his entire agreement. As a term of the DA, Matco required that Fleming execute an attachment to the DA titled "Exhibit O" – the Matco Distributor Business System Software License, Maintenance and Support Agreement. Fleming Decl. ¶ 8 (required to sign Exh. O as condition of employment), Exh. 1 at 34-38 (copy of Exh. O); DA ¶ 3.7 ("The Distributor . . . will sign the Matco Distributor Business System

Software License, Maintenance and Support Agreement ("the "Software License Agreement")(Exhibit O) as may be modified from time to time, and will pay the required software license fees and annual maintenance support fee set forth in the Software License Agreement."). Exhibit O is a one-year agreement that renews every year as long as Fleming paid the "annual Systems Maintenance and Support charges" and otherwise complied with the agreement. Fleming Decl., Exh. 1 (¶ 3). If Fleming did not annually renew the Software Agreement by paying the annual fee he was subject to termination under the provisions of the DA. DA ¶¶ 3.7, 11.3. Fleming complied with the terms of the software licensing agreement and renewed that portion of his employment agreement every year, thus extending his employment with Matco, until December 2018. Fleming Decl., ¶¶ 9-11. His final renewal was in August 2018. Fleming Decl. ¶ 11.

Because Fleming's employment agreement was renewed and extended after January 1, 2017, Section 925 applies. *Karl*, 2018 U.S. Dist. LEXIS 189997, at *9 (finding that "[t]hough plaintiff's initial agreement was signed in 2015 (before the effective date of Section 925), defendants later revised plaintiff's compensation on June 1, 2018 (after the effective date). . . . [T]he contract update emailed to plaintiff on June 1, 2018 was an amendment that modified his initial agreement. The modification condition required by Section 925 is met."). As Section 925 evinces the strong public policy of litigating California labor disputes in California under California law, Matco's forum selection clause is voidable "per public policy." *Karl*, 2018 U.S. Dist. LEXIS 189997, at *3–6.

B. 20040.5 Voids Matco's Forum Selection Clause

Matco does not dispute that the Ninth Circuit has held that a forum selection clause like Matco's contained in a franchise agreement is void and unenforceable under California Business and Professions Code section 20040.5.[2] *Jones*, F.3d at 498 (holding forum selection clause invalid because section 20040.5 specifically provided that California franchisees were entitled to a California venue). Instead, Matco posits three arguments why this Court should decline to apply *Jones*. As set forth below, none has merit.

1. The Federal Arbitration Act Does Not Preempt Application of Section 20040.5 Because There is No Enforceable Arbitration Agreement Covering This Dispute

a. The DA Expressly Provides That No Arbitration Obligation Exists

Despite liberally excerpting whole paragraphs of the DA in their motion, Matco conveniently omits key language that renders the arbitration clause null and void. Specifically, the DA's severability clause provides 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 any such breaches." DA, ¶ 12.12 (emphasis added). This blow-up provision

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[2] Section 20040.5 provides "A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state."

fully disposes of Matco's FAA preemption argument and requires denial of this motion.

The analysis is straightforward. Matco's arbitration clause expressly waives Fleming's representative private attorney general claims. Specifically, Section 12.7 provides that "[n]o 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." DA, ¶ 12.7.

Under settled Ninth Circuit law, this clause constitutes an unlawful waiver of Fleming's representative claims under the Labor Code Private Attorneys General Act of 2004 ("PAGA"). *Sakkab,* 803 F.3d at 440 ("the waiver of [the Plaintiff's] representative PAGA claims may not be enforced."). PAGA permits aggrieved employees to act as private attorneys general on behalf of the State of California to collect civil penalties for Labor Code violations. In light of this public purpose, "an employee's right to bring a PAGA action is unwaivable," and "an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy." *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 360, 383 (2014); *Sakkab*, 803 F.3d at 449 (holding that the FAA does not preempt the *Iskanian* rule); *Hopkins v. BCI Coca-Cola Bottling Co of Los Angeles.*, 640 F. App'x 672, 673 (9th Cir. 2016) ("the *Iskanian* rule applies to the arbitration agreement between Hopkins and BCI Coca-Cola Bottling Company of Los Angeles (BCI) and Hopkins's waiver of his right to bring a representative PAGA action is unenforceable")

Contemplating the possibility that its waiver of private attorney general claims would be found unenforceable, Matco drafted its arbitration clause to render the entire agreement to arbitrate "null and void" under that contingency, such that *no obligation to arbitrate* exists. DA, ¶ 12.12 ("if the provision prohibiting . . . 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 any such breaches."). In turn, Section 12.1 of the DA defines "breaches" as "all breaches, claims, causes of action, demands, disputes and controversies." In short, by straightforward operation of plain contract terms, the unenforceable PAGA waiver renders the entire arbitration provision void *ab initio*.

"[T]he federal [arbitration] policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 476 (1989). While "doubts [of arbitrability] should be resolved in favor of coverage" (*see AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (internal quotations omitted)), the Court must enforce the plain language of the contract where there is no doubt. Indeed, where arbitration contracts contain unambiguous "poison pill" provisions like the blow-up provision in Matco's agreement, district courts have found that there is no agreement to arbitrate. *See McArdle v. AT&T Mobility LLC*, No. 09-cv-01117-CW, 2017 U.S. Dist. LEXIS 162751, at *14–15 (N.D. Cal. Oct. 2, 2017) (no enforceable arbitration agreement where a poison pill provision made "the entirety of [the] arbitration provision...null and void"); *Securitas Sec. Servs. USA, Inc. v. Superior Court* (2015) 234 Cal. App. 4th 1109, 1125 (where unlawful PAGA representative action waiver is not severable, it

"presents an all-or-nothing proposition: . . . either the employee forgoes his or her right to arbitrate such claims, or the entire agreement to arbitrate disputes is unenforceable and the parties must resolve their disputes in superior court"). *See also Sakkab*, 803 F.3d at 437 ("The FAA contemplates that parties may simply agree *ex ante* to litigate high stakes claims if they find arbitration's informal procedures unsuitable.").

Here, Matco drafted its arbitration agreement to prohibit severance of the unlawful provision and settled rules of contract construction and arbitration jurisprudence preclude relieving the company from the consequences of that drafting decision. The Court should hold Matco to its bargain. Because the agreement to arbitrate is null and void, there is no basis to either dismiss Fleming's claims or transfer the action. Matco's motion must be denied, and Fleming's claims against Matco, including his PAGA representative action claim, should proceed before this Court.

b. If Even There Were an Agreement to Arbitrate, It Would Expressly Exclude Fleming's Claims

Further, even if an agreement to arbitrate existed (which it does not), it would exclude Fleming's claims. Specifically, Section 12.5 of the DA states that "any dispute or controversy involving the Marks" is "not [] subject to Arbitration." Because Fleming's action is a "controversy involving the Marks," it falls outside the scope of the arbitration clause.

Matco hired Fleming to run his tool route "in accordance with the [Matco] Business System," which Matco

states is "identified by. . . the Marks."[3] DA, at 1 ("Recitals"). Fleming's independent contractor misclassification lawsuit challenges the legality of Matco's "business system," which Fleming alleges is in fact an employment arrangement. See Section III.A.1, *supra*. Thus, Fleming's claims are a "dispute or controversy involving the Marks."[4] The language throughout the DA is confirmation:

---

[3] The DA states that Matco "developed a distinctive business system relating to the establishment and operation of Matco mobile distributorships" to sell Matco's products, such as tools, "to professional mechanics and other businesses," which Matco defines as its "Business System." DA at 1 ("Recitals"). This Business System "is identified by means of certain trade names, service marks, trademarks, logos, and emblems, including, the trademarks and service marks "MATCO®" and MATCO® TOOLS (the "Marks")." *Id.* Matco "desire[d] to appoint the [Plaintiff] as an authorized Matco mobile distributor to sell and service the Products in a certain geographic area." And Plaintiff was required to affirm that he "desire[d] to operate a Matco mobile distributorship in accordance with the Business System. . . . " *Id.*

[4] The Ninth Circuit has found that when interpreting statutes, the term "involving" "usually signifies something narrower than 'relating to' and often "connotes 'includ[ing] (something) as a necessary part or result.'" *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1087 (9th Cir. 2018) (citing to the New Oxford American Dictionary 915 (3d ed. 2010)), while district courts engaging in contract interpretation have sometimes read "involving" more expansively. *PPG Indus. v. Pilkington PLC*, 825 F. Supp. 1465, 1478 (D. Ariz. 1993) ("The Court finds that the word "involving" is the functional equivalent of the words "relating to.""). Because the business system that Plaintiff is challenging is identified by the Marks, the Marks are "a necessary part or result" of Plaintiff's independent contractor misclassification claims. Indeed, some of the control that Matco retained over Plaintiff's work was defined by the Marks; for example, requiring that Plaintiff include the Marks on his Mobile Store.

- Matco "grants to the Distributor a non-exclusive, non-transferable right and license to use the Marks in the normal course of operating the Distributorship" and requires that Distributors "only use the Marks in connection with the sale of the Products sold pursuant to the Business System." DA, ¶ 7.1.
- Matco requires that Fleming uses the mark "MATCO TOOLS®, the approved logo and all colors and graphics commonly associated with the Matco Business System on the Mobile Store in accordance with Matco's specifications." DA, ¶ 3.6.
- Fleming must submit a sample of any website to Matco and obtain Matco's prior written approval if the website mentions the Marks, Matco, and/or the Business System. DA, ¶ 3.14.
- Matco requires the Distributor to agree not to drive the Mobile Store under the influence of alcohol or illegal drugs and to submit to a random drug test at Matco's request. Matco states that operating the Mobile Store in an unsafe manner, or under the influence of alcohol or illegal drugs "may injure or harm the Marks." DA ¶ 3.15.
- Matco can terminate Fleming if he was "involved in any conduct or act which materially impairs the goodwill associated with Matco, the Business System, or the Marks." DA, ¶ 11.5.

Because Fleming's claims "involv[e] the Marks," they are not subject to arbitration. Accordingly, there is no ground to dismiss Fleming's claims or transfer this case.

c. Any Arbitration Agreement Would Be Unconscionable and Invalid

Even assuming, *arguendo*, that an agreement to arbitrate existed which encompassed Fleming's claims, it would be unconscionable and unenforceable. To determine whether an arbitration agreement is unconscionable, courts apply a sliding scale: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Lou v. Ma Laboratories, Inc*., 2013 WL 2156316, at *2 (N.D. Cal. May 17, 2013) (internal citations omitted). Here, the agreement is an adhesion contract that is substantively unconscionable in multiple respects, rendering it unenforceable.

1. The Arbitration Provision Is Procedurally Unconscionable

An agreement is procedurally unconscionable when it is based on "oppression" and "surprise" and results from unequal bargaining strength between the parties. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000). "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice." *Tompkins v. 23andMe, Inc*., No. 5:13-CV-05682-LHK, 2014 WL 2903752, at *14 (N.D. Cal. June 25, 2014) (citation omitted). "Surprise" refers to "the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed

terms." *Perez v. Maid Brigade, Inc.*, No. C 09-3473 SI, 2007 WL 2990368, at *5 (N.D. Cal. Oct. 11, 2007).

Here, the arbitration provision is a result of both oppression and surprise. It is oppressive because it is a contract of adhesion, and the oppression element of the procedural unconscionability analysis is "nearly always satisfied when the contract is one of adhesion." *Armendariz*, 24 Cal. 4th at 113. Indeed, the arbitration agreement is exactly the sort of contract of adhesion that California courts have found to be unconscionable. There can be no dispute that Matco was in a superior bargaining position to Fleming, an individual seeking a job selling tools for the company. The agreement Fleming signed was a standardized contract presented to every person who wished to work for Matco, and it was a "take-it-or-leave-it standardized employment form." *Lou*, 2013 WL 2156316, at *2. Matco does not contend that the DA was negotiable, and Fleming quite reasonably did not believe that any terms thereof were subject to negotiation. Fleming Decl., ¶ 4; *Lou*, 2013 WL 2156316, at *2. Fleming's only option was to sign the agreement in its entirety—including the arbitration clause—or walk away and decline the opportunity to work for Matco. Indeed, in the case of pre-employment arbitration agreements, the economic pressure exerted by employers "may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." *Id.* at 115.

The arbitration clause also satisfies the surprise element of procedural unconscionability. The arbitration provisions – set out in 12 paragraphs (12.1 to 12.12) out of 109 total paragraphs in the DA–were hidden in the lengthy adhesion contract. The arbitration

provisions are also inconspicuous, not bolded or otherwise set apart from the rest of the text and are not on a page requiring a separate signature. Courts have found such buried and un-bolded arbitration provisions procedurally unconscionable. *See Zaborowski v. MHN Gov't Servs., Inc.*, 936 F. Supp. 2d 1145, 1152 (N.D. Cal. 2013) (finding procedural unconscionability where the arbitration clause appeared in paragraph 20 of 23 of the contract, was not highlighted or outlined, and did not require a separate signature); *Lau v. Mercedes-Benz USA, LLC*, No. CV 11-1940 MEJ, 2012 WL 370557, at *8 (N.D. Cal. 2012) (finding procedural unconscionability where arbitration clause was "imbedded inconspicuously" within the document and not on a page requiring a signature).

Finally, Matco's failure to provide Fleming with the rules governing arbitration renders the arbitration clause procedurally unconscionable under California law. *See Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010) (finding that failing to attach the "full description of the nonbinding conciliation and binding arbitration processes . . . multiply the degree of procedural unconscionability); *Milliner v. Bock Evans Fin. Counsel, Ltd.*, 114 F. Supp. 3d 871, 879 (N.D. Cal. 2015) (finding increased procedural unconscionability where the arbitration agreement did not provide the applicable arbitration rules and did not otherwise indicate where the plaintiffs could find them); *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 797 (2012) (finding procedural unconscionability where the agreement cited the rules that would govern arbitration but did not provide a copy of them.[5] Here,

[5] *See also Lou*, 2013 WL 2156316, at *3 (similar); *Mayers v. Volt Mgmt. Corp.*, 203 Cal. App. 4th 1194 (2012) (finding "a high degree of procedural unconscionability" where the contract was

the Agreement states that arbitration would "take place only in accordance with the Rules and Regulations of the American Arbitration Association" but did not include a copy of these rules. DA, ¶ 12.1. Accordingly, Fleming did not and could not have understood the obligations he was purportedly undertaking when he signed the Agreement. Fleming Decl., ¶ 7. *See Lou*, 2013 WL 2156316, at *3 (where arbitration rules were not provided, "it would have been unreasonable to expect that the employee understood to what she was obligating herself"). Indeed, AAA has multiple sets of rules, including both Employment and Commercial, and the DA does not specify which apply. Given that the Commercial rules, for example, could require Fleming to pay significant costs for the Arbitration—another unconscionable provision—it is significant that Fleming was prevented from knowing the rules to which he was agreeing. *See Dunham v. Envtl. Chem. Corp.*, No. C 06-03389 JSW, 2006 U.S.Dist. LEXIS 61068, at *26 (N.D. Cal. Aug. 16, 2006) ("the cost-sharing provision of the [AAA] Commercial Rules is clearly unconscionable under *Armendariz*"). Therefore, the arbitration clause is procedurally unconscionable.

2. The Arbitration Clause Contains Numerous Unconscionable Terms

Arbitration provisions are substantively unconscionable when they are overly harsh or one-sided, or lack a "modicum of bilaterality." *Armendariz*, 24 Cal. 4th at 117. "Arbitration agreements that encompass

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presented on a take-it-or leave-it basis and required plaintiff to agree to arbitration with unknown rules); *Trivedi v. Curexo Technology Corp.*, 189 Cal. App. 4th 387, 393 (2010) (recognizing that "the failure to provide a copy of the arbitration rules to which the employee would be bound, supported a finding of procedural unconscionability").

unwaivable statutory rights must be subject to particular scrutiny." *Id*. at 100. As discussed below, Matco's arbitration clause contains numerous unconscionable terms which permeate the agreement, cannot be severed, and render the clause unenforceable.

a. The Limitation on Remedies and Shortened Statute of Limitation Are Unconscionable.

Arbitration involves a change in the forum for resolution of a dispute, not a change in available statutory rights and remedies. Thus, courts have refused to enforce arbitration clauses that limit available remedies. *Armendariz,* 24 Cal.4th at 103 ("an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees"); *Graham Oil Co. v. ARCO Prods. Co*., 43 F.3d 1244, 1248 (9th Cir. 1994) (rejecting arbitration clause that deprived the plaintiff of its statutory right to punitive damages). Similarly, an arbitration agreement that imposes a shortened limitations period is substantively unconscionable. *See Martinez v. Master Protection Corp.*, 118 Cal. App. 4th 107, 117 (2004) (provision shortening statute of limitation for Labor Code claims unconscionable).

Here, the arbitration clause expressly prohibits the award of punitive damages (in addition to "exemplary, incidental, indirect, special, or consequential damages"). DA, ¶ 12.8. The arbitration agreement also provides that "in the event of a dispute, the recovery of either party will be limited to the recovery of any actual damages sustained by it." DA, ¶ 12.8. Both of these provisions are not only facially unconscionable and unenforceable but serve as unconscionable limitations on the likely relief *in this case* by precluding an award of statutory penalties and civil penalties under

PAGA. Cal. Labor Code § 2699(a) (allowing for civil penalty to be recovered through civil action "brought by an aggrieved employee on behalf of himself or herself and other current or former employees."); *Zaborowski*, 936 F. Supp. 2d at 1155 (quoting *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003)) ("punitive damages waiver 'improperly proscribes available statutory remedies' afforded to plaintiffs bringing employment claims").

The arbitration clause also shortens the statute of limitations on Fleming's claims to "the earlier of (A) the time period for bringing an action under any applicable state or federal statute of limitations; (B) one (1) year after the date on which a party discovered, or should have discovered, the facts giving rise to an alleged claim; or (C) eighteen (18) months after the first act or omission giving rise to an alleged claim." DA, ¶ 12.3 (emphasis added). This provision is unconscionable and unenforceable. *See Zaborowski*, 936 F. Supp. 2d at 1153 (shortened statute of limitations unconscionable because it was not a "sufficient time period to discover and pursue remedies"); *Jackson v. S.A.W. Entertainment Ltd.*, 629 F. Supp. 2d 1018, 1028–29 (N.D. Cal. 2009) (similar); *Wherry v. Award, Inc.*, 192 Cal. App. 4th 1242, 1249 (2011) (shortening statute of limitation period by 50 percent constitutes unlawful waiver of statutory rights); *Martinez v. Master Protection Corp.*, 118 Cal. App. 4th 107, 117–18 (2004) (same).[6]

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[6] These unconscionable provisions are not saved by the precatory language "unless . . . prohibited by applicable law." While the unconscionable provisions render the agreement unenforceable, they do not (from a contractual standpoint) unambiguously fall within the category of provisions "prohibited by law." *Mohamed v. Uber Techs. Inc*, 109 F. Supp. 3d 1185, 1209 n. 25 (N.D. Cal.

b. The One-Sided "Free Peek" Provision is Unconscionable

The arbitration agreement also contains a one-sided requirement that Fleming submit to mediation before a mediator in a city within 30 miles of Matco's principal place of business as a condition to arbitration. Such "free peek" provisions are unconscionable under California law. *Carmona v. Lincoln Millennium Car Wash, Inc*, 226 Cal. App. 4th 74, 90 (2014) ("requiring plaintiff to submit to an employer-controlled dispute resolution mechanism (i.e. one without a neutral mediator) suggests that defendant would receive a 'free peek' at plaintiff's case, thereby obtaining an advantage if and when plaintiff were to later demand arbitration"). Indeed, this "free peek" provision is not even free to Fleming, since he must bear half the expenses of the mediation taking place on Matco's home turf, in addition to associated travel costs and fees. DA, ¶ 12.6. Courts have consistently found unconscionable contractual provisions that impose arbitration-related expenses beyond that which an individual would be required to bear if he were free to pursue his statutory claims in court. *Roe v. SFBSC Mgmt., LLC*, 2015 WL 930683, *11 (N.D. Cal. Mar. 2, 2015) (arbitration cost-splitting provisions substan-

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2015), aff'd in part, rev'd in part and remanded by 848 F.3d 1201 ("a more accurate reading is that *Armendariz* simply renders unenforceable employment contracts that purport to require employees to bear those costs."); *see also IJL Dominica S.A. v. It's Just Lunch International, Inc*., 2009 WL 305187, at *3–4 (C.D. Cal. Feb. 6, 2009) (finding unconscionable arbitration provision that waives punitive damages "to the extent permitted by law"). To hold otherwise would encourage the drafting of blatantly unconscionable arbitration agreements with numerous unconscionable provisions, with the hope that the Court would blue pencil the agreement by rendering every such provision void.

tively unconscionable and unenforceable under California law); *Lou,* 2013 WL 2156316, at *5 (to be enforceable, arbitration agreement must meet "certain minimum requirements, including limits on the costs of arbitration").

c. The Unconscionable Provisions Permeate the Agreement and Cannot Be Severed, Rendering the Arbitration Agreement Unenforceable.

To the extent Matco urges the Court to sever any unconscionable provisions, severance would be inappropriate, as the arbitration agreement contains multiple unlawful provisions and there is no single provision the court could strike or restrict in order to remove the "unconscionable taint" from the agreement. *Armendariz*, 24 Cal.4th at 124. Despite a "liberal federal policy favoring arbitration agreements, a court cannot rewrite the arbitration agreement for the parties." *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1084 (9th Cir. 2007) (finding arbitration agreement unenforceable where it was procedurally unconscionable and there were four substantively unconscionable provisions). The arbitration agreement here should be rejected in its entirety as the overwhelmingly one-sided nature of the arbitration provisions demonstrates Matco's intent to reserve for itself multiple unfair advantages in the arbitration process while passing off significant burdens to Fleming. The "overarching inquiry" must be "whether the interests of justice would be furthered by severance," and there can be no justice where "the party in the superior bargaining position [is] trying to impose arbitration not as an alternative to litigation but rather as an inferior forum." *Jackson v. S.A.W. Ent.*, 629 F. Supp. 2d 1018, 1030 (N.D. Cal. 2009). Rather than severing any

unconscionable provisions, the arbitration agreement should be voided in its entirety.

2. Matco's Dormant Commerce Clause Challenge to Section 20040.5 Fails

Matco's argument that Section 20040.5 is unconstitutional misconstrues Dormant Commerce Clause jurisprudence. The Commerce Clause of the United States Constitution grants Congress the authority "[t]o regulate commerce . . . among the several states[.]" U.S. Const., art. I, § 8, cl. 3. This grant of authority to Congress, however, "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). "A critical requirement for proving a violation of the dormant Commerce Clause is that there must be a *substantial burden* on *interstate commerce*." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). "[N]ot every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." *Great Atl & Pac. Tea Co. v. Cottrell,* 424 U.S. 366, 371 (1976) (stating that "States retain broad power to legislate protection for their citizens in matters of local concern"). In analyzing challenges pursuant to the Dormant Commerce Clause, courts examine whether a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect. If so, it is unconstitutional unless it "serves a legitimate local purpose" that could not be served as well by available nondiscriminatory means." *Int'l Franchise Ass'n v. City of Seattle,* 803 F.3d 389, 399 (9th Cir. 2015). If there is no discrimination, courts will uphold the law "unless the burden imposed on interstate commerce is clearly excessive in

relation to the putative local benefits." *Id.* A party challenging a statute under the Dormant Commerce Clause bears the burden of showing discrimination. *Black Star Farms, LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010).

Matco challenges only Section 20040.5's alleged discriminatory purpose,[7] arguing that— even though the law is generally applicable to all franchisors doing business in California—the intent of Section 20040.5 is to discriminate against out-of-state franchisors because they may be called to court in California. (Mot. at 11–12). Discriminatory purpose may be proven by a stated discriminatory purpose or actions making clear that the statute's purpose is to discriminate against

[7] To the extent Matco attempts to reframe its discriminatory purpose argument as a discriminatory effects argument, it is nonsensical. A law is not "discriminatory simply because it affects in-state and out-of-state interests unequally." *Rocky Mountain Farmers Union v. Corey,* 730 F.3d 1070, 1089 (9th Cir. 2013). Matco's contention that California franchisors derive a "competitive advantage" from a California venue because they can "rely on consistent judicial interpretations" (Mot. at 12) is baseless as Section 20040.5 does not dictate the substantive law that applies to any case; obligations may differ based on the applicable law and thus it does not ensure "consistent judicial interpretations." Moreover, Section 20040.5 is only applicable to franchisors operating within the state—California-headquartered franchisors may also be sued elsewhere where jurisdiction exists. Third, even if California franchisors could always require a California forum, Section 20040.5 does not require *state court* venue, and a federal forum is clearly available to diverse parties under Section 20040.5. The availability of diversity jurisdiction alleviates any concern that the law deprives franchisors "from the protections of federal law in diversity cases." Mot. at 12; *See Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 502 (9th Cir. 2001) ("The 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.") (citations omitted).

out-of-state interests. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1098 (9th Cir. 2013). Matco has failed to meet its significant burden of demonstrating a discriminatory purpose, pointing only to legislative history that says no such thing.[8] Indeed, Matco must concede that "the Legislature's stated need for the statute was ostensibly to protect California-based franchisees from costly out-of-state litigation"—ensuring they are effectively able to seek redress for unlawful conduct. (Mot. at 12). *See Rocky Mountain Farmers Union*, 730 F.3d at 1098 (the court "will assume that the objectives articulated by the legislature are actual purposes of the statute unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation"). And Matco's only cited case is inapposite. In *1800-Got-Junk? LLC v. Superior Court.*, 189 Cal. App. 4th 500, 505, 518 (2010), the court enforced a *choice of law* provision in a franchise agreement but could not—and did not—enforce a forum selection clause because Section 20040.5 "categorically prohibits" forum selection clauses in franchise agreements.

Because there is no discriminatory purpose behind Section 20040.5, the court must uphold the law unless Matco can show that "the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." *Int'l Franchise Ass'n*, 803 F.3d at 399. Yet Matco has presented no evidence of any burden on interstate commerce—nor can it. The statute applies equally to in-state and out-of-state actors

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[8] Moreover, where there "is strong textual evidence" of an acceptable purpose and "weaker textual evidence" of a potentially suspect classification, the Ninth Circuit has found that a discriminatory purpose does not exist. *Int'l Franchise Ass'n, Inc.*, 804 F.3d at 401.

and solely classifies entities based on their business model—that they are franchise arrangements—which is a facially neutral classification for the purposes of a Dormant Commerce Clause analysis. *See id.* at 400 ("A distinction drawn based on a firm's business model—a characteristic [Defendant] contends is highly correlated with interstate commerce—does not constitute facial discrimination against out-of-state entities or interstate commerce."). In contrast, Section 20040.5's legislative history contains proof of significant local benefits. Dkt. 16-6 ("Many franchise contracts contain clauses that require a civil action or proceeding arising under or relating to a franchise agreement to be commenced in a designated out-of-state venue. . . . Few franchisees can easily afford to defend or prosecute their actions in another state. The author of AB 1920 contends that these contractual provisions put the California franchisee at a great disadvantage in pursuing meritorious actions against a franchisor."). Matco points to no case in which a court has invalidated a similar state statute, and Plaintiff is aware of none. *See e.g. In'tl Franchise Ass'n*, 803 F.3d at 389 (upholding an interpretation of a city's wage ordinance that required franchisors to comply with city's minimum wage schedule). Matco has fallen far short of meeting its burden to successfully challenge Section 20040.5.

3. Equitable Estoppel Is Not a Basis to Override Section 20040.5

Matco's estoppel argument suffers from several fatal infirmities. Most fundamentally, the suggestion that bringing a claim for independent contractor misclassification estops a plaintiff from avoiding obligations imposed under the agreement is novel—and frivolous. If that were true, every independent contractor mis-

classification case from this Court would have been wrongly decided, since all independent contractor agreements contain certain provisions (such as a clause contending that the worker is an independent contractor) that the worker seeks to "avoid." Unsurprisingly, Matco offers no persuasive authority[9] for its argument that the doctrine of equitable estoppel trumps California's strong public policy, as expressed in Section 20040.5, against non-California forum selection clauses in franchise agreements.[10]

IV. THE MOTION TO TRANSFER SHOULD BE DENIED BECAUSE THE RELEVANT PRIVATE AND PUBLIC INTEREST FACTORS UNDER 28 U.S.C. § 1404(A) WEIGH AGAINST TRANSFER

Though Matco entirely ignores 28 U.S.C. § 1404(a), it is the correct standard for evaluating whether transfer is appropriate under the present facts. Where, as here, there is no enforceable forum selection clause, courts considering a motion to transfer weigh both the convenience of the parties ("private factors") and public interest considerations in deciding whether to

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[9] Matco cites *Turner v. Thorworks Indus*., No. CIV S-05-02653 WBS KJM, 2006 U.S. Dist. LEXIS 21668 (E.D. Cal. Mar. 28, 2006), but *Turner* contains no discussion of or reference to Section 20040.5. Indeed, it appears that the plaintiff in *Turner* failed to argue that the defendants' forum selection clause was a violation of California public policy.

[10] Defendants also rely on Cal. Civ. Code § 3521 ("He who takes the benefit must bear the burden"). However, Cal. Civ. Code § 3513 states that "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Because Section 20040.5 articulates California's strong public policy against exclusive, non-California forum selection clauses in franchise agreements, it is nonwaivable.

retain jurisdiction. *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 62 (2013); *see also Brackett v. Hilton Hotels Corp.*, 619 F.Supp.2d 810, 820 (N.D. Cal. 2008). In determining whether transfer is proper under § 1404(a), courts must "balance the preference accorded plaintiff's choice of forum with the burden of litigating in an inconvenient forum." *Decker Coal Co. v. Commonwealth Edison Co*., 805 F.2d 834, 843 (9th Cir. 1986). The "defendant must make a strong showing of inconvenience to upset the plaintiff's choice of forum." *Id.*

A. The Private Factors Weigh Against Transfer

In deciding a Section 1404(a) transfer motion, the Ninth Circuit has held that courts should examine: (1) the location where the contract was negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, (8) the ease of access to sources of proof, (9) the presence of a forum selection clause, and (9) the relevant public policy of the forum state. *See Jones,* 211 F.3d at 498–499 (citations and quotation marks omitted).

Matco has failed to meet its burden. Here, the *only* factor supporting Matco's motion is that the DA contains a choice of forum provision—yet as described above, that provision is void. *See* Section III, *supra*. And all other factors support Fleming's choice of forum in the Northern District of California. First, the DA was presented to Fleming in California, within the Northern District of California's jurisdiction. Fleming

Decl. ¶ 4. Second, Plaintiff asserts claims pursuant to California law, and, as described above, Labor Code Section 925 requires that California law applies to the instant action. California courts are clearly most familiar with California law. *See Kuhnhausen v. Dwyer*, No. 2:06 CV 1062 GEB DAD, 2006 WL 2666076, at *2 (E.D. Cal. Sept. 15, 2006) (noting the interest in having a forum that is "at home with the law"). Third, Fleming's choice of forum is California because his causes of action arose within California—Fleming has only worked for Matco in California and seeks to represent only Matco distributors who have worked in California. Dkt. 1 at ¶ 32. Fourth, the majority of witnesses are located in California, including Matco supervisors and class members.[11] Fifth, it would be significantly more expensive for Fleming to litigate and to represent the interest of California Matco distributors in Ohio. Fleming Decl. ¶ 13. Finally, as discussed below, the public policy of California undeniably supports this Court retaining jurisdiction over this matter.

B. The Public Factors Weigh Against Transfer

Public interest factors similarly weigh in favor of this Court retaining jurisdiction.[12] Those factors

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[11] To the extent Matco argues that relevant documents exist outside California, it would not weigh in favor of transfer. *See Cohen v. State Farm & Cas. Co.,* No. 09–1051, 2009 WL 2500729, at *6 (E.D. Cal. Aug. 14, 2009) ("[T]echnological advances (i.e. electronic filing, video and teleconferencing, express mail services, faxes, etc.) have substantially reduced the burden of having to litigate in a distant forum.").

[12] Courts also consider public interest factors in the event there is a valid forum selection clause. *See Atl. Marine Const. Co.*, 51 U.S. at 64. While there is no enforceable forum selection clause here for the reasons articulated in Section III, *supra*, in the event the Court finds a valid forum selection clause, the public interest

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." *Atl. Marine Const. Co.*, 51 U.S. at 62 n. 6 (citations omitted). First, the factor of relative court congestion weighs against transfer. Although Matco focuses on the gross number of cases in each district, the Ninth Circuit has made clear that "[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." *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1337 (9th Cir. 1984). The Northern District of California has a median time from filing to disposition in civil cases of 7 months, compared to 10.3 months in the Northern District of Ohio. United States Courts, National Judicial Caseload Profile, (June 2018), available at https://www.uscourts.gov/statistics-reports/federal-court-management-statistics-june-2018. Therefore, transfer would not lead to a speedier resolution.

Second, courts examine the public interest in adjudicating local controversies. "As some courts say—borrowing a term from conflict of laws jurisprudence—a case ought to be heard where its 'center of gravity' lies, thereby preventing the case from proceeding in an illogical forum and imposing its attendant costs, such as jury duty, on disinterested citizens." *LRN Corp. v. RGA Reinsurance Co.*, No. 2:14-cv-05771-SVW-RZ, 2015 U.S. Dist. LEXIS 190391, at *4 (C.D. Cal. Jan. 20, 2015) (internal quotations and citations omitted). This analysis examines the parties' and the dispute's

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factors here still weigh in favor of this Court retaining jurisdiction.

relationship to the potential forums, including where the relevant agreements were negotiated and executed. *Id.*; *see also Jones*, 211 F.3d at 498. Here, Matco presented Fleming the DA in California; Fleming worked for Matco solely in California; and Matco employs over a hundred of other drivers in California. Fleming Decl., Exh. 1 at 40-42. In contrast, Fleming has no connection to Matco's proposed forum of Ohio. This factor also weighs against transfer.

This last factor is familiarity with the underlying law. Here, California law applies to the disputes at issue. Indeed, Ohio law has no corollary to most of Fleming's claims, including no statute similar to PAGA, no statute similar to Labor Code Section 2802, no daily overtime, and no meal and rest breaks. Accordingly, a California court is better situated to decide Fleming's claims.

V. CONCLUSION

For the foregoing reasons, Matco's motion to dismiss, or in the alternative, transfer venue to the U.S. District Court for the Northern District of Ohio should be dismissed.

DATED: March 5, 2019

RUKIN HYLAND & RIGGIN LLP

By: /*s*/ Valerie Brender
Valerie Brender
Attorney for Plaintiff

APPENDIX L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:19-cv-00463-WHO

JOHN FLEMING, on behalf of himself and all others similarly situated,

Plaintiff,

v.

MATCO TOOLS CORPORATION, a Delaware corporation; NMTC, INC. d/b/a MATCO TOOLS, a Delaware corporation, FORTIVE CORPORATION, a Delaware corporation; and DOES 1-20, inclusive,

Defendant.

Date: April 24, 2019

Time: 2:00 p.m.

Dept: Courtroom 2, 17th Floor

Judge: Hon. William H. Orrick

Complaint Filed: January 25, 2019

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 [*FORUM NON CONVENIENS*]

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiff strains to make this motion seem more complex than it is. The Opposition is devoted to arguments that have no bearing on Plaintiff's burden to justify his decision to file suit in California in contravention of the Ohio forum-selection clause. For instance, Plaintiff's attack on the enforceability of the arbitration provision in his Distributorship Agreements is immaterial—policy arguments unrelated to venue are irrelevant to the validity of a forum-selection clause. Likewise, California Labor Code Section 925 ("Section 925") provides no support for Plaintiff's position. The statute does not apply to franchisees, it is preempted by the FAA, and it violates the Dormant Commerce Clause. Regardless, Plaintiff does not qualify for Section 925's protections because his Distributorship Agreements were not entered into, modified or renewed on or after January 1, 2017—and the self-renewing software license agreement Plaintiff entered into before that date did not "modify or renew" his 10 year Distributorship Agreements annually, as Plaintiff implausibly claims. These, and the other distractions permeating the Opposition, cannot mask the absence of exceptional circumstances precluding the enforcement of the forum-selection clause. This case should be dismissed, or, transferred to the Northern District of Ohio.

II. ARGUMENT IN REPLY

A. Section 20040.5 Does Not Preclude The Forum-Selection Clause.

1. Plaintiff Concedes That *Bradley* Is Dispositive.

Plaintiff does not dispute two foundational arguments supporting this motion. First, the FAA applies

here. (Dkt. No 16 ("MPA") at 10 n.4.) Second, because the FAA applies, Section 20040.5 is preempted. (*Id.* at 10:12-11:4 (citing *Bradley v. Harris Research*, 275 F.3d 884 (9th Cir. 2001).) Tacitly recognizing that *Bradley* controls, Plaintiff obfuscates, arguing that the arbitration provision in his Distributorship Agreements is unenforceable. The Court should disregard this red herring.

2. The Forum Selection Clause Is At Issue—Not The Arbitration Provision.

a. Policy Arguments Untethered To Venue, Such As Plaintiff's Attack On The Arbitration Provision, Are Irrelevant To The Validity Of Forum-Selection Clauses.

Defendants seek to enforce the forum-selection clause in the Distributorship Agreements. That is where the Court's focus should remain.

Plaintiff, however, attempts to distract from the relevant inquiry by arguing that the arbitration provision is unenforceable. His position is untenable. Courts have repeatedly rejected smokescreens advanced by parties who seek to avoid a forum-selection clause by claiming the contract containing the clause is unenforceable. *E.g.*, *Washington v. Cashforiphones.com*, No. 15-cv- 0627-JAH (JMA), 2016 U.S. Dist. LEXIS 192253, *12-13 (S.D. Cal. Jun. 1, 2016) ("When the issue before a district court is limited to venue[,] the court need not address the validity of an entire contract."); *SeeComm Network Servs. Corp. v. Colt Telecomm.*, No. C 04-1283, 2004 U.S. Dist. LEXIS 18049, *12-13 (N.D. Cal. Sept. 3, 2004) ("To hold that the Forum-Selection Clause is invalid because the contract as a whole is invalid. . . requires the Court to

assess the merits of the case. [This] analysis is clearly backwards. The question before the Court is the validity of the Forum-Selection Clause, not the validity of the contract as a whole."); *Cream v. N. Leasing Sys., Inc.*, No. 15-cv-1208, 2015 U.S. Dist. LEXIS 100537, *18-19 (N.D. Cal. Jul. 31, 2015) (same); *Lizdale v. Advanced Planning Servs., Inc.*, No. 10-cv-0834, 2011 U.S. Dist. LEXIS 31277, *15-16, (S.D. Cal. Mar. 25, 2011) (same). *See also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) ("an arbitration provision is severable from the remainder of the contract"). The validity of the arbitration provision in the Distributorship Agreements has no bearing on this motion. Instead, what matters is whether the forum-selection clause is enforceable.

Plaintiff's attempt to sidetrack the Court's attention from the enforceability of the forum-selection clause must be rebuffed. As this Court held in *Rowen v. Soundview Cmmc'ns, Inc.* (a case cited in the Opposition), "absent a total foreclosure of remedy in the transferee forum, courts tether their policy analysis to the forum selection clause itself, finding the forum selection clause unreasonable only when it contravenes a policy *specifically related to venue*." *Rowen v. Soundview Cmmc'ns, Inc.*, No. 14-cv-05530-WHO, 2015 U.S. Dist. LEXIS 24986, *10-11 (N.D. Cal. Mar. 2, 2015) (rejecting arguments against enforceability of forum-selection clause unrelated to venue) (emphasis added). Further, "even if the foreclosure is likely or practically certain, courts still refuse to consider policies unrelated to venue [because] the mere ability to argue the application of California law means no foreclosure of remedy and prevents consideration of policies unrelated to venue." *Id.* at *10 n.2 ("The foreclosure of a remedy must be inevitable[.]"). Indeed, there is no total foreclosure of remedy here, because Plaintiff

may argue that California law applies.[1] *Id.* at *18 ("Plaintiff is free to pursue remedies in federal court

[1] Plaintiff's suggestion that he may be precluded from pursuing certain claims in Ohio is irrelevant. Plaintiff may argue that California law applies, and so his concern is of no consequence. *Rowen*, 2015 U.S. Dist. LEXIS 24986 at *18-19. In addition, *Doe 1 v. AOL LLC*, cited by Plaintiff for the proposition that transfer is inappropriate where the transferee court would be unable to provide class action procedures, is inapposite. Rule 23 would apply in the Northern District of Ohio, just as it applies in this Court (though it bears noting the Distributorship Agreements contain class action waivers, which have been repeatedly upheld by the Supreme Court). *Cf. Doe 1 v. AOL LLC*, 662 F.3d 1077, 1083-85 (9th Cir. 2009) (forum-selection clause requiring litigation in Virginia state court unenforceable because Virginia state courts did not permit consumer disputes to be tried as class actions). *See also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). Finally, Plaintiff's contention that language in the Distributorship Agreements purporting to waive private attorney general claims voids the arbitration provision must be disregarded because it is untethered to the forum-selection clause. *Rowen*, 2015 U.S. Dist. LEXIS 24986 at *10-20; *SeeComm Network Servs. Corp.*, 2004 U.S. Dist. LEXIS 18049 at *12-13. In any event, Plaintiff's interpretation of this language is incorrect. The Distributorship Agreements contemplate that private attorney general claims shall be excluded from arbitration if required by law. (Swanson Dec. ¶¶ 4-5, Exs. 1 and 3 at § 12.12 ("[I]f 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 any such breaches*.") (emphasis added).) Plaintiff's interpretation of Section 12.12 makes little sense, as it would invalidate the parties' obligation to arbitrate individual claims brought in the same lawsuit as class or private attorney general claims. *See Corp. Express Office Prods., Inc. v. Can Guelpen*, No. C 02-04588 WHA, 2002 U.S. Dist. LEXIS 27642, *6 (N.D. Cal. Dec. 12, 2002) (rejecting interpretation of contract that "would lead to an absurdity") ("No contract

in New York and is free to argue for application of California law.") (internal punctuation omitted). Plaintiff's argument concerning the enforceability of the arbitration provision thus warrants no consideration.

b. It Is Premature To Consider Whether The Arbitration Provision Is Enforceable Because The Governing Law Has Not Been Determined.

Plaintiff's attack on the arbitration provision is also misguided because it presumes that California law applies, despite the Distributorship Agreements' Ohio choice of law provision. (Swanson Dec. ¶¶ 4-5, Exs. 1 and 3 at § 13.3.) This Court, however, has not issued any rulings on the validity of the choice of law provision, and it should not now. "[T]he choice-of-law analysis is irrelevant to determining if the enforcement of a forum selection clause contravenes a strong public policy." *Rowen*, 2015 U.S. Dist. LEXIS 24986 at *18-19 (finding "no reason why the [transferee] court will not or cannot entertain. . . choice of law arguments"). That is precisely why Plaintiff's focus on the enforceability of the arbitration provision is ill-conceived—neither the parties nor the Court know which body of law applies, and that question cannot be resolved in connection with this motion.

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provision should be interpreted in a manner that would render other provisions meaningless.").

3. Section 20040.5 Violates The Dormant Commerce Clause Because It Burdens Out-Of-State Economic Interests And Benefits In-State Economic Interests.

Plaintiff's discussion of the Dormant Commerce Clause misses the point of Defendants' argument. Matco has legitimate interests in ensuring uniformity across its nationwide franchisees' operations and in having its franchise agreements governed by the same body of law. *See 1-800-Got-Junk? LLC v. Super. Ct.*, 189 Cal. App. 4th 500, 515 (Cal. Ct. App. 2010). Section 20040.5 disrupts these interests by requiring litigation in California instead of the parties' agreed upon forum of Ohio. Moreover, Section 20040.5 strips away the application of federal law to the analysis of the enforceability of forum-selection clauses. Federal law, which governs the enforceability of forum-selection clauses, provides that parties' relative bargaining power is irrelevant. Yet Section 20040.5 purports to override federal law by imposing a state law standard presupposing that out-of-state forum-selection clauses are invalid due to purported inequality in bargaining power. (RJN ¶ 1, Ex. A.) *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1141 (9th Cir. 2004) (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (parties' bargaining power is irrelevant); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988) (federal law controls interpretation of forum-selection clauses). Section 20040.5, therefore, provides California franchisors with a competitive advantage over out-of-state franchisors, the latter of which cannot rely on consistent interpretations of their contracts.

The Ninth Circuit's opinion in *Nationwide Biweekly Admin, Inc.* demonstrates why Section 20040.5 imper-

missibly burdens interstate commerce. There, the court held that a law restricting the issuance of licenses to corporations incorporated in California likely discriminated against out-of-state economic interests because permitting "states to require local incorporation as a condition of engaging in interstate commerce" promoted economic "Balkanization" that could result in national corporations having "to incorporate in all 50 states in order to do business." *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 737 (9th Cir. 2017). The fact that the law required California and out-of-state businesses to obtain the license mattered not—as the court noted, the statute discriminated against non-California businesses by requiring them to incorporate in California in order to receive a license. *Id.*

Section 20040.5 also fosters impermissible economic "Balkanization" because only California franchisors may utilize forum-selection clauses requiring litigation in their home state. *See Rhode v. Becerra*, 342 F. Supp. 3d 1010, 1015 (S.D. Cal. 2015) (rejecting argument that California Proposition 63 did not violate the Dormant Commerce Clause because it applied to in-state and out-of-state online retailers) ("What is important is that California's resident businesses are the only businesses that may sell directly to ammunition consumers. Sales of any quantity, by all other sellers, anywhere else in the country, must be funneled through a California resident vendor licensed to sell ammunition."). As Section 20040.5's legislative history confirms, out-of-state forum-selection clauses in franchise agreements "usually" point to "the state of the franchisor's headquarters." (RJN ¶ 1, Ex. A.) In other words, Section 20040.5 specifically targets out-of-state businesses and precludes them from achieving uniformity in their franchise operations—the very

essence of a franchise. *See 1-800-Got-Junk? LLC*, 189 Cal. App. 4th at 515; *Cislaw v. Southland Corp.*, 4 Cal. App. 4th 1284, 1292 (Cal. Ct. App. 1992) ("[T]he franchisor's interest in the reputation of its entire system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchisee into an agent."); 15 U.S.C. § 1127 (franchisors obligated to maintain control over use of trademarks).

"[I]n all but the narrowest circumstances, state laws violate the [Dormant] Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Nationwide Biweekly Admin., Inc.*, 873 F.3d at 736. This is not one of those narrow circumstances. Because Section 20040.5's stated purpose of protecting California franchisees from the costs of out-of-state litigation can be achieved through nondiscriminatory means (*see* MPA at 13:1-10), the statute should not apply here.

4. Plaintiff Is Estopped From Contesting The Forum-Selection Clause.

Plaintiff offers no authority refuting *Turner v. Thorworks Indus.*, in which the court held that California franchisees were precluded from avoiding enforcement of an Ohio forum-selection clause because their claims "necessarily [relied] upon the Franchise Agreement and the relationships thereby created." *Turner v. Thorworks Indus.*, No. CIV S-05-02653 WBS KJM, 2006 U.S. Dist. LEXIS 21668, *9-10 (E.D. Cal. Mar. 28, 2006). Moreover, his proffered distinction of the instant matter from *Turner* fails to address the crux of Defendants' argument. As explained below, franchisor-franchisee relationships differ markedly from typical independent contractor-principal rela-

tionships. (*See* Section IV.B.2, *infra*.) Plaintiff's suggestion that the standards applicable to a garden variety independent contractor misclassification case render *Turner* inapplicable is therefore inapt. As in *Turner*, and as confirmed by Plaintiff's Complaint (*see* MPA at 14:5-24), Plaintiff's claims are derivative of the Distributorship Agreements and the relationships they created. Plaintiff is therefore estopped from contesting the forum-selection clause, which is a term of the very agreements giving rise to his claims.

B. Section 925 Cannot Preclude Enforcement Of The Forum-Selection Clause.

1. Section 925 Is Preempted By The FAA.

The Court should deem Section 925 preempted for the same reason that the Ninth Circuit held Section 20040.5 to be preempted in *Bradley*. *See Bell Prods. v. Hosp. Bldg. & Equip. Co.*, No. 16-cv-04515-JSC, 2017 U.S. Dist. LEXIS 9183, *12 (N.D. Cal. Jan. 23, 2017) (FAA preempts Cal. Code Civ. Proc. § 410.42(a)(1), which voids forum-selection clauses in subcontractor agreements, pursuant to *Bradley*). Like Section 20040.5, Section 925 applies to only one type of contract—an employment contract. *See* Cal. Lab. Code § 925. (*See also* Supplemental Request for Judicial Notice ("Supp. RJN") ¶ 1, Ex. A.) Accordingly, because Section 925 does not apply to "any contract," it is preempted. *See* 9 U.S.C. § 2; *Bradley*, 275 F.3d at 890, 892; *Bell Prods.*, 2017 U.S. Dist. LEXIS 9183 at *12.

2. Section 925 Does Not Apply To Franchisees.

Section 925 has no application here because the statute does not apply to franchise agreements. *See* Cal. Lab. Code § 925. (*See also* Supp. RJN ¶ 1, Ex. A (legislative history of Section 925 confirms the statute

applies only to employment contracts).) There are fundamental differences between an independent contractor misclassification case and a case involving a franchisee claiming to be an employee of a franchisor that render Section 925 irrelevant to the instant matter.

In *Juarez v. Jani-King of Cal., Inc.*, this Court denied certification of California Labor Code claims filed against a franchisor on behalf of a putative class of franchisees who operated janitorial services franchises. *Juarez v. Jani-King of Cal., Inc.*, 273 F.R.D. 571, 574, 581-583 (N.D. Cal. 2011). Like Plaintiffs here, the *Juarez* plaintiffs alleged that they were misclassified as independent contractors by virtue of the work they performed as franchisees. *Id.* at 575. The *Juarez* plaintiffs therefore argued that the rebuttable presumption of employment applicable to independent contractor misclassification claims should apply to their case. *Id.* at 580-583 (citing *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 48 Cal. 3d (Cal. 1989); *Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010)). The Court rejected the *Juarez* plaintiffs' argument, holding that the rebuttable presumption of employment did not apply to franchisees. *Id.* Central to the Court's ruling was the fact that the heavily regulated franchisor-franchisee business model differs starkly from a typical independent contractor-principal relationship:

> Jani-King responds that many of the above-mentioned franchise agreement terms are policies Jani-King must abide by under California's law governing franchises. [. . .] Jani-King argues that Plaintiffs' common proof shows nothing more than that which makes the owners franchisees. Jani-King also

argues that Plaintiffs, not Jani-King, should have the burden of establishing an employer-employee relationship. [. . .] The Court agrees with Jani-King. It is true that under California law, in determining whether a plaintiff is an employee or an independent contractor, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee. However, Plaintiffs cite no authority suggesting that this rebuttable presumption applies to franchisees. There are substantial public policy reasons for the [rebuttable presumption of employment in independent contractor misclassification cases]: with the hiring of employees comes the additional expenses of compliance with California's Labor Code, and employers have a strong motive to avoid these costs through creatively classifying their workers as independent contractors. This is why California does not permit circumvention of the Labor Code through label or subterfuge. Franchisors, however, are subject to a considerable amount of regulation that does not apply to independent contractors or employees. [. . .] Thus the above policy concerns do not weigh as heavily in the franchise context. [. . .] For this reason, California courts have consistently held that a principal-agent relationship only exists when the franchisor retains complete or substantial control over the daily activities of the franchisee's business.

Id. at 581-583 (franchisees must show that the "franchisor exercised 'control beyond that necessary to protect and maintain its interest in its trademark, trade name and goodwill' to establish a prima facie case of an employer-employee relationship"). The Court thus spurned the plaintiffs' attempt to upend the franchise model through the introduction of a test for employment that ignored the realities of the parties' franchisor-franchisee relationships. *Id.* at 583 ("Once it sets aside the policies required to protect Jani-King's service mark and good will, the Court finds very little—if any—common evidence tending to prove an employer-employee relationship between Jani-King and its franchisees.").[2] *See also Cislaw*, 4 Cal. App. 4th at 1292 ("[T]he franchisor's interest in the reputation of its entire system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchisee into an agent.").

The California Supreme Court is also cognizant that "[f]ranchising is different" than other businesses, and accordingly, it has avoided subverting the franchise model, which has existed for over 150 years, and, which "employs millions of people, carries payrolls in the billions of dollars, and generates trillions of dollars in total sales." *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474, 489 (Cal. 2014). Of course, franchising is a "heavily regulated" form of business (*Cislaw*, 4 Cal. App. 4th at 1288) with what constitutes a franchise

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[2] The District Court granted Jani-King's motion for summary judgment after the denial of certification. Plaintiffs appealed the District Court's order, and the Ninth Circuit remanded *Juarez* for further proceedings in light of *Dynamex Ops. West, Inc. v. Super. Ct.*, 4 Cal. 5th 903 (Cal. 2018). *See Juarez v. Jani-King of Cal., Inc.*, No. 12-17759, 728 Fed. App'x 755 (9th Cir. Jun. 26, 2018).

defined on the federal level and in many states, including California. The hallmark is the identification and association with the franchisor's trademark. *See, e.g.,* 16 C.F.R. § 436.1(h)(1) and Cal. Corp. Code § 31005(a)(1)-(3). Because federal law requires trademark owners to maintain control over the use of their trademarks, *see* 15 U.S.C. § 1127 (2000), franchisors must necessarily exercise a certain level of control over the operational standards their franchisees implement in distributing goods or services under those marks. *Patterson,* 60 Cal. 4th at 490.

In *Patterson*, the California Supreme Court rejected the application of vicarious liability to a franchisor for the acts of a franchisee's employees where the franchisor had not "retained or assumed a general right of control over. . . relevant day-to-day aspects of the workplace behavior of the franchisee's employees." *Id.* at 497-498 ("Any other guiding principle would disrupt the franchise relationship."). Like the Ninth Circuit in *Juarez*, the *Patterson* court's decision reflects an appreciation that the very existence of franchising depends upon the success of a relationship between franchisor and franchisee that is incompatible with the principles of typical agency relationships:

> Under the business format model, the franchisee pays royalties and fees for the right to sell products or services under the franchisor's name and trademark. In the process, the franchisee *also* acquires a business plan, which the franchisor has crafted for all of its stores. This business plan requires the franchisee to follow a system of standards and procedures. A long list of marketing, production, operational, and administrative areas is typically involved. [. . .] The business format

> arrangement allows the franchisor to raise capital and grow its business, while shifting the burden of running local stores to the franchisee. The systemwide standards and controls provide a means of protecting the trademarked brand at great distances. The goal—which benefits both parties to the contract—is to build and keep customer trust by ensuring consistency and uniformity in the quality of goods and services, the dress of franchise employees, and the design of the stores themselves. [. . .] The franchisee is often an entrepreneurial individual who is willing to invest his time and money, and to assume the risk of loss, in order to own and profit from his own business. In the typical arrangement, the franchisee decides who will work as his employees, and controls day-to-day operations in his store. The franchise arrangement puts the franchisee in a better position than other small business owners. It gives him access to resources he otherwise would not have, including the uniform operating system itself.

Id. at 489-491 (internal citations omitted).

Section 925 should not be mechanically applied here simply because Plaintiff alleges employment-related claims. Plaintiff never entered into an employment contract with Defendants, and his relationships with them are governed by the extensive body of law covering franchises. Indeed, Section 20040.5, which became effective before Section 925, explicitly covers forum-selection clauses in franchise agreements (though Section 20040.5 is inapplicable here). *See* Cal. Bus. & Prof. Code § 20040.5. It is implausible that the Legislature intended for Section 925 to apply to franchise

agreements given that forum-selection clauses in such contracts have been governed by Section 20040.5 since the latter statute's enactment. *See Imperial Merchant Servs., Inc. v. Hunt*, 47 Cal. 4th 381, 390 (Cal. 2009) ("'We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous.'") (citing *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) and *Shoemaker v. Myers*, 52 Cal. 3d 1, 22 (Cal. 1990)) (holding that a civil remedies provision in Cal. Civ. Code § 1719 would be rendered superfluous if read in conjunction with the rest of the Civil Code). Much as the traditional tests for employment have been deemed inapplicable to cases involving franchisees, so, too, should Section 925.

Karl v. Zimmer Biomet Holdings, Inc., cited by Plaintiff, is inapposite in light of the foregoing. There, the court held that an independent contractor alleged a plausible misclassification theory under *Dynamex Ops. W. v. Super. Ct.*, 4 Cal. 5th 903 (Cal. Ct. App. 2018). *Karl v. Zimmer Biomet Holdings, Inc.*, No. C 18-04176 WHA, 2018 U.S. Dist. LEXIS 189997, *8-9 (N.D. Cal. Nov. 6, 2018). The court thus determined that Section 925 precluded the forum-selection clause in the plaintiff's independent contractor agreement, which had been modified on or after January 1, 2017. *Id.* at *8-12. *Karl*, however, did not involve a franchisee claiming to be the employee of a franchisor, and, as explained above, the typical independent contractor misclassification tests do not provide the appropriate vehicle for determining whether Plaintiff should have been treated as an employee.[3] The case therefore pro-

[3] The Ninth Circuit is considering the applicability of *Dynamex* to franchisees in *Vazquez v. Jan-Pro Franchising Int'l Inc.*, Case No. 0:17-cv-16096. Regardless, Ohio law may govern

vides no support for the application of Section 925 here.

3. The Dormant Commerce Clause Precludes Section 925.

Section 925 violates the Dormant Commerce Clause.[4] The legislative history of Section 925 reveals a blatant discriminatory purpose:

> [G]iven that employees may not have the freedom to select their employer with particularity, let alone negotiate the terms of their employment contracts, employers largely have the upper hand when requiring an employee to agree to choice of law, choice of venue, and choice of forum provisions. [. . .] As such, choice of law and choice of forum agreements contained in . . . employment contracts, to a great degree, are arguably not procured "freely and voluntarily." [. . .] Thus, as a matter of public policy, this bill appears to level the playing field between. . . employers and employees in many otherwise non-negotiable contracts in a reasonable fashion. Furthermore, as noted by the California Employment Lawyers Association, in support of the bill, *this bill also levels the playing field between California and non-California businesses and employers*[.]

(Supp. RJN ¶ 2, Ex. B (emphasis added).) *See Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 401

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this dispute, and it would be premature to conclude that *Dynamex*, or any other test under California law, applies here.

[4] *See* MPA at 7:7-17 (discussing standards for determining Dormant Commerce Clause violation).

(9th Cir. 2015) ("[S]tatutes struck down for their impermissible purpose have contained language. . . seeking to level the playing field."); *Nationwide Biweekly Admin., Inc.*, 873 F.3d at 736 ("[I]n all but the narrowest circumstances, state laws violate the [Dormant] Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."). The Legislature clearly intended to favor California businesses over out-of-state businesses insofar as Section 925 aims to minimize a perceived competitive advantage separating the two. Moreover, Section 925 disturbs out-of-state employers' employee relations, because there is no assurance that the same laws, court rules and regulations will apply to their employment contracts given that it thwarts federal law holding that inequality in bargaining power is irrelevant to the validity of forum-selection clauses. *Murphy*, 362 F.3d at 1141. Finally, the Legislature's ostensible purpose of protecting California residents could be served by non-discriminatory means, such as requiring California and non-California employers to pay costs unique to out-of-state litigation. (*See* MPA at 13:1-10.) In light of the foregoing, the Dormant Commerce Clause precludes Section 925.[5]

[5] In addition, Plaintiff's Section 925 argument fails because he is estopped from contesting the validity of the forum-selection clause. (*See* MPA at 13:11-14:24 (discussing *Turner*).)

4. Section 925 Does Not Apply To Plaintiff Because His Distributorship Agreements Were Not Entered Into, Modified Or Extended After December 31, 2016.

Even if Section 925 *could* apply here, it would not in light of the undisputed facts. Section 925 only applies to employment contracts "entered into, modified, or extended on or after January 1, 2017." Cal. Lab. Code § 925(f). Plaintiff, however, terminated one of his Distributorship Agreements in September 2015, and, his other Distributorship Agreement (entered into in July 2012) was not modified or extended after December 31, 2016. (Swanson Dec. ¶¶ 4-5, Exs. 1-3.)

The self-renewing Software License, Maintenance and Support Agreement ("Software Agreement") that Plaintiff contends he "entered into" on or after January 1, 2017, and which purportedly "modified and extended" his Distributorship Agreement, does not salvage his argument. The Distributorship Agreement that remained effective after December 31, 2016 had a term of 10 years. (Swanson Dec. ¶ 4, Ex. 1 at § 2.1.) It was not "renewed" by virtue of the Software Agreement's annual automatic renewal. (*See* Dkt. No. 21-1 ("Fleming Dec.") Ex. 1 at p. 35, ¶ 3.) Such an interpretation of Plaintiff's agreements would render the 10 year term set forth in the Distributorship Agreement meaningless. *See Corp. Express Office Prods., Inc.*, 2002 U.S. Dist. LEXIS 27642 at *6 ("No contract provision should be interpreted in a manner that would render other provisions meaningless."). Indeed, as the Software Agreement's terms make clear, it is a standalone contract that existed separate and apart from the Distributorship Agreement. (Fleming Dec. Ex. 1 at p. 38, ¶ 11 ("This Agreement sets forth the entire understanding of the parties and supersedes any and

all prior agreements, arrangements and understandings relating to the subject matter hereof . . . .").) Moreover, Plaintiff's admission that he renewed the Software Agreement he signed in approximately July 2012 by paying annual fees—as opposed to executing a new document that was appended to his Distributorship Agreement—confirms that the Distributorship Agreement was not "entered into, modified or extended" on or after December 31, 2016. Cal. Lab. Code § 925(f). (*See also* Fleming Dec. ¶¶ 4-12.) *Karl*, therefore, does not support Plaintiff's argument because the agreement in question there was modified by virtue of a written amendment in 2018, and there was no such written amendment here. *See Karl*, 2018 U.S. Dist. LEXIS 189997 at *9-12. The Software Agreement thus lends nothing to Plaintiff's Opposition.

C. Plaintiff Has No Evidence Of Fraud Or Overreaching, And His Concern Regarding The Expense Of Out-Of-State Litigation Is Irrelevant.

Plaintiff demoted his arguments that the forum-selection clause resulted from overreaching, and, that he will be deprived of his day in court, to a footnote that fails to explain the merit of either position.

The sole evidence supporting Plaintiff's contention that he will be deprived of his day in court consists of the following statement in his declaration: "The costs associated with litigating a case in Ohio would be personally overwhelming—with respect to the costs connected with litigation, and with respects to the costs of travel and lodging." (Fleming Dec. ¶ 13.) The expense of out of state litigation, however, is irrelevant and cannot be considered. *Rowen*, 2015 U.S. Dist. LEXIS 24986 at *21-22 (holding that the "lower expenses of litigating in California. . . are irrelevant under *Atl.*

Marine Constr. Co.). *See also Balducci v. Congo Ltd.*, No. 17-cv-04062-KAW, 2017 U.S. Dist. LEXIS 154523, *11-12 (N.D. Cal. Sept. 21, 2017) (assertion of increased expense and inconvenience was "inadequate to show that litigating this case in Colorado would effectively deprive [plaintiff] of his day in court").

Plaintiff's claim of overreaching is supported only by the argument of counsel and it thus fails. *Goldman v. U.S. Transp. & Logistics, LLC*, No. 17-cv-00691-BAS-NLS, 2017 U.S. Dist. LEXIS 210423, *7-10 (S.D. Cal. Dec. 20, 2017) (rejecting counsel's argument where plaintiff failed to produce evidence of fraud or overreaching) (quoting *Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865, 869 (9th Cir. 1991) ("Argument by counsel serves only to elucidate the legal principles and their application to the facts at hand; it cannot create the factual predicate.")).

Plaintiff thus has failed to carry his burden of showing that the forum-selection clause is unenforceable. *See Brady Mktg. Co. v. KAI USA, Ltd.*, No. 16-cv-02854-RS, 2016 U.S. Dist. LEXIS 115877, *4-5 (N.D. Cal. Aug. 29, 2016) (plaintiff has burden of showing that forum-selection clause was the product of fraud or overreaching, that he would be deprived of his day in court, or that the clause contravenes a strong public policy) (citing *Atl. Marine Constr. Co.*).

D. Plaintiff Has Not Identified Any Public Interest Factors Constituting Exceptional Circumstances That Would Justify Invalidating The Forum-Selection Clause.

Public interest factors "rarely defeat" the application of a valid, mandatory forum-selection clause. *Monastiero v. appMobi, Inc.*, No. C 13-05711 SI, 2014

U.S. Dist. LEXIS 67202, *13-14 (N.D. Cal. May 15, 2014). They certainly do not here.

Court Congestion: Plaintiff highlights that cases filed in this Court have a median time to disposition that is 3.3 months shorter than cases filed in the Northern District of Ohio. Fair enough. He disregards, however, that the June 2018 report he cites states that the median time from filing to trial is more than eight months longer in this Court than in the Northern District of Ohio. (Supp. RJN ¶ 3, Ex. C (21.4 months in N.D. Ohio, 29.7 months in N.D. Cal.).) Regardless of how the numbers are sliced and diced, they do not provide a basis for overriding the valid forum-selection clause. *Atl. Marine Constr. Co. v. Dist. Ct.*, 134 S. Ct. 568, 581 ("a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases") (internal citation and punctuation omitted).

Local Interest In The Case: Plaintiff's myopic focus on his interests disregards that Ohio has an equivalent local interest. *Rowen*, 2015 U.S. Dist. LEXIS 24986 at *22 ("[T]here are interests other than Rowen's at play, including those of Soundview, a Georgia corporation that negotiated the contracts with Georgia venue and choice of law provisions, and Lotus, the Nevada limited liability company. The effects of this litigation, while undoubtedly affecting Rowen as a resident of California, also have effects in Georgia and Nevada."). Plaintiff's "interest in having this dispute settled in California does not make this an 'exceptional case' that defeats application of a valid forum selection clause." *Id.* at *22-23.

Interest In Having Trial In A Forum That Is At Home With The Law: Plaintiff conflates familiarity with the applicable law, and, the question of which

State's law applies, insofar as he posits that his claims lack counterparts under Ohio law. The relevant inquiry, however, is not whether California or Ohio law applies, but instead, the transferor and transferee courts' familiarity with the governing law. *Glob. Quality Foods, Inc. v. Van Hoekelen Greenhouses*, No. 16-cv-00920-LB, 2016 U.S. Dist. LEXIS 107121, *26-27 (N.D. Cal. Aug. 12, 2016); *Rowen*, 2015 U.S. Dist. LEXIS 24986 at *10-20. Because the governing law remains an open question (*see* Section II.A.2, *supra*), this factor is necessarily neutral. "[F]ederal judges routinely apply the law of a State other than the State in which they sit," and so the Northern Districts of California and Ohio are equally able to apply the laws of other states. *Rowen*, 2015 U.S. Dist. LEXIS 24986 at *21 (quoting *Atl. Marine Constr. Co.*).

E. Plaintiff's Discussion Of Private Interest Factors Is Irrelevant.

The Court must disregard Plaintiff's discussion of private interest factors relating to the enforcement of the forum-selection clause. *Balducci*, 2017 U.S. Dist. LEXIS 154523 at *20 (courts "should not consider the parties' private interests because such considerations were waived by agreement to the forum selection clause"). The forum-selection clause is mandatory and valid.[6] Private interest factors, therefore, are irrelevant. *Rowen*, 2015 U.S. Dist. LEXIS 24986 at *20 ("a district court may consider arguments about public-interest factors only") (quoting *Atl. Marine Constr. Co.*).

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[6] *See* MPA at 15 n.8 (explaining that the forum-selection clause is mandatory).

F. Plaintiff's Claims Are Covered By The Forum-Selection Clause.

The Distributorship Agreements could not be more clear that, with limited exceptions, all claims of any nature are covered by the arbitration provision containing the Ohio forum-selection clause:

> **12.5 Disputes not Subject to Arbitration.** The following disputes and controversies between the Distributor and Matco will not be subject to Arbitration: any dispute or controversy involving the Marks or which arises under or as a result of Article 7 of this Agreement, any dispute or controversy involving immediate termination of this Agreement by Matco pursuant to Section 11.5 of this Agreement, and any dispute or controversy involving enforcement of the covenants not to compete contained in this Agreement.

(Swanson Dec. ¶¶ 4-5, Exs. 1 and 3 at § 12.5.)

The "Marks" referenced in Section 12.5 of the Distributorship Agreements are "certain trade names, service marks, trademarks, logos and emblems, including, the trademarks and service marks "Matco®" and MATCO® TOOLS (the 'Marks')." (*Id.* Exs. 1 and 3 at p. 1 (Recitals).)

Plainly, the Distributor Agreements contemplate the exclusion of litigation concerning certain of Matco's intellectual property from the arbitration provision. (*Id.* Exs. 1 and 3 at § 12.5; *see also id*. Exs. 1 and 3 at § 12.4 ("the arbitrator will not have the right or authority to declare any Mark generic or otherwise invalid").)

Plaintiff urges the Court to adopt a tortured interpretation of Section 12.5. His claims have nothing to

do with his use of the Marks, nor their validity, yet he claims that Section 12.5 excludes each cause of action alleged from the arbitration provision. Taken to its logical conclusion, Plaintiff's position would render Section 12.5 meaningless because every conceivable claim brought by a franchisee or Defendants would be exempt from arbitration—yet the very point of a franchise relationship is that a franchisee is permitted to use the franchisor's trademarks. (*See* Section II.B.2, *supra*.) Plaintiff's absurd interpretation of Section 12.5 must be dismissed, for it is clear that his employment-related claims are covered by the forum-selection clause. *Corp. Express Office Prods., Inc.*, 2002 U.S. Dist. LEXIS 27642 at *6 (rejecting proposed interpretation of contract that "would lead to an absurdity"); *see also Harris v. Gulf Ins. Co.*, 297 F. Supp. 2d 1220, 1226 (N.D. Cal. 2003) ("The Court cannot adopt an interpretation that would lead to such absurd results.").

III. CONCLUSION

For all the foregoing reasons, and those stated in Defendants' opening memorandum, Defendants request that the Court dismiss this matter, or, transfer it to the Northern District of Ohio, pursuant to the *forum non conveniens* doctrine.

DATED: March 12, 2019

Respectfully submitted,

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Eric M. Lloyd

Attorneys for Defendants

Matco Tools Corporation, NMTC, Inc. and Fortive Corporation

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. ____

IN RE MATCO TOOLS CORPORATION, NMTC, INC.
AND FORTIVE CORPORATION,

Petitioners,

v.

U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,

Respondent;

JOHN FLEMING

Real Party in Interest.

On Review from the United States District Court
for the Northern District of California
Civil Action No. 3:19-cv-004663-WHO

PETITION FOR WRIT OF MANDAMUS
STAY REQUESTED

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that: Prior to June 3, 2016, MATCO TOOLS CORPORATION was known as NMTC, INC. d/b/a/ MATCO TOOLS. Further, MATCO TOOLS CORPORATION is a wholly-owned subsidiary of FORTIVE CORPORATION. FORTIVE CORPORATION is a publicly-held corporation and no publicly-held corporation owns 10 percent or more of its stock.

/s/ Eric M. Loyd
Eric M. Lloyd
Attorney for Petitioners

Dated: May 31, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases Page(s)

INTRODUCTION AND RELIEF SOUGHT

Real Party In Interest John Fleming ("Fleming") entered into two franchise agreements ("distributorship agreements") with an arbitration provision containing an Ohio forum-selection clause. Despite the forum-selection clause, Fleming filed suit against Petitioners Matco Tools Corporation, NMTC, Inc. and Fortive Corporation ("Petitioners") in the U.S. District Court for the Northern District of California in January 2019. Petitioners then promptly moved to dismiss or transfer this matter pursuant to the doctrine *of forum non conveniens.* The District Court, however, denied Petitioners' motion. And while the denial of *aforum non conveniens* motion is not, in and of itself, remarkable, the circumstances of this case are, and mandamus review is therefore warranted.

Binding Supreme Court precedent requires that a plaintiff resisting enforcement of a forum-selection clause has the burden of proving that the clause itself is invalid. Numerous courts, including the First, Seventh and Eleventh Circuits, and numerous district courts in the Ninth Circuit, have held that a plaintiff cannot carry this burden by arguing that the contract containing the forum-selection clause is invalid. And where (as here) a mandatory forum-selection clause has not been proven invalid, it must be enforced, except in the rare circumstance in which certain enumerated public interest factors heavily disfavor transfer or dismissal.

The District Court disregarded this black letter law. The Order denying Petitioners' *forum non conveniens* motion sidesteps altogether Fleming's burden to prove that the Ohio forum-selection clause was invalid. Instead, the District Court created a new test out of whole cloth *solely* because the forum-selection clause is set forth in an arbitration provision. Thus, rather

than determining whether Fleming had proven the forum-selection clause was unenforceable, it instead ruled that conventional enforceability analysis would be irrelevant if, as it determined, the underlying arbitration provision was invalid.

This clear departure from the proper procedural inquiry had a ripple effect that resulted in the erroneous denial of Petitioners' motion. Based on its improperly reached invalidity ruling, the District Court concluded that the FAA did not preempt the application of a California statute which purports to invalidate out-of-state forum-selection clauses in franchise agreements one which this Court has already deemed preempted.[1] The District Court then held that the private interest factors relating to the forum-selection clause—factors which are irrelevant to enforcement of a valid, mandatory forum-selection clause—and public interest factors compelled denial of Petitioners' motion.

The District Court's erroneous ruling is premised on an impermissible hostility to arbitration. The Order makes painstakingly clear that the District Court scrapped the analysis required by the Supreme Court solely because the forum-selection clause is contained within an arbitration provision. The District Court therefore disregarded the Supreme Court's long-standing edict that arbitration agreements must be placed on "equal footing" with other types of contracts.

The impact of the District Court's error is devastating to Petitioners because they have effectively been stripped of their rights under the FAA. The FAA provides a party to an arbitration agreement the right

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[1] *See Bradley v. Harris Research Inc.*, 275 F.3d 884, 886 , 890 (9th Cir. 2001) (FAA preempts Cal. Bus. & Prof. Code § 20040.5).

to move for an order directing that "arbitration proceed in the manner provided for" in the agreement. 9 U.S.C. § 4. Moreover, if such motion is denied, the party may seek an immediate appeal. *Id. §* 16(a)(1)(B).

Petitioners, however, cannot exercise these fundamental rights unless this case is dismissed or transferred to Ohio, the contractually-designated forum. That is because the Northern District of California cannot order arbitration outside its jurisdiction, which precluded Petitioners from seeking in this proceeding an order directing arbitration as provided for in Fleming's distributorship agreements. In addition, even though the District Court's Order effectively forecloses arbitration under the distributorship agreements, Petitioners lack appellate recourse because denial of a *forum non conveniens* motion is not immediately appealable. The District Court's Order therefore interferes with arbitration by denying to Petitioners safeguards afforded them by the FAA and Supreme Court precedent favoring arbitration.

Courts are certain to face the same issue presented in this Petition. This Court has not addressed whether *forum non conveniens* motions concerning forum-selection clauses in arbitration agreements should be subjected to a different analysis than motions concerning forum selection clauses contained in other types of contracts. The swift rise in the use of arbitration agreements in recent years ensures that other plaintiffs will seek to exploit the arbitration loophole created by the District Court's Order. This Court would provide needed clarity by resolving the issue presented here now, on a record that squarely presents it.

Petitioners respectfully petition this Court to issue a writ of mandamus vacating the District Court's Order denying their *forum non conveniens* motion,

and, directing the District Court to either: (1) transfer this case to the United States District Court for the Northern District of Ohio as provided in the forum-selection clause at issue; or (2) dismiss the case. In addition, Petitioners request that the Court stay the proceedings in the District Court, as contemplated by the Circuit Advisory Committee Note to Circuit Rules 21-1 to 21-4.

ISSUE PRESENTED

1. Did the District Court err in holding that in order to rule on the enforceability of a forum-selection clause set forth in an arbitration provision, it first had to determine the validity of the arbitration provision?

RELEVANT FACTS

A. Fleming Entered Into Two Franchise Agreements Containing An Ohio Forum-Selection Clause.

1. Matco Tools Corporation ("Matco"), which is headquartered in Stow, Ohio, markets high quality, durable and innovative mechanic repair tools, diagnostic equipment and toolboxes. (Petitioners' Appendix ("PA") 000027 at ¶ 3.) Matco contracts with franchisees who sell Matco's products in designated areas through their "mobile stores." (*Id.*) Prior to June 3, 2016, Matco was known as NMTC Inc. ("NMTC"). (*Id.*) Defendant Fortive Corporation is the corporate parent of Matco. (*Id.*)

2. Fleming entered into two separate distributorship agreements with NMTC in July 2012 and October 2013, respectively. (PA 000027 at ¶¶ 4-5, PA 000029-52, PA 000086-111.) Starting in July 2012, Fleming operated at least one Matco distributorship in the Monterey, California area, until December 2018.

(PA 000027-28 at ¶¶ 4-5, 7.) All of Fleming's customers and potential customers were based in California. (PA 000028 at ¶ 7.) In connection with the operation of his distributorships, Fleming purchased tools from NMTC (and its successor entity, Matco) which he then sold to his customers. (*Id.*)

3. Pursuant to his distributorship agreements, Fleming agreed to arbitrate any and all claims against Petitioners. Fleming's distributorship agreements state, in relevant part:

> 12.1 Arbitration. Except as expressly provided in Section 12.5 of this Agreement, all breaches, claims, causes of action, demands, disputes and controversies (collectively referred to as "breaches" or "breach") between the Distributor, including his/her Spouse, immediate family members, heirs, executors, successors, assigns, shareholders, partners or guarantors, and Matco, including its employees, agents, officers or directors and its parent, subsidiary or affiliated companies, whether styled as an individual claim, class action claim, private attorney general claim or otherwise, arising from or related to this Agreement, the offer or sale of the franchise and distribution rights contained in this Agreement, the relationship of Matco and Distributor, or Distributor's operation of the Distributorship including any allegations of fraud, misrepresentation, and violation of any federal, state or local law or regulation, will be determined exclusively by binding arbitration on an individual, non-class basis only in accordance with the Rules and Regulations of

> the American Arbitration Association ("Arbitration").

(PA 000046-47, 000105-106.)

4. In addition, Fleming agreed to arbitrate any and all disputes against Petitioners in the State of Ohio:

> 12.10 Venue and Jurisdiction. 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 in 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.

(PA 000049, 000108.)

5. Fleming terminated his October 2013 distributorship agreement in September 2015 and his July 2012 distributorship agreement in December 2018. (PA 000027 at ¶¶ 4-5.) Thereafter, in January 2019, Fleming filed a putative class action lawsuit alleging that Petitioners misclassified him as an "independent contractor." (PA 000240-269.)

B. Citing The Forum Selection Clause, Petitioners Moved To Dismiss Or Transfer Fleming's Lawsuit.

6. Petitioners promptly moved to enforce the Ohio forum-selection clause in Fleming's distributorship agreements by filing a motion to dismiss, or, to transfer, pursuant to the doctrine *of forum non conveniens* on February 19, 2019.[2] (PA 000001-24.) Citing the U.S. Supreme Court's decision in *Atl. Marine Constr. Co. v. Dist. Ct.*, 134 S. Ct. 568 (2013), Petitioners explained that Fleming could not carry his burden to show that the mandatory forum-selection clause was invalid, for

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[2] Petitioners did not also file an petition to compel arbitration because the District Court could not order the parties to arbitrate in Ohio. (PA 000022 at T B.3.d (citing *Textile Unlimited, Inc. v. A..BMH and Co., Inc.*, 240 F.3d 781, 785 (9th Cir. 2001) (FAA confines arbitration to the district in which petition to compel is filed)).)

the following reasons: first, Fleming did not allege, and could not prove, that the inclusion of the forum-selection clause in his distributorship agreements resulted from fraud or overreaching (PA 000015-16 at ¶ B.1.); second, Fleming would receive his day in court if the forum-selection clause were enforced (PA 000016 at ¶ B.1); and third, enforcement of the forum-selection clause would not contravene a strong public policy of California because the FAA preempts California Business and Professions Code section 20040.5, which purports to void non-California forum-selection clauses in franchise agreements (PA 000017-18 at ¶ B.3.a (citing *Bradley*, 275 F.3d at 892)).

7. Accordingly, because the forum-selection clause was valid, Petitioners argued that, pursuant to *Atl. Marine*, Fleming's choice of forum was to be afforded no weight, and the District Court was obligated to consider only public interest factors in deciding whether to enforce the forum-selection clause. (PA 000022-24.) Given that the public interest factors—administrative difficulties resulting from court congestion; the local interest in the matter; and familiarity with the applicable law were either neutral or favored litigation in Ohio, Petitioners asked the District Court to dismiss the Complaint, or, transfer Fleming's lawsuit to the Northern District of Ohio. (*Id.*)

C. Fleming's Opposition Implored The Court To Ignore The Forum-Selection Clause And To Instead Focus On The Validity Of The Arbitration Provision.

8. In his opposition, Fleming failed to meaningfully address the factors which framed his burden to show that the forum-selection clause was invalid. He did

not contest that the FAA preempts Section 20040.5.[3] (PA 000131-133, 000137.) He did not introduce any evidence proving that the inclusion of the forum-selection clause in the distributorship agreements resulted from fraud or overreaching. (PA 000132 at n.1.) And, he baldly claimed that he would be denied his day in court if the case were transferred to Ohio. (*Id.*)

9. Fleming instead attacked the enforceability of the arbitration provision containing the forum-selection clause. As relevant here, Fleming argued that the arbitration provision was unenforceable because, he maintained, Sections 12.7 and 12.12 of the distributorship agreements purportedly voided the obligation to arbitrate pursuant to this Court's decision in *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), which held that pre-dispute PAGA waivers are unenforceable.[4] Consequently, Fleming

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[3] Fleming also argued that Cal. Lab. Code section 925 ("Section 925") precluded enforcement of the forum-selection clause. (PA 000133-137.) Section 925, however, cannot provide an independent grounds for affirmance because Fleming did not enter into, modify or extend his distributorship agreements on or after January 1, 2017, the effective date of the statute. *See* Cal. Lab. Code § 925(f). (PA 000027, 000219-220.)

[4] Section 12.7 of the distributorship agreements states "THE DISTRIBUTOR EXPRESSLY WAIVES ANY RIGHT TO ARBITRATE OR LITIGATE . . . IN A PRIVATE ATTORNEY GENERAL CAPACITY." (PA 000048, 000107.) Section 12.12 then states that "if the provision prohibiting . . . 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 any such breaches." (PA 000049, 000108.) As explained below, the District Court held that Sections 12.7 and 12.12 voided the arbitration provision. Petitioners respectfully disagree with that conclusion. However, this Court need not reach this issue because, as shown

posited, the forum-selection clause was invalid because it was set forth within a purportedly invalid arbitration agreement. (PA 000137-139.) Fleming then argued that the District Court was obligated to consider both private and public interest factors in deciding whether to dismiss or transfer the case, all which supposedly favored denial of the motion. (PA 000150-152.)

D. Petitioners' Reply Explained That The Validity Of The Forum-Selection Clause, And Not The Arbitration Provision, Was At Issue.

10. In reply, Petitioners demonstrated that Fleming had failed to carry his burden of showing that the forum-selection clause was invalid. First, Petitioners pointed out that Fleming did not contest that the FAA applied, nor that the FAA preempts Section 20040.5. (PA 000209 at ¶ II.A.1.) Second, citing numerous district courts in this Circuit,[5] Petitioners explained that Fleming's focus on the enforceability of the arbitration provision was misplaced because its validity

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below, the District Court erred in even reaching the validity of the arbitration provision.

[5] *Washington v. Cashforiphones.com*, No. 15-cv-0627-JAH (JMA), 2016 U.S. Dist. LEXIS 192253, *12-.13 (S.D. Cal. Jun. 1, 2016) ("When the issue before a district court is limited to venue [. . . ,] the court need not address the validity of an entire contract"); *SeeComm Network Servs. Corp. v. Colt Telecomm.*, No. C 04-1283, 2004 U.S. Dist. LEXIS 18049, *12-13 (N.D. Cal. Sept. 3, 2004) ("To hold that the Forum-Selection Clause is invalid because the contract as a whole is invalid . . . requires the Court to assess the merits of the case. [This] analysis is clearly backwards. The question before the Court is the validity of the Forum-Selection Clause, not the validity of the contract as a whole."); *Cream v. N. Leasing Sys., Inc.*, No. 15-cv-1208, 2015 U.S. Dist. LEXIS 100537, *18-19 (N.D. Cal. Jul. 31, 2015) (same); *Lizdale v. Advanced Planning Servs., Inc.*, No. 10-cv-0834, 2011 U.S. Dist. LEXIS 31277, *15-16, (S.D. Cal. Mar. 25, 2011).

was not at issue. Instead, the District Court was obligated to focus on whether the forum-selection clause was enforceable. (PA 000209-211 at ¶ II.A.2.a.) Further, Petitioners noted that any attack on the arbitration provision premised on California law (such as Fleming's) was premature given that the distributorship agreements contained an Ohio choice of law provision. (PA 000211 at ¶ II.A.2.b.) Finally, Petitioners implored the District Court to disregard Fleming's discussion of the private interest factors relating to the enforcement of the forum-selection clause, pursuant to *Atl. Marine*, given that the forum-selection clause was mandatory and valid. (PA 000222 at ¶¶ E.-F.)

E. The District Court Denied Petitioners' Motion Because It Found The Arbitration Provision Was Void—Not Because It Found The Forum-Selection Clause Unenforceable.

11. The District Court denied Petitioners' motion. (PA 000238.) At the outset, it acknowledged that Petitioners were "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 the contract as a whole, when ruling on a motion to dismiss or transfer." (PA 000229.) Nonetheless, and citing no authority, it decided to "make a threshold determination on the validity of the arbitration provision to determine if it preempts Section 20040.5." (PA 000230.)

12. The District Court reasoned that:

> 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.

(PA 000230.)

13. The District Court further dismissed the authorities cited by Petitioners for the proposition that the validity of a contract does not affect the enforceability of a forum-selection clause:

> [Petitioners'] 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.

(PA 000230 (citations omitted).)

14. The District Court then held that the arbitration provision was void in light of Sections 12.7 and 12.12, citing Ninth Circuit and California law precluding the enforcement of pre-dispute waivers of PAGA claims, and concluding, (incorrectly and without any authority) that the outcome would be no different under Ohio law. (PA 000231-233 (citing *Sakkab* and *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. 2014).)

15. Consequently, because the District Court found the arbitration provision void, it held that "the FAA does not preempt Cal. Bus. & Prof. Code § 20040.5 and the forum selection clause has no effect." (PA 000233.) And having refused to accord the parties' agreement any weight, it then analyzed both the private interest factors and public interest factors relating to the enforcement of the forum-selection clause, determined that they favored Fleming, and declined to transfer the case. (PA 000235-237.)

LEGAL STANDARDS

A. This Petition Meets The Criteria For Mandamus Relief.

This Court considers five factors when assessing whether mandamus relief is appropriate: (1) whether the petitioner has other adequate means to attain the relief he or she desires, (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal, (3) whether the district court's order is clearly erroneous as a matter of law, (4) whether the district court's order makes an "oft-repeated error," or "manifests a persistent disregard of the federal rules"; and (5) whether the district court's order raises new and important problems, or legal issues of first impression. *In re Van Dusen*, 654 F.3d 838, 841 (citing *Bauman v. Dist. Cr*, 557 F.2d 650, 654-55 (9th Cir. 1977)). Not all of these factors are relevant in every case. *Christensen v. Dist. Cr*, 844 F.2d 694, 697 (9th Cir. 1988); *DeGeorge v. Dist. Cr*, 219 F.3d 930, 940 (9th Cir. 2000) (*Bauman* factors may be mutually exclusive).

As explained more fully below, mandamus review is warranted because (a) the District Court erroneously decided an important legal issue of first impression in this Circuit, and (b) without mandamus review,

Petitioners would effectively and permanently be deprived of rights explicitly accorded to them by the FAA.

B. Courts Adjudicating *Forum Non Conveniens* Motions Premised On Forum-Selection Clauses Must Give The Parties' Choice Of Forum "Controlling Weight In All But The Most Exceptional Circumstances."

Federal law governs the validity and enforceability of forum-selection clauses. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988). Pursuant to federal law, "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases." *Atl. Marine Constr. Co.*, 134 S. Ct. at 580 (alterations in original and internal quotation omitted). As the Supreme Court explained:

> When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause . . . may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, "the interest of justice" is served by holding parties to their bargain.

Id. at 583.

"[T]he plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." *Id.* at 582. To overcome the presumption that a forum-selection clause is valid, a plaintiff must show that: "(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; and (3) [enforcement] would contravene a strong public policy of the forum in which suit is brought." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004) (citing *Richards v. Lloyd's of London*, 135 F.3d 1289, 1294 (9th Cir. 1998); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)) (internal punctuation omitted).

Further, where a valid forum-selection clause is mandatory, the plaintiff "has waived the right to challenge the preselected forum as inconvenient or less convenient." *Atl. Marine Constr. Co.*, 134 S. Ct. at 582. "A court accordingly must deem the private-interest factors [relating to the enforcement of a forum-selection clause] to weigh entirely in favor of the preselected forum" and "consider arguments about public-interest factors only." *Id.* at 582-583. The public interest factors courts may consider—which "will rarely defeat a transfer motion"—are "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 581 n.6.

REASONS WHY A WRIT SHOULD ISSUE

A. The District Court's Order Contains A Clear Error Of Law.

The District Court's Order is premised on a clear legal error—the conclusion that *the forum non conveniens* analysis differs where a forum-selection clause is set forth in an arbitration agreement as opposed to another type of contract.

1. The District Court Disregarded The Precedent Of The Supreme Court And This Court By Failing To Analyze The Enforceability Of The Forum-Selection Clause.

Circuit courts and district courts alike agree: the validity of a forum-selection clause is not dependent upon the validity of the contract containing it. A plaintiff resisting dismissal or transfer to another forum has the "heavy burden" of proving that a presumptively valid forum-selection clause is unenforceable. *Atl. Marine Constr. Co.*, 134 S. Ct. at 583 n.8; *The Bremen*, 407 U.S. at 15, 17. The validity of the contract containing a forum-selection clause is a separate question having no bearing on the enforceability of the forum-selection clause. *E.g.*, *Autoridad de Energia ElEctrica v. Vitol S.A.*, 859 F.3d 140, 147-148 (1st Cir. 2017) (forum-selection clauses enforceable where contracts containing them were purportedly void); *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006) (rejecting as an "absurdity" appellants' argument that forum-selection clauses were void because contracts were purportedly unenforceable as part of an illegal pyramid scheme); *Rucker v. Oasis Legal Fin.*, 632 F.3d 1231, 1237-38 (11th Cir. 2011) (rejecting argument that forum-selection clause was void because it was set forth in purportedly void illegal gambling contracts); *Goldman v. U.S. Transp. & Logistics, LLC*, No. 17-cv-00691-BAS-NLS, 2017 U.S. Dist. LEXIS 210423, *9-10 (S.D. Cal. Dec. 20, 2017) ("other courts have rejected similar challenges made to an agreement as a whole, as opposed to specifically a forum selection clause contained in the agreement"); *Hegwer v. Am. Hearing & Assocs.*, No. C 11-04942 SBA, 2012 U.S. Dist. LEXIS 24313, *6-8 (N.D. Cal. Feb. 27, 2012) ("[W]hether other provisions of the Employment Agreement are unconscionable is not

germane to the salient issue presented; namely, whether the Plaintiff has carried his heavy burden of establishing that *the forum selection clause* is unreasonable.") ("Enforcement of the forum selection clause has no bearing on the enforceability of the arbitration clause.").[6]

The logic of courts that have rejected arguments concerning the validity of the underlying contract is plain. A forum-selection clause is an agreement "in advance to litigate disputes in a particular forum." *Atl. Marine Constr. Co.*, 134 S. Ct. at 583. Requiring courts which the parties have not selected as the forum for their disputes to determine whether a contract is valid, as a condition precedent to enforcing a forum-selection clause, is precisely backwards. Where the validity of a contract is in dispute, the court previously designated as the parties' forum of choice should rule on the enforceability of the contract, provided that the forum-selection clause is valid.

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[6] *See also* PA 000209-210 (citing *Washington*, 2016 U.S. Dist. LEXIS 192253 at *12-13; *SeeComm Network Servs. Corp.*, 2004 U.S. Dist. LEXIS 18049 at *12-13; *Cream*, 2015 U.S. Dist. LEXIS 100537 at *18-19; *Lizdale*, 2011 U.S. Dist. LEXIS 31277 at *15-16). *See also Fountain v. Oasis Legal Fin., LLC*, 86 F. Supp. 3d 1037, 1044-46 (D. Minn. 2015) (granting forum non conveniens motion due to forum-selection clause in purportedly void purchase agreement) ("[N]umerous courts . . . have addressed the validity of a forum-selection clause before determining the validity of a contract as a whole. [. . .] This Court will do the same.") (internal citations omitted); *Knopick v. UBS AG*, 137 F. Supp. 3d 728, 733 (M.D. Pa. 2015) ("[I]t is the legality of the forum selection clause, and not of the underlying contract, that governs[.]") ("The validity of the underlying contracts [is] . . . more properly addressed to the court or courts that the parties themselves selected to settle their disputes.").

As the Seventh Circuit explained in *Muzumdar*, the opposite approach would lead to "absurdity":

> Appellants also spend a good deal of time trying to convince us that because the contracts themselves are void and unenforceable as against public policy i.e., they set out a pyramid scheme—the forum selection clauses are also void. The logical conclusion of the argument would be that the federal courts in Illinois would first have to determine whether the contracts were void before they could decide whether, based on the forum selection clauses, they should be considering the cases at all. An absurdity would arise if the courts in Illinois determined the contracts were not void and that therefore, based on valid forum selection clauses, the cases should be sent to Texas—for what? A determination as to whether the contracts are valid?

Muzumdar, 438 F.3d at 762.

Muzumdar foreshadowed the District Court's error here. Petitioners and Fleming agreed to resolve their disputes through binding arbitration in Ohio, and, to resolve challenges to the arbitration provision in Ohio. (PA 000046-47, 000048, 000105-106, 000108.) Fleming violated these agreements by filing suit in the Northern District of California. Consistent with their contractual obligations under the distributorship agreements, Petitioners thus sought dismissal or a transfer to Ohio, the forum the parties agreed would rule on the validity of the arbitration provision if any challenges to it arose.

Now contemplate the outcome if the District Court, applying the same analytical framework, held that the

arbitration provision was valid and enforceable, and that the forum-selection clause was therefore valid and enforceable: this case would have been dismissed or transferred to the Northern District of Ohio—for a determination as to whether the arbitration provision that the Northern District of California deemed valid and enforceable, is, in fact, valid and enforceable. What, then, is the purpose of a forum-selection clause if a court other than the one designated by the parties must wade into the merits of their dispute to determine whether a forum-selection clause is enforceable? *See Corp. Express Office Prods., Inc. v. Can Guelpen*, No. C 02-04588 WHA, 2002 U.S. Dist. LEXIS 27642, *6 (N.D. Cal. Dec. 12, 2002) ("No contract provision should be interpreted in a manner that would render other provisions meaningless.").

Moreover, if trial courts must rule on the validity of a contract before turning to the forum-selection clause, how can they do so where, as here, the contract contains a choice of law provision, the validity of which has yet to be determined?[7] (PA 000050 at § 13.3, 000109 at § 13.3.)

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[7] The District Court erred in concluding that the private attorney general claim waiver in the distributorship agreements would void the arbitration provision under either California or Ohio law. (PA 000233.) To the contrary, Ohio law permits pre-dispute waivers of private attorney general claims. *E.g.*, *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758, 770 (N.D. Ohio 2009) (arbitration provision with private attorney general claim waiver not substantively nor procedurally unconscionable); *Love v. Crestmont Cadillac*, 90 N.E.3d 123, 130 (Ohio Ct. App. 2017) (rejecting argument that arbitration provision violated public policy due to private attorney general claim waiver). However, this Court need not reach this issue because the District Court erred in denying Petitioners' motion to transfer based on the supposed invalidity of the arbitration provision. In any event,

The District Court's Order clashes with the generally accepted rule that courts adjudicating *aforum non conveniens* motion must focus their analyses on whether a forum-selection clause is enforceable—not whether the contract containing such a clause is enforceable. Moreover, the rationale for the District Court's stark departure from this rule is premised on an impermissible aversion to arbitration agreements, as explained below.

2. The District Court Evinced Clear Hostility To Arbitration By Failing To Apply The Correct Test To Determine The Validity Of The Forum-Selection Clause.

Time and again, the Supreme Court has affirmed that the FAA[8] "requires courts to place arbitration agreements 'on equal footing with all other contracts.' *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (quoting *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 465 (2015)); *see also*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) ("courts must place arbitration agreements on an equal footing with other contracts"); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (FAA "leaves no place for the exercise of discretion by a district court"). "Under the [FAA], arbitration is a matter of contract, and courts must enforce arbitration contracts accord-

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Sakkab, which the District Court cited as authority for invalidating the PAGA waiver, has been called into question by the Supreme Court's decision in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). *See McGovern v. U.S.*, No. 18-CV-1794-CAB-LL, 2019 U.S. Dist. LEXIS 12595, *22 n.5 ("It is difficult to reconcile *Epic* with *[Sakkab]*.").

[8] The FAA applies to the arbitration provision containing the forum-selection clause. (PA 000017 at n.5; PA 000209; PA 000229-230.)

ing to their terms." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010)).

Accordingly, as the Supreme Court has repeatedly pronounced, rules that "[single] out arbitration agreements for disfavored treatment" are impermissible. *See*, *e.g.*, *Epic Sys. Corp.*, 138 S. Ct. at 1622-23 (rejecting argument that the National Labor Relations Act bars class action waivers in employment arbitration agreements; FAA's savings "clause offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue') ("A defense of that kind . . . is one that impermissibly disfavors arbitration[.]"); *Kindred Nursing Ctrs. Ltd.*, 137 S. Ct. at 1425-28 (striking down Kentucky's "clear statement rule," which held that a power of attorney "could not entitle a representative to enter into an arbitration agreement without specifically saying so," on the ground that it evinced the "kind of 'hostility to arbitration' that led Congress to enact the FAA").

The District Court, therefore, was obligated to apply the same analysis to determine the validity of the forum-selection clause contained within the arbitration provision in Fleming's distributorship agreements as it would have had the agreements lacked an arbitration provision.

The District Court, however, forged its own path. The Order paid lip service to the test a plaintiff resisting a forum-selection clause must meet to carry his or her burden of proving it is unenforceable (*see* PA 000227 (citing *Murphy*, 362 F.3d at 1140)) only to repudiate it. In place of this test, the District Court substituted a policy judgment unsupported by any

authority that because the forum-selection clause is contained within an arbitration provision, the "typical" analysis did not apply, and that it "must make a threshold determination on the validity of the arbitration provision to determine if it preempts Section 20040.5. . . 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." (PA 000229.). (*See also* PA 000230 (dismissing authorities holding that courts should not consider the validity of a contract as a whole because they did not involve arbitration agreements).)

The denial of Petitioners' motion, therefore, is rooted in the District Court's decision to single out the arbitration provision in the distributorship agreements for disfavored treatment in comparison to other types of contracts. That is precisely the sort of "judicial hostility to arbitration agreements" that prompted Congress to enact the FAA and this Court should accordingly intervene to correct the District Court's clear error. *See AT&T Mobility LLC*, 131 S. Ct. at 1745; *see also Epic Sys. Corp.*, 138 S. Ct. at 1622-23; *Kindred Nursing Ctrs. Ltd.*, 137 S. Ct. at 1425-28.

B. Mandamus Is Warranted Because Petitioners Have Been Deprived Of Their Rights Under The FAA.

Absent a writ, Petitioners will have no alternative avenue for relief. An order denying *a forum non conveniens* motion is not immediately appealable. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988). The inability to immediately appeal an order of a district court is one factor supporting issuance of a writ. *Henson v. Dist. Ct.*, 869 F.3d 1052, 1058 (9th Cir. 2017)

(unavailability of "contemporaneous ordinary appeal" supports issuance of writ).

Accordingly, it has long been this Court's view (one which is shared by other Circuits) that "Venue provisions deal with rights too important to be denied review. [E]rror in denying change of venue cannot be effectively remedied on appeal from final judgment." *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 951 (9th Cir. 1968).[9] *See also*, *e.g.*, *In re Rolls Royce Corp.*, 775 F.3d 671, 683 (5th Cir. 2014) (granting mandamus where district court refused to transfer case to venue identified in forum-selection clause); *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 289 (5th Cir. 2015) (same); *In re Apple, Inc.*, 581 Fed. App'x 886, 888 (Fed. Cir. Sept. 11, 2014). *See also In re Howmedica Osteonics Corp.*, 867 F.3d 390, 411 (3d Cir. 2017) (granting mandamus where district court transferred case in violation of forum-selection clause), *cert. denied sub nom. Nordyke v. Howmedica Osteonics Corp.*, 138

[9] Subsequent decisions limiting *Pacific Car & Foundry Co.* are distinguishable. For instance, in *In re Orange, SA*, this Court held that the petitioner failed to identify a clear legal error, or, any purported harm aside from the expenditure of ordinary litigation costs. *In re Orange, SA*, 818 F.3d 956, 961-964 (9th Cir. 2016). Moreover, the forum-selection clause there was not contained within an arbitration provision—as the Court acknowledged, its analysis may have differed had the converse been true. *See id.* at 962-963 (discussing *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999) ("The fact that the forum selection clause in *Simula* was an arbitration provision weighed heavily in our analysis. We stated that all doubts are to be resolved in favor of arbitrability, and, as a result, the plaintiff's claims need only touch matters covered by the contract. Here, we do not interpret an arbitration clause, and accordingly, do not apply the strong presumption that prompted us in *Simula* to construe broadly the scope of the arbitration clause.") (internal citations and punctuation omitted).

S. Ct. 1288 (2018). Petitioners, therefore, lack any other adequate means to obtain the relief sought. *See In re Van Dusen*, 654 F.3d at 841.

The prejudice that will befall Petitioners if they are restricted to post-judgment review of the District Court's Order will be of such severity that it cannot be corrected through normal appellate avenues. *Id.* The FAA grants Petitioners the right to seek "an order directing that . . . arbitration proceed in the manner provided for" in Fleming's distributorship agreements. 9 U.S.C. § 4. Indeed, the "principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC*, 131 S. Ct. at 1748 (internal citations and punctuation omitted).

To that end, and in furtherance of the "liberal federal policy favoring arbitration agreements," the FAA provides parties attempting to enforce an arbitration agreement with the ability to seek immediate appellate review of an order denying a motion to compel arbitration. *See* 9 U.S.C. § 16(a)(1)(B); *AT&T Mobility LLC*, 131 S. Ct. at 1749.

The District Court's erroneous ruling eradicated these mandatory safeguards.

Fleming's decision to flout the forum-selection clause, left unchecked, thwarts Petitioners' rights under the FAA, in at least three significant ways. First, Petitioners will not receive the benefit of their contractual agreement to have an Ohio court resolve Fleming's challenges to the arbitration provision.[10]

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[10] The Supreme Court recently affirmed that a trial court must enforce provisions delegating questions of arbitrability to an arbitrator "even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly

(PA 000049; 000108.) Second, Petitioners cannot seek an order compelling the parties to arbitrate pursuant to the terms of the distributorship agreements from the Northern District of California because the District Court cannot order arbitration in Ohio. 9 U.S.C. § 4; *Textile Unlimited*, 240 F.3d at 785. Third, because Petitioners cannot seek an order compelling arbitration in a manner consistent with the terms of the distribution agreements, they will never have the ability to exercise the right under the FAA to immediately appeal the denial of a petition to enforce the contractually agreed upon terms of the arbitration provision. *See* 9 U.S.C. § 16(a)(1)(B).

The District Court's Order therefore interferes with the hallmarks of the FAA: it denies arbitration on the terms set forth in the distributorship agreements without providing Petitioners the requisite appellate recourse. *See AT&T Mobility LLC*, 131 S. Ct. at 1750 (striking down law that interfered with arbitration).

Mandamus is the only procedure by which Petitioners may vindicate their rights under the FAA. If writ relief does not issue, Petitioners will be deprived of the ability to seek enforcement of the arbitration provision pursuant to its terms, and no appellate court will be able to review the preemptive denial of enforcement of its terms.

Thus, this Petition is premised on an extraordinary situation: the *de facto* denial of Petitioners' rights under the FAA. *See Kasey v. Molybdenum Corp. of Am.*, 408 F.2d 16, 20 (9th Cir. 1969) ("[W]e are not

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groundless." *Henry Schein, Inc.*, 139 S. Ct. at 526. Much as agreements to delegate threshold questions of arbitrability to an arbitrator must be upheld, so, too, should agreements to delegate arbitrability challenges to a particular tribunal.

unaware that judicial economies are nonexistent if the focus of mandamus is too narrow. If, on appeal, it is determined that the 1404(a) motion was improperly ruled upon, a new trial is necessary. Alternatively, and perhaps more persuasively, it may be that the abuse is not susceptible to correction on appeal and, by postponing review, courts are denying effective appeal.") (denying mandamus where transfer would not have served interests of justice because case had been pending over nine years).

C. This Petition Raises An Important Issue Of First Impression That Will Arise Repeatedly Given The Spike In Arbitration Agreements.

This case presents an issue of first impression that is certain to arise again. As this Court has recognized, "We have become an arbitration nation." *ASPIC Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1169 (9th Cir. 2019). District courts throughout the Ninth Circuit will thus undoubtedly be asked to enforce forum-selection clauses contained within arbitration agreements with increasing frequency, making the issue presented here one of ongoing importance.

Moreover, it is an issue as to which this Court's guidance is urgently needed. While district courts within this Circuit appear to agree with the First, Seventh and Eleventh Circuits that a court ruling on the enforceability of a forum-selection clause should not adjudicate the validity of the underlying contract,[11] this Court has not yet determined whether the test to determine the enforceability of forum-selection clauses

[11] *See Autoridad de Energia ElEctrica*, 859 F.3d at 147-148; *Muzumdar*, 438 F.3d at 762; *Rucker*, 632 F.3d at 1237-38.

differs if the underlying contract is an arbitration agreement.

This case therefore provides an appropriate vehicle for clarifying whether courts should disregard the Supreme Court's mandate in *Atl. Marine* that a party resisting a forum-selection clause has the burden of proving the clause unenforceable where the underlying contract is one for arbitration.

CONCLUSION

Petitioners respectfully ask that this Court issue a writ of mandamus vacating the District Court's Order denying their *forum non conveniens* motion, and, because the record is adequate, direct the District Court to either: (1) transfer this case to the United States District Court for the Northern District of Ohio; or (2) dismiss the case. In addition, Petitioners request that the Court issue an order staying matters in the District Court pending the resolution of this mandamus proceeding.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 31, 2019, I filed the foregoing Petition for Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system. I further certify that, on the same day, I served one paper copy of the same Petition in compliance with Rule 25 by certified mail, return receipt requested and/or hand delivery, upon each of the following; recipients whose e-mail addresses are listed below also received service by e-mail on May 31, 2019:

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CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND
TYPE STYLE REQUIREMENTS

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 21(a)(2)(C) and Circuit Rule 29-2(c) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f):

This brief contains 8,039 words on 30 pages.

In addition, the word count divided by 280 equals 28.7, which is less than the maximum ratio of 30 prescribed by Circuit Rules 29-2(c) and 32-3(2).

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> This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in plain, 14-point Times New Roman typeface; footnotes use the same typeface and type style.

/s/ Eric M. Lloyd
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Dated: May 31, 2019

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 19-71352

IN RE MATCO TOOLS CORPORATION, NMTC, INC.
and FORTIVE CORPORATION,

Petitioners,

v.

U.S. DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA,

Respondent,

JOHN FLEMING,

Plaintiff-Real Party in Interest.

ON REVIEW FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA
Case No. 3:19-CV-004663-WHO
Hon. William H. Orrick

PLAINTIFF-REAL PARTY IN INTEREST'S
ANSWER TO PETITION
FOR A WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT
(FRAP 26.1)

None of the plaintiffs, who are individuals, have "parent companies" or issue shares to the public, and no publicly held corporation owns 10% or more of any stock in any plaintiff.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent John Fleming ("Fleming") requests that the Court dismiss the mandamus petition and lift the stay on district court proceedings. Mandamus is a "drastic remedy" only available in "extraordinary circumstances." *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978). There is nothing "remarkable," Petition for Writ of Mandamus ("Pet.") at 1, about the District Court's denial of Matco's motion to transfer. Far from "forg[ing] its own path," Pet. at 23, the District Court issued a well-reasoned decision grounded in settled law.

What is extraordinary, however, are the material misstatements and omissions in Matco's Petition. Not only does Matco misrepresent the operative Supreme Court test governing enforcement of choice of forum clauses and ignore settled principles of federal arbitration law, but it has failed to bring to this Court's attention controlling Ninth Circuit authority that upends the analytical house of cards it has constructed.

The District Court's analysis below was guided by two key Ninth Circuit decisions. In *Jones v. GNC Franchising*, 211 F.3d 495 (9th Cir. 2000), this Court affirmed a district court's denial of a motion to transfer pursuant to a forum selection clause. *Jones*, like this case, involved a franchise agreement containing a forum selection clause that ran afoul of California Business and Professions Code Section 20040.5.[1] In

[1] California Business and Professions Code Section 20040.5 provides that "[a] provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any

affirming the district court's order, this Court held that the forum selection clause was invalid because the "strong public policy" under California Business and Professions Code Section 20040.5 specifically provided that California franchisees were entitled to a California venue. *Jones*, 211 F.3d at 498 (citing *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 15 (1972)).

Subsequently, in *Bradley v. Harris Research, Inc*., 275 F.3d 884 (9th Cir. 2001), this Court was confronted with another choice of forum clause subsumed in a franchise agreement that also contained an otherwise valid and enforceable arbitration clause. The Court concluded that Section 20040.5 was not "a generally applicable contract defense that applies to any contract, but only to forum selection clauses in franchise agreements," and was therefore preempted by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (2018) ("FAA").[2] *Id.* at 892.

In order to determine whether *Jones* or *Bradley* controlled—and accordingly whether the forum selection clause at issue was enforceable—the District Court had to decide whether the parties were subject to a

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claim arising under or relating to a franchise agreement involving a franchise business operating within this state."

[2] As discussed *infra* at (IV)(A), *Bradley*'s holding has been called into question twice by this Court, first expressly in *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F. 3d 425, 432 (9th Cir. 2015) and again implicitly just two weeks ago in *Blair v. Rent-A-Center*, No. 17-17221, 2019 U.S. App. LEXIS 19476, at *11 (9th Cir. June 28, 2019) ("a rule is generally applicable if it appl[ies] equally to arbitration and non-arbitration agreements . . . a rule is not generally applicable if it prohibits outright the arbitration of a particular type of claim") (internal quotations and citations omitted); s*ee also* PA000229 at n.2 (District Court noting that "*Bradley* has been called into question by the Ninth Circuit's decision in *Sakkab*").

valid agreement to arbitrate. The District Court looked to the parties' agreement, which contained one provision that required Fleming to waive his representative claims under California's Labor Code Private Attorneys General Act, Section 2698 *et. seq.* ("PAGA"), and another provision that voided the entire arbitration agreement *ab initio* (such that no arbitration agreement existed in the first instance) in the event the PAGA waiver was unlawful. The District Court correctly applied this Court's precedent to determine that the PAGA waiver was unlawful and concluded that no valid arbitration agreement existed by plain operation of the parties' contract terms; it then applied this Court's decision in *Jones* to nullify the choice of forum clause. PA000232 (citing *Sakkab*, 803 F.3d at 430–31); *see also Blair*, 2019 U.S. App. LEXIS 19476, at *13–15.

Inexplicably, Matco's mandamus petition fails to mention *Jones* and affirmatively misstates the controlling rule of law it represents. Pet. at 15–16 (describing three-part *M/S Bremen* test in the conjunctive rather than disjunctive and stating that "plaintiff must show" all three factors). Ignoring *Jones* leads Matco to make outright misstatements of law, like claiming that "The District Court [] was obligated to apply the same analysis to determine the validity of the forum-selection clause contained within the arbitration provision in Fleming's distributorship agreements as it would have had the agreements lacked an arbitration provision." Pet. at 23. Read literally, that sentence demands that the District Court ignore *Bradley* and apply *Jones*, which would void the very choice of forum clause Matco is seeking to enforce. Indeed, entire swaths of Matco's mandamus petition are incomprehensible in light of Matco's disregard of *Jones*. *See* Pet. at 22–24

(contending that, in the absence of an arbitration provision, the choice of forum clause is enforceable).

Matco's FAA preemption arguments are equally defective, starting with its misrepresentation that Fleming below "did not contest that the FAA preempts Section 20040.5." Pet. at 9. In fact, Fleming expressly disputed that the FAA preempted Section 20040.5 in this case. PA000137–139. As Fleming argued, and the District Court correctly found, the FAA does not preempt application of Section 20040.5 in this case because Matco and Fleming did not agree to arbitration of this dispute. Instead, Matco drafted a clause that provided for *no arbitration* in the event the PAGA waiver it drafted was unlawful. Matco has never coherently explained why the FAA would preempt Section 20040.5 in the face of the parties' agreement *not* to arbitrate their dispute.

In summary, the District Court's analysis was correct and consistent with controlling circuit authority. The District Court determined that the choice of forum clause was unlawful under *Jones*, and that Section 20040.5 was not preempted under *Bradley* because the parties' arbitration agreement was void *ab initio* by its own terms. The District Court made no determination disfavoring arbitration. It did not find that the parties' underlying franchise agreement was invalid. It simply examined the arbitration agreement *at Matco's urging* to determine whether Section 20040.5 was preempted by the FAA. Because the District Court did not make a clear error as a matter of law, Matco's mandamus petition is without merit and should be denied.

Finally, there is no truth to Matco's contention that it has no means other than mandamus to enforce its alleged right to arbitration. Section 12.10 of Matco's forum selection clause expressly required arbitration

in California where, as here, California law voids a forum selection clause that deprives California franchisees of a California forum. Had Matco moved to compel arbitration in California, it would have had the right to directly appeal any denial of that motion under Section 16 of the FAA, including any determination that the arbitration agreement's blow up provision had been triggered. 9 U.S.C. § 16(a)(1)(C) (appeal may be taken from an order denying an application to compel arbitration). Instead, Matco moved to transfer the case to Ohio, knowingly assuming the risk that it would not have the ability to appeal the denial of that motion. Matco's inability to directly appeal the District Court's (correct) determination that the arbitration agreement's blow up provision was triggered by the unlawful PAGA waiver is thus entirely a problem of Matco's own making. Under these circumstances, mandamus is unwarranted.

II. FACTUAL AND PROCEDURAL HISTORY

A. Fleming, a California Worker, Signed a Franchise Agreement with Matco Containing a "No Arbitration" Provision.

Matco manufactures and distributes mechanics tools and service equipment. PA000241 ¶ 5. It relies on workers like Fleming to carry out its business by making weekly sales and service calls to existing and prospective Matco customers through mobile distributorship stores. PA000244 ¶ 15.

Fleming, a California-based Matco distributor, was required to sign a form franchise agreement in order to work for Matco. PA000242–243 ¶ 9, PA000156 ¶ 4, PA000193 ¶ 3. The franchise agreement, also referred to as a "Distribution Agreement" or "DA," contained a forum selection clause. PA000049 ¶ 12.10. Fleming did

not negotiate its terms and was not represented by counsel at the time he signed the DA. PA000156 ¶ 6.

Fleming's DA also contained clauses related to arbitration, which described the circumstances under which the parties had agreed to arbitrate. PA000046–47 ¶ 12.1, PA000049 ¶ 12.12. Under Section 12.12, the severability clause related to arbitration, the parties agreed 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 any such breaches." *Id.* Section 12.1 of the DA defines "breaches" as "all breaches, claims, causes of action, demands, disputes and controversies." PA000046 ¶ 12.1

Matco's arbitration clause expressly waives Fleming's representative PAGA claims. Specifically, Section 12.7 provides that "[n]o 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." PA000048 ¶ 12.7.

After signing the DA, Fleming worked a Matco sales and distribution route in Salinas Valley, California and regularly worked 40–60 hours a week. PA000242–243 ¶ 9. Matco required Fleming to work full-time. PA000244 ¶ 15. Matco also imposed numerous other requirements and restrictions on Fleming, including requiring that he make personal sales calls every week to each of the stops, shops or locations on his list of calls, wear Matco's uniform, and drive a Matco-approved and Matco-labeled truck. PA000245 ¶ 23(d), PA000247 ¶¶ 24, 26.

On January 25, 2019, Fleming filed a Class Action and a Representative Private Attorneys General Act Action alleging that by misclassifying Fleming and similarly situated Distributors as independent contractors, Matco sought to avoid various duties and obligations owed to employees under California's Labor Code and Industrial Welfare Commission ("IWC") wage orders, including overtime compensation, expense reimbursement, meal and rest period premium payments, and other claims. PA000242 ¶ 6.

B. Matco Acknowledged Below That Its Forum Selection Clause Would Be Invalid Under Business and Professions Code Section 20040.5 in the Absence of an Agreement to Arbitrate.

In its briefing below, Matco recognized this Court's holding in *Jones*, 211 F.3d at 498, that Section 20040.5 evinces a "strong public policy," which invalidates "non-California forum selection clauses in franchise agreements signed by California franchise businesses." PA000017; *see also* PA000013 (acknowledging the general rule that forum selection clauses may be invalidated because "enforcement would contravene a strong public policy of the forum in which the suit is brought") (internal quotations and citations omitted). Matco did not dispute that Fleming signed a franchise agreement in California and worked exclusively in California.

In urging the District Court to apply *Bradley* rather than *Jones*, Matco expressly placed the existence and scope of its arbitration agreement with Fleming at issue. PA000010 ("Pursuant to his Distributorship Agreements, Plaintiff agreed to arbitrate any and all claims against NMTC, Matco and Fortive"); *see also* PA000015 (asking the District Court to find that

"Plaintiff's causes of action all clearly fall within the scope of the forum-selection clause" because "the arbitration provision is all-encompassing").

In response, Fleming presented Judge Orrick with three independent reasons why no valid agreement to arbitrate existed, nullifying Matco's FAA preemption argument. First, Fleming pointed out that the parties' agreement included a provision that expressly voided the arbitration agreement *ab initio* if Fleming's waiver of representative claims under PAGA was unenforceable, and that—as a matter of law—the PAGA waiver was unenforceable. PA000137–139 (citing *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 360, 383 (2014) ("an employee's right to bring a PAGA action is unwaivable") and *Sakkab,* 803 F.3d at 440 (finding that the FAA does not preempt the *Iskanian* rule and that "the waiver of [the Plaintiff's] representative PAGA claims may not be enforced.")). As a result, under the terms of the arbitration agreement that Matco drafted, there was no valid arbitration agreement and no basis to find FAA preemption. PA000139.

Second, Fleming argued that "even if an agreement to arbitrate existed (which it does not), it would exclude Fleming's claims." PA000139. Specifically, Fleming argued that Section 12.5 of the DA states that "any dispute or controversy involving the Marks" is "not [] subject to Arbitration." *Id.* Fleming argued that because his action was a "controversy involving the Marks," it fell outside the scope of the arbitration clause. PA000139–141.

Third, Fleming argued that the arbitration agreement was procedurally and substantively unconscionable, and thus invalid.[3] PA000141–146.

C. The District Court Found That Mateo's Forum Selection Clause Was Unenforceable Under *Jones*, and That *Bradley* Did Not Apply Because the Parties Agreed Not to Arbitrate Their Dispute.

The District Court began its analysis by recognizing that where there is a valid forum selection clause, the Supreme Court has held that a court may only consider the "public interest" factors, and not the "private interest factors." PA000227 (citing *Atl. Marine Constr. Co v. United States Dist. Ct.*, 571 U.S. 49, 62–64). The District Court went on to find that Fleming "must show either that the forum selection clause is not valid or that the public interest factors . . . make transfer inappropriate." PA000228.

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[3] Fleming also argued that the choice of forum clause was unlawful and unenforceable under California Labor Code Section 925, a law that expressly applies to claims in court and arbitration and which (unlike Section 20040.5) has never been deemed preempted by the FAA. PA000133–137; *see also Karl v. Zimmer Biomet Holdings, Inc.*, No. C 18-04176 WHA, 2018 U.S. Dist. LEXIS 189997, at *6–9 (N.D. Cal. Nov. 6, 2018) (finding where the plaintiff asserted a plausible claim for independent contractor misclassification, Section 925 applied to the choice of forum clause in question), *mandamus denied*, *Zimmer Biomet Holdings, Inc. v. United States Dist. Court*, No. 18-73216, 2019 U.S. App. LEXIS 5699 (9th Cir. Feb. 26, 2019). Contrary to Matco's representation, Pet. at 9, n.3, Fleming also produced evidence that Fleming's employment agreement was "entered into, modified or extended on or after January 1, 2017," pursuant to the requirements of Section 925. PA000136. Labor Code Section 925 provides an independent basis for affirming the District Court's Order.

In analyzing whether the forum selection clause was valid, the District Court reviewed the applicability of Section 20040.5 pursuant to *Jones* and *Bradley*. PA000228–233. The District Court recognized that under this Court's ruling in *Jones*, Section 20040.5 "expresses a strong public policy of the State of California" and that a forum selection clause which "'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*.'" PA000228 (quoting *Jones*, 211 F.3d at 498).

The District Court then turned to *Bradley* and observed that Section 20040.5 is preempted by the FAA where there is an agreement to arbitrate the disputes, stating that: "This motion hinges on the preemptive effect of the arbitration provision and I cannot turn a blind eye toward questions of its validity." PA000230 (citing *Bradley*, 275 F.3d at 890). The District Court recognized that Section 20040.5 is preempted by the federal policy enshrined in the FAA *only when* there is an agreement to arbitrate the disputes between the parties. *Id*.

Turning to the parties' agreement, the District Court found that under *Sakkab* and *Iskanian*, "the Distribution Agreement's PAGA waiver contained in ¶12.7 constitute[d] an impermissible pre-dispute agreement to waive Fleming's PAGA claims." PA000232. The District Court found that "combined with the severability provision of ¶ 12.12, the provision requiring arbitration of breaches between Fleming and Matco is null and void and neither party has an obligation to arbitrate." *Id*. Because the agreement to arbitrate in this case is "null and void" by the

parties' own agreement, the District Court found that, pursuant to *Jones*, Section 20040.5 applies to the dispute between the parties and "the forum selection clause has no effect." PA000233. The Court declined to address Fleming's California Labor Code Section 925 argument because Fleming's Section 20040.5 argument was dispositive. PA000233 at n.3.

After determining that the forum selection clause was void pursuant to Section 20040.5, the District Court looked to 28 U.S.C. Section 1404(a) to determine whether to transfer the case "[f]or the convenience of parties and witnesses [or] in the interest of justice." PA000235–236. The District Court analyzed both the "private interest" and the "public interest" factors pursuant to the precedent of this Court and the United States Supreme Court, concluding that "the private factors, to a great degree, and the public factors, to a much lesser extent favor Fleming" and denied Petitioner's motion to transfer." PA000236–238.

III. STANDARD OF REVIEW

This Court has described the writ of mandamus as a "drastic remedy," only available in "extraordinary circumstances." *Sherman*, 581 F.2d at 1361. The Court "must be firmly convinced that the district court has erred, and that the petitioner's right to the writ is clear and indisputable." *Valenzuela-Gonzalez v. United States Dist. Court*, 915 F.2d 1276, 1279 (9th Cir. 1990) (internal quotation marks and citations omitted).

While the Court considers five factors in determining whether mandamus should be granted, *see* Pet. at 14 (citing *Bauman v. United States*, 557 F.2d 650, 654–55 (9th Cir. 1977)), the third factor—whether there is a clear error of law—is the most important. "[T]he absence of factor three—clear error as a matter of

law—will always defeat a petition for mandamus." *In re Swift Transp. Co.*, 830 F.3d 913, 916 (9th Cir. 2016) (citing *In re United States*, 791 F.3d 945, 955 (9th Cir. 2015)). "Clear error is a highly deferential standard of review." *Id.* (citing *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011). This Court "will not grant mandamus relief simply because a district court commits an error, even one that would ultimately require reversal on appeal." *Id.* (citing *In re Van Dusen*, 654 F.3d at 845).

IV. ARGUMENT

A. The Petition Must Be Denied Because There Was No Clear Error of Law.

Matco's mandamus petition grossly mischaracterizes the District Court's Order. Far from "disregard[ing] . . . black letter law," Pet. at 2, the District Court straightforwardly applied controlling circuit precedent. Matco, on the other hand, has provided this Court with a misleading summary of legal principles and deficient analysis of applicable law.

The Supreme Court has recognized three independent reasons for declining to enforce a forum selection clause: "(1) its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived of its day in court; ***or*** (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought." *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324–25 (9th Cir. 1996) (internal citations and quotations omitted) (emphasis added). Contrary to Matco's representation, Pet. at 15–16, the test is in the *disjunctive*. A party challenging the enforceability of a forum selection clause because it contravenes a

strong public policy of the forum in which the suit is brought need make no additional showing regarding fraud or overreaching. *Jones*, 211 F.3d at 497–98.

Section 20040.5 is such a statute. It represents California's strong public policy that disputes involving a California franchisee be adjudicated in California. Where, as here, a plaintiff brings suit in California, and the parties' forum selection clause is contained in a franchise agreement, the forum selection clause is invalid and unenforceable. *Id*. Although Matco has inexplicably failed to bring *Jones* to this Court's attention, it conceded the case's import below. PA000017 (citing *Jones*, 211 F.3d at 498) ("Defendants are aware the Ninth Circuit has ruled that California Business and Professions Code section 20040.5, which voids non-California forum-selection clauses in franchise agreements signed by California franchise businesses, is a 'strong public policy'" that requires non-enforcement of a forum selection clause).

Meanwhile, in *Bradley*, this Court held that Section 20040.5 was preempted by the FAA where the parties had agreed to arbitrate. *Bradley*, 275 F.3d at 887–88 (observing that the district court found that there was an enforceable arbitration clause). The Court reasoned that because Section 20040.5 applied to a certain kind of contract (franchise agreements), it was not a "generally applicable contract defense" that applied to all types of contracts and hence was subject to FAA preemption. *Id.* at 892–93.

Subsequent to *Bradley*, however, the U.S. Supreme Court and two panels of the Ninth Circuit have all construed the phrase "generally applicable contract defense" to mean a contract defense that does not single out *arbitration agreements* for unfavorable treatment. *See Sakkab*, 803 F.3d at 432–33; *Blair*, 2019

U.S. App. LEXIS 19476, at *10–18; *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339–340 (2011). Because Section 20040.5 does not single out arbitration agreements for unfavorable treatment, *Bradley's* holding cannot be squared with the Supreme Court's current savings clause jurisprudence. Indeed, in *Sakkab*, this Court expressly suggested that *Concepcion* undermined *Bradley's* interpretation of the FAA's savings clause. *See Sakkab*, 803 F.3d at 433 (noting that *Concepcion* "cuts against [*Bradley's*] construction of the saving clause."). Overruling *Bradley* would provide independent grounds for dismissing Matco's mandamus petition. *See Thompson v. Paul*, 547 F.3d 1055, 1058–59 (9th Cir. 2008) ("We can affirm on any ground supported by the record.").

But this Court need not overrule *Bradley* to dismiss this mandamus petition, because the District Court followed *Bradley*. PA000229 at n.2 (recognizing that *Bradley* has been called into question but not yet overruled). Indeed, the District Court expressly recognized that, under *Bradley*, the presence of an enforceable arbitration agreement would require a finding that Section 20040.5 was preempted. PA000229. Accordingly, the District Court looked to see whether the parties had an operative agreement to arbitrate the underlying dispute. PA000231–233. Not only was this analysis correct in light of *Jones* and *Bradley*, but it was *invited by Matco*, which premised its motion to transfer on the existence of an arbitration agreement between the parties. PA000009, PA000013.

Matco's attack on Judge Orrick—accusing him of having an "impermissible hostility to arbitration" and "pa[ying] lip service" to the law—is meritless. *See* Pet. at 3, 23. The District Court *honored* federal arbitration policy by holding Matco to the terms of the arbitration

agreement it drafted and imposed on Fleming. Matco's mandamus petition regurgitates entire sections of the underlying franchise agreement but neglects to include the key provision relied on by the District Court which renders the entire arbitration clause void *ab initio*. *See* Pet. at 6–7. The franchise agreement's severability clause provides 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 any such breaches*." PA000049 ¶ 12.12 (emphasis added). In turn, Section 12.7 of the DA provides that "[n]o 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." PA000048 ¶ 12.7.

The District Court properly analyzed these provisions under general contract interpretation principles and in light of federal arbitration policy. Under settled Ninth Circuit law, Section 12.7 of the franchise agreement constitutes an unlawful waiver of Fleming's representative claims under the PAGA. *Sakkab,* 803 F.3d at 440 ("the waiver of [the Plaintiff's] representative PAGA claims may not be enforced.").[4] PAGA permits

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[4] In a footnote, Matco makes cryptic reference to the continued vitality of *Sakkab* in light of the Supreme Court's decision in *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018). Pet. at 21, n. 7. But this mandamus petition is an inappropriate vehicle for revisiting *Sakkab* (if that is even what Matco suggests) for three reasons. First, Matco has waived any such argument by failing to raise it before the district court and or in the body of its Petition. *See Estate of Saunders v. C.I.R.*, 745 F.3d 953, 962 n.8 (9th Cir. 2014)

aggrieved employees to act as private attorneys general on behalf of the State of California to collect civil penalties for Labor Code violations. In light of this public purpose, "an employee's right to bring a PAGA action is unwaivable," and "an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy." *Iskanian*, 59 Cal. 4th at 360, 383; *Sakkab*, 803 F.3d at 449 (holding that the FAA does not preempt the *Iskanian* rule); *Hopkins v. BCI Coca-Cola Bottling Co of Los Angeles.*, 640 F. App'x 672, 673 (9th Cir. 2016) (waiver of right to bring a representative PAGA action is unenforceable under *Iskanian*).[5]

("Arguments raised only in footnotes . . . are generally deemed waived."); *Tibble v. Edison Int'l*, 843 F.3d 1187, 1193 (9th Cir. 2016) (en banc) ("we do not 'entertain[] arguments on appeal that were not presented or developed before the district court.'") (quoting *Visendi v. Bank of Am., N.A.*, 733 F.3d 863, 869 (9th Cir. 2013)). Second, this Court recently reaffirmed *Sakkab* post-*Epic Systems*. *See Blair*, 2019 U.S. App. LEXIS 19476, at *15–18. Third, the argument does not present grounds for mandamus review. *Swift*, 830 F.3d at 917 ("If 'no prior Ninth Circuit authority prohibited the course taken by the district court, its ruling is not clearly erroneous'" and mandamus is not appropriate) (quoting *In re Morgan*, 506 F.3d 705, 713 (9th Cir. 2007)).

[5] Matco now argues, for the first time, and in a footnote, that the PAGA waiver would not be void under Ohio law. *See* Pet. at 21, n.7. This argument is procedurally improper. *Saunders*, 745 F.3d at 962 n.8 (argument raised only in footnote is generally waived); *Tibble*, 843 F.3d at 1193 (argument not raised below is waived). It is also wrong. The cases that Matco relies upon do not involve PAGA or a PAGA-like statute, but rather the Ohio Consumer Sales Protection Act ("CSPA"), which is nothing like PAGA. Most critically, the CSPA does not allow private litigants "the right to act as a private attorney general to recover the full measure of penalties the state could recover"—the touchstone of PAGA. *Sakkab*, 803 F.3d at 433, 439. In any event, that District

Contemplating the possibility that its waiver of private attorney general claims would be unenforceable, Matco drafted its arbitration clause to render the entire agreement to arbitrate "null and void" under that contingency, such that *no obligation to arbitrate* exists. PA000049 ¶ 12.12 ("if the provision prohibiting . . . 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 any such breaches."). Put differently, Section 12.12 creates a condition precedent to the existence of an agreement to arbitrate. If the PAGA waiver is invalid, *no agreement to arbitrate exists ab initio*. And if no agreement to arbitrate exists, then the choice of forum clause is unenforceable under controlling Ninth Circuit law. *See Jones*, 211 F.3d at 498. In short, the unenforceable PAGA waiver renders the entire arbitration provision void *ab initio* by straightforward operation of plain contract terms.

Matco accuses the District Court of disrespecting arbitration, Pet. at 23–24, but it is Matco that misunderstands federal arbitration jurisprudence. The FAA is not a field preemption statute. *See Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989). "[T]he federal [arbitration] policy is simply to ensure the enforceability, according to their terms, of private agreements to

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Court's finding that the waiver would be void under either California or Ohio law is not clearly wrong, since Ohio courts have also found pre-dispute waivers of private attorney general actions unenforceable when those waivers violate public policy. *See, e.g., Eagle v. Fred Martin Motor Co.*, 809 N.E.2d. 1161, 1183 (Ohio Ct. App. 2004) (finding that, combined with a confidentiality clause, the private attorney general waiver "imped[es] the remedial function of the CSPA" and is invalid as against public policy).

arbitrate." *Id.* at 476. Although Matco may wish it had drafted its agreement differently, it cannot now rewrite the terms. Workers regularly are held to the terms of arbitration agreements drafted by company attorneys; companies that impose such agreements must be held to the written terms as well.

Matco's remaining arguments are nonsensical. Matco says that the District Court improperly "scrapped" the traditional analysis requiring deference to a choice of forum clause "solely because the forum selection clause is contained within an arbitration provision." Pet. at 3. As discussed above, the *reverse* is true. Controlling circuit precedent—which Matco acknowledged below but omitted from its Petition—renders the forum selection clause here *unenforceable* in the *absence* of a valid arbitration agreement. *See Jones*, 211 F.3d at 498. The District Court examined the arbitration provision *at Matco's urging* to determine whether the forum selection clause, which would otherwise be unenforceable under *Jones*, could be *saved*—not out of some gratuitous hostility to arbitration.

Matco also spends five pages arguing that a district court faced with a forum selection clause should not examine the "validity of the contract containing it." Pet. at 17–21. Of course, that is not what the District Court did here. Fleming did not argue below that the forum selection clause was unenforceable because the franchise agreement containing it was invalid, and the District Court made no finding regarding the lawfulness of the franchise agreement. Rather, Fleming attacked the forum selection clause—and only the forum selection clause—on the ground that it is unenforceable under *Jones*. In turn, the District Court examined the arbitration clause simply to determine

whether the parties were subject to an agreement to arbitrate, such that this Court's decision in *Bradley,* rather than *Jones*, would control.

The District Court's analysis follows governing law, and it makes sense. Because the FAA is not a field preemption statute, the mere appearance of the word "arbitration" in a contract does not preempt Section 20040.5. Where, as here, the underlying contract reflects the parties' agreement *not* to arbitrate a dispute, then the District Court would have committed clear error by refusing to invalidate the forum selection clause under Section 20040.5 and *Jones*. Instead, the District Court correctly applied *Sakkab*, found the parties had not agreed to arbitrate, and properly denied the motion to transfer under *Jones*.

B. Mateo's Additional Grounds for Review Are Insufficient to Support a Writ of Mandamus

1. Writs Related to Venue Provisions Are Routinely Denied, Even Though Denials of Motions to Transfer Are Not Immediately Appealable.

Without a showing of clear error, Matco is not entitled to mandamus review. Matco alleges that mandamus review is warranted because "[v]enue provisions deal with rights too important to be denied review." Pet. at 24–25 (quoting *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949 (9th Cir. 1968)). But as Matco's own cited cases reflect, there is no special rule permitting interlocutory review of transfer rulings. *See, e.g.*, *Pac. Car & Foundry*, 403 F.2d at 951–52 (permitting review of "clearly erroneous orders entered under § 1404(a)"); *In re Lloyd's Register N. Am., Inc*., 780 F.3d 283, 290 (5th Cir. 2015) (reviewing a transfer ruling only after establishing that the party had shown that

the district court committed "clear abuses of discretion that produce patently erroneous results."); *In re Rolls Royce Corp*., 775 F.3d 671, 677 (5th Cir. 2014) (establishing that the petitioner's right to review on an order regarding transfer was "clear and indisputable" because the district court had committed a "clear abuse of discretion," and "produce[d] a patently erroneous result."); *In re Apple, Inc.*, 581 F. App'x 886, 888 (Fed. Cir. 2014) ("We will grant mandamus relief only when a district court's clear abuse of discretion produces a patently erroneous result."); *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 401 (3d Cir. 2017) (requiring "a clear and indisputable abuse of discretion or . . . error of law" in granting mandamus review for 1404(a) orders).

Matco says that review now is urgent, but this Court has found that challenges to a district court's denial of a dismissal for *forum non conveniens* can be properly reviewed after a final judgment. *Orange, S.A. v. United States Dist. Court*, 818 F.3d 956, 963–64 (9th Cir. 2016) ("[I]f appellate courts were to issue writs of mandamus routinely after denial of a motion to dismiss for forum non conveniens, they would be allowing non-statutory rights of interlocutory appeal."). As a result, this Court routinely denies mandamus petitions for review of orders denying *forum non conveniens* and 1404(a) motions. *See id.* at 964–65. This case is no different.

Matco also claims that the District Court's order "eradicated the[] mandatory safeguards" of the FAA because it will be unable to move to compel arbitration or take an appeal from the denial of a motion to compel arbitration under 9 U.S.C. § 16(a)(1)(B). Pet. at 26–27. Matco, however, could have moved to compel arbitration in the District Court below, with the right to

appeal any denial of its motion to compel arbitration to this Court under Section 16 of the FAA. Transferring the case to Ohio as a predicate to such a motion was unnecessary and improper, because the plain terms of the franchise agreement provide that any arbitration hearing *must be conducted in California, not Ohio*. Specifically, Section 12.10 of the franchise agreement provides that arbitration proceedings are to be venued in Ohio unless "the law of the jurisdictions in which Distributor operates the Distributorship require that arbitration proceedings be conducted in that state," in which case "the Arbitration hearings under this agreement shall be conducted in the state in which the principal office of the Distributorship is located, and in the city closest to the Distributorship." PA000049. Because Section 12.10 of the franchise agreement, read in tandem with Section 20040.5, requires that any arbitration proceeding be conducted in California, Matco could have filed a motion to compel arbitration in the District Court below (although that motion would have failed due to the absence of a valid and enforceable arbitration agreement).

2. This Petition Raises a Fact-Specific Issue That Is Neither Novel nor Likely to Arise Repeatedly.

Finally, there is no merit to Matco's contention that the blow-up clause in its franchise agreement—a feature of the agreement it drafted—is of some greater, circuit-wide significance. Matco recasts the District Court's analysis as "adjudicat[ing] the validity of the underlying contract" when "ruling on the enforceability of a forum-selection clause," Pet. at 29, but as noted above (*supra* at IV(A)), the District Court did no such thing. Matco's motion to transfer and this Court's precedent required the District Court to determine

whether an arbitration agreement existed, so that it could decide whether *Jones* or *Bradley* controlled. This is the same analysis that other courts have undertaken when deciding whether there was FAA preemption. *See, e.g.*, *Bradley*, 275 F.3d at 888. There is no novel issue here for this Court to decide.

V. CONCLUSION

For the reasons set forth above, the Court should deny Defendants' petition in full.

DATED: July 11, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES
(Circuit Rule 28-2.6)

Fleming is not aware of any related cases pending in this Circuit.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 21(d) and 32(a)(7)(B) because this brief contains 5,967 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 Times New Roman 14-point font.

Date: July 11, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2019, I electronically filed the foregoing PLAINTIFF-REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR A WRIT OF MANDAMUS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and mailed, via United States Mail, a true copy thereof to the address shown below. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

United States District Court
Northern District of California
San Francisco Courthouse
450 Golden Gate Avenue,
San Francisco, California 94102

Respondent

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 11, 2019, at Oakland, California.

/s/ Peter Rukin
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