No.

IN THE

Supreme Court of the United States

ERICKA RICHARDSON AND LUIS A. SILVA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

COVERALL NORTH AMERICA, INC., AND SUJOL LLC, ABC CORPS., JANE & JOHN DOES 1-20,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether incorporation by reference of a separate set of arbitration rules constitutes clear and unmistakable evidence of intent to delegate the threshold question of arbitrability to an arbitrator in a case involving an unsophisticated party presented with an adhesive agreement;

2. Whether state or federal law should govern the determination as to whether an arbitration agreement clearly and unmistakably delegated the threshold question of arbitrability to an arbitrator.

PARTIES TO THE PROCEEDING

Petitioners are Ericka Richardson and Luis A. Silva on behalf of themselves and all others similarly situated.

Respondents are Coverall North America Inc. and Sujol LLC.

RELATED PROCEEDINGS

Richardson v. Coverall N. Am. Inc., No. 3:18-cv-00532, U.S. District Court for the District of New Jersey. Judgment entered Sept. 27, 2018.

Richardson v. Coverall N. Am. Inc., No. 18-3393, 18-3399, U.S. Court of Appeals for the Third Circuit. Judgment entered Aug. 19, 2020, petition for reh'g denied, June 30, 2020.

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INTRODUCTION

Petitioners Ericka Richardson and Luis Silva respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. In recent years, this Court has addressed a number of cases construing the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and in particular, the question of who should decide the threshold question of whether a dispute must be arbitrated – a court or an arbitrator. *See, e.g., Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). This Court has articulated the stringent requirement that any delegation to an arbitrator of threshold questions of arbitrability, such as the scope and validity of an arbitration agreement, must be "clear and unmistakable" to overcome the presumption in favor of judicial resolution of such questions. *First Options*, 514 U.S. at 944. Despite the rigorous "clear and unmistakable" standard announced by this Court, many federal courts have issued decisions holding that a mere passing reference to a separate set of arbitration rules that contain a delegation provision suffices as evidence of a clear and unmistakable intent to delegate threshold arbitrability issues to an arbitrator. *See, e.g., Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 673 (5th Cir. 2012) (two oil companies negotiated a contract with one another); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1368 (Fed. Cir. 2006) (patent infringement case between two telecommunications corporations); *Terminix Int'l Co., LP v. Palmer Ranch*

Ltd. P'ship, 432 F.3d 1327, 1329 (11th Cir. 2005); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205 (2d Cir. 2005) (corporation sought to compel arbitration of indemnification dispute with manufacturer).

This case raises an extremely important question for which a split has developed below, regarding whether the incorporation by reference of a separate set of arbitration rules is sufficient to overcome the strong presumption in favor of judicial resolution of arbitrability issues where one party is an unsophisticated layperson, presented with an adhesive agreement in the consumer or employment context (as opposed to a sophisticated commercial entity negotiating with another sophisticated entity). Some lower courts have recognized a difference in this situation between contracts negotiated by sophisticated legal entities and adhesive contracts accepted by unsophisticated laypeople. *See Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 529 (4th Cir. 2017) (the parties' clear and unmistakable intent was demonstrated when "*two sophisticated parties* expressly incorporate into a contract JAMS Rules") (emphasis added) *abrogated in part by Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1075, n. 2 (9th Cir. 2013) ("We hold that *as long as an arbitration agreement is between sophisticated parties to commercial contracts*, those parties shall be expected to understand that incorporation of the UNCITRAL rules delegates questions of arbitrability to the arbitrator…..") (emphasis add-

ed).[1] Other courts have not recognized this distinction, simply following prior decisions, which held that mere incorporation by reference of arbitration rules is enough to constitute clear and unmistakable delegation, notwithstanding the fact that one party lacks sophistication and was presented with an adhesive agreement referencing rules they have no reason to recognize or understand. *See, e.g., Arnold v. Homeaway, Inc.*, 890 F.3d 546, 552 (5th Cir. 2018); *Awuah*

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[1] Drawing on this distinction, a number of lower courts have expressly found there was not clear and unmistakable evidence of delegation through incorporation by reference of separate arbitration rules in cases involving unsophisticated laypeople. *See In re Little*, 610 B.R. 558, 567-68 (D.S.C. 2020); *Takiedine v. 7-Eleven, Inc.*, 2019 WL 934994, at *9 (E.D. Pa. Feb. 25, 2019); *Chong v. 7-Eleven, Inc.*, 2019 WL 1003135, at *10 (E.D. Pa. Feb. 28, 2019); *Stone v. Wells Fargo Bank, N.A.*, 361 F. Supp. 3d 539 (D. Md 2019); *Paragon Litig. Trust v. Noble Corp. PLC (In re Paragon Offshore PLC)*, 588 B.R. 735 (Del. Bankruptcy Ct. 2018); *Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 427-29 (E.D. Pa. 2016); *Ingalls v. Spotify USA, Inc.*, No. C 16-03533 WHA, 2016 WL 6679561, at *4 (N.D. Cal. Nov. 14, 2016); *Aviles v. Quik Pick Express, LLC*, 2015 WL 9810998, at *6 (C.D. Cal. Dec. 3, 2015), *vacated on other grounds*, 703 F. App'x 631 (9th Cir. 2017); *Meadows v. Dickey's Barbecue Rests., Inc.*, 144 F. Supp. 3d 1069 (N.D. Cal. 2015); *Tompkins v. 23andMe, Inc.*, 2014 U.S. Dist. LEXIS 88068 (N.D. Cal. 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016).

v. Coverall N. Am., Inc., 554 F.3d 7, 12 (1st Cir. 2009).

In the decision below, the Third Circuit held that the plaintiff–an immigrant janitor who does not read or understand English well and who signed an adhesive agreement in order to obtain work from the Defendants–had nonetheless "clearly and unmistakably" agreed to delegate the threshold issue of whether his dispute was arbitrable because the agreement he signed contained a passing reference to the American Arbitration Association ("AAA") Commercial Rules, which permit an arbitrator to decide "the existence, scope, or validity of the arbitration agreement or [] the arbitrability of any claim or counterclaim." App.39a. These rules were not included in the agreement itself, nor was a copy of the rules provided to him. *See* 18-3393, JA094-95, § 21(A). The Third Circuit's decision is a bridge too far that simply does not comport with this Court's "clear and unmistakable" standard. To allow this decision to stand, and allow this lower court split to continue, would effectively eviscerate the longstanding requirement that arbitrators may decide whether a dispute is arbitrable *only if* both parties actually intended for that threshold issue itself to be arbitrated.

This case highlights the absurdity of the assumption that reference to arbitration rules in an agreement constitutes "clear and unmistakable" delegation of arbitrability to an arbitrator. To claim that an immigrant worker who does not speak English well would know that he was agreeing to let an arbitrator decide the scope of his or her own authority through reference to a set of rules that were never presented to him is simply a legal fiction. As set

forth above, although some courts have held that incorporation of the arbitration rules constitutes "clear and unmistakable" evidence of delegation, these decisions have typically involved sophisticated, commercial parties. This case presents the Court with a critical opportunity to address the growing split between lower courts regarding whether it is relevant that one party is unsophisticated.

The Third Circuit opinion in this case also presents a second important issue about the proper interpretation of the "clear and unmistakable" rule, which warrants this Court's attention. Specifically, the decision sharpens a conflict among the Circuit Courts of Appeal regarding whether the "clear and unmistakable" standard for delegating arbitrability presents a question of federal or state law. *Compare Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020) (holding that the "clear and unmistakable" question is one of federal law) with *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 (2d Cir. 2018) (holding that the question is one of state law).

In its opinion below, the Third Circuit stated that the question of whether a court or arbitrator should determine arbitrability must be governed by New Jersey state law, *see* App.4a-5a. However, the court then inexplicably did not apply or even cite controlling New Jersey Supreme Court precedent regarding incorporation by reference and contract formation. Indeed, the court's holding conflicts with decisions of the New Jersey Supreme Court, such as *Morgan v. Sanford Brown Inst.*, 225 N.J. 289 (2016), which held that mere incorporation by reference of a

separate set of arbitration rules is not sufficient to satisfy the requirements of mutual assent under New Jersey contract law. Thus, the Third Circuit's holding in this case underscores the confusion among the Courts of Appeal regarding the application of this Court's "clear and unmistakable" standard, as the court here stated that it would apply state law but then actually applied federal law, by only citing to federal precedents and ignoring controlling New Jersey law regarding incorporation by reference.

In sum, this Court should take the opportunity presented by this case to clarify whether or not a party's relative sophistication plays any role in determining whether mere incorporation of a set of arbitration rules meets the high burden to overcome the presumption in favor of judicial resolution of gateway issues and shows "clear and unmistakable" delegation and to clarify whether the "clear and unmistakable" standard for delegating arbitrability to an arbitrator is a question of state law or federal law.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is available at *Richardson v. Coverall N. Am., Inc.*, 811 F. App'x 100 (3d Cir. 2020), and is reproduced in the appendix at App.2a-8a. The decision of the United States District Court for the District of New Jersey, dated September 27, 2018, is available at *Richardson v. Coverall N. Am., Inc.*, No. CV18532MASTJB, 2018 WL 4639225 (D.N.J. Sept. 27, 2018), and is reproduced in the appendix at App.9a-32a.

JURISDICTION

The Court of Appeals entered its judgment on April 28, 2020. App.1a. A petition for rehearing en banc was filed on May 12, 2020, and was subsequently denied on June 30, 2020. App.34a. Pursuant to this Court's March 19, 2020 Order extending the deadline to file a petition for writ of certiorari to 150 days from the date of the order denying a timely petition for rehearing, this petition is due on or before November 27, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 2-4, is reproduced at App.35a-38a. Furthermore, Rule R-7 of the American Arbitration Association Commercial Rules and Mediation Procedures ("AAA Rules"), which is discussed herein, is reproduced at App.39a.

STATEMENT OF THE CASE

A. This Court's Decisions Regarding Delegating Arbitrability to an Arbitrator

The Federal Arbitration Act ("FAA") imbues courts with the responsibility for deciding whether a given dispute is subject to arbitration. *See* 9 U.S.C. § 3. This Court has previously held that "the question of arbitrability…is undeniably an issue for judicial determination." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986). Thus, "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbi-

trate is to be decided by the court, not the arbitrator." *Id.*

"When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally … should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. However, one "qualification" to this rule is that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* (internal quotation omitted). This "clear and unmistakable" evidence can be satisfied by the inclusion of an express delegation clause, stating that the parties intend for the arbitrator to have the exclusive authority to decide questions of arbitrability, including "any claim that all or any part of this agreement is void or voidable." *Rent-A-Ctr., W., Inc.*, 130 S. Ct. at 2774.

This Court's "clear and unmistakable" standard operates as a "qualification" to state law governing the interpretation of contracts. *First Options*, 514 U.S. at 944. It has been described "as a type of 'revers[e] presumption'—one in favor of a judicial, rather than an arbitral, forum." *Rent-A-Ctr.*, 561 U.S. at 79 (*quoting First Options*, 514 U.S. at 945). Reversing the presumption in favor of compelling arbitration in this context is "understandable" because the "who (primarily) should decide arbitrability question—is rather arcane" and "[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945. Thus, the inquiry regarding whether the parties have clearly and

unmistakably agreed to delegate arbitrability should be focused on the "the parties' intent" and is "an interpretive rule based on an assumption about the parties' expectations" that "contracting parties would likely have expected a court to have decided [a] gateway matter" of arbitrability. *Rent-A-Ctr.*, 561 U.S. at 70, n. 1 (internal quotations omitted).

Here, the Third Circuit's decision departed from this Court's jurisprudence regarding delegation of arbitrability and deepened existing splits in authority on this issue. The Court summarily concluded that the mere incorporation by reference of the AAA Commercial Rules constituted "clear and unmistakable" evidence of an intent to delegate arbitrability to an arbitrator, sufficient to overcome the presumption in favor of judicial resolution of such questions. It reached this conclusion despite the fact that the plaintiff in this case was an unsophisticated layperson, who signed an adhesive contract in the employment context.[2] Under *Rent-A-Ctr.*, the plaintiff's "expectations" and "intent" could not have been to delegate arbitrability as he would have no reason to know that a passing reference to a lengthy, separate set of arbitration rules would commit questions about the enforceability of the agreement to an arbitrator –something "parties would likely have expected a court to have decided." *Rent-A-Ctr.*, 561 U.S. at 70, n.1.

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[2] The plaintiff was classified as an independent contractor but contends that he should have been classified as an employee and brings wage claims against Defendants.

In reaching this conclusion, the Third Circuit's opinion in this case departed from a number of decisions from within the Third, Fourth, and Ninth Circuits that find unsophisticated parties do not "clearly and unmistakably" agree to delegate arbitrability through mere incorporation of the AAA Rules. *See supra*, n. 1. The split in authority embodied by the Third Circuit's decision warrants this Court's review.

Furthermore, the Third Circuit's opinion in this case failed to even consider New Jersey state law on the question of incorporation by reference and contract formation, which had direct bearing on the question presented. The court acknowledged that the question of whether the parties had clearly and unmistakably delegated questions of arbitrability to the arbitrator was one of state law, but it then ignored New Jersey Supreme Court precedent in favor of several federal cases. *See* App.4a-5a. In failing to consider New Jersey state law, the Third Circuit deepened the confusion regarding whether state or federal law applies to this analysis. Although the "clear and unmistakable" test has been described as a "qualification" to the usual rule that "state-law principles" govern whether parties decided to arbitrate arbitrability[3], *First Options*, 514 U.S. at 944, the Third Circuit here did not consider state law regarding incorporation by reference, even though New Jersey state law directly addressed this issue and would not find clear and unmistakable delegation

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[3] In other words, courts must apply the "clear and unmistakable" standard, but in doing so, they must still apply state contract law.

here, *see Morgan*, 225 N.J. at 310-311. The "clear and unmistakable" standard qualifies state law to the extent state law does not already contain this stringent standard for delegation; it does not *displace* state contract law where it does. This Court should grant review to clarify the appropriate body of law that applies to this analysis.

B. Factual and Procedural Background

Plaintiffs Luis Silva and Ericka Richardson filed this class action lawsuit in New Jersey state court on December 8, 2017, on behalf of themselves and other workers who have performed cleaning services in New Jersey for Defendants. 18-3393, JA038-40. These workers, many of whom are non-English-speaking immigrants, provide janitorial services to businesses that negotiate cleaning services accounts with Defendant Coverall North America Inc. ("Coverall") and its "master franchisees."[4] *Id.* Coverall classifies these cleaning workers as independent contractor "franchisees." However, Plaintiffs contend that they are misclassified under New Jersey state law and are in fact Coverall's employees.

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[4] "Master franchisees" are intermediary companies that contract directly with cleaning worker "franchisees" like the plaintiffs in this case. Here, Defendant Sujol LLC dba Coverall of Southern New Jersey served as the intermediary "master franchisee" between Plaintiffs and Coverall North America Inc.

In order to begin working for Coverall, Plaintiffs were each required to sign a "Janitorial Franchise Agreement", which contained an arbitration clause. 18-3393, JA094, §21; JA137, §26. The Agreements' arbitration provisions specify that arbitration shall be subject to the Federal Arbitration Act ("FAA") and "the then current Rules of the American Arbitration Association for Commercial Arbitration." 18-3393, JA0984; JA137.

The arbitration provision in the Richardson franchise agreement contained an express delegation clause:

> Except as otherwise provided in this Agreement, all controversies, disputes or claims between Coverall, … and Franchisee … arising out of or related to this Agreement or the validity of this Agreement or any provision therefore (*including this arbitration agreement, the validity and scope of which Coverall and Franchisee acknowledge and agree is to be determined by an arbitrator, not a court*) …shall be submitted promptly for binding arbitration.

18-3393, JA137, § 26(A) (emphasis added). By contrast, the Silva agreement contained no such express delegation of arbitrability to an arbitrator. 18-3393, JA094-95, § 21(A).

In the District Court below, Defendants moved to compel both plaintiffs' claims to arbitration. Plaintiffs challenged the enforceability of the arbitration agreements on several grounds. In support of their Opposition, Plaintiffs each submitted declara-

tions attesting to their lack of sophistication. Plaintiff Silva's declaration explained that he immigrated to the United States from Peru and that he was not able to read the agreement because he does not speak, read, or understand English well. 18-3393, SA010-11 at ¶¶7-11. Silva was unable to negotiate any aspect of the franchise agreement, including the arbitration agreement and the alleged delegation clause. *Id.* at ¶12.

The District Court ultimately held that the arbitration provision was unenforceable with respect to Silva. App.23a-24a. As a predicate issue, the District Court ruled that there was no clear and unmistakable delegation of arbitrability in Silva's agreement and so the court would have to decide the enforceability of the agreement. App.16a-19a. Unlike Richardson's agreement, which contained an express delegation clause, Silva's agreement merely incorporated the AAA Rules in passing, and given his lack of sophistication (as an individual with no command of the English language, contracting with a multinational business entity that was solely responsible for drafting the agreement), the District Court found that such a reference to the AAA rules was not sufficient to evince a clear and unmistakable mutual intent to delegate arbitrability. App.16a-19a, 25-26a.

On appeal, the Third Circuit reversed. App.2a. The panel reasoned that AAA Commercial Rule 7 provides an arbitrator with authority to decide threshold questions of arbitrability, and mere incorporation of these rules by reference was enough to meet the "onerous burden" of showing clear and unmistakable intent to delegate arbitrability, citing *Chesapeake Ap-*

palachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 763 (3d Cir. 2016). The court acknowledged at the outset that "[s]tate law governs" the question of who determines arbitrability. App.4a. Inexplicably, the court then ignored state law, as announced by the New Jersey Supreme Court in *Morgan v. Sanford Brown Inst.*, 225 N.J. 289 (2016), and instead applied federal caselaw from other circuits regarding incorporation by reference and contract formation. *See* App.6a-7a (citing appellate decisions from the Fifth, Sixth, Eighth, and Ninth Circuits, which in turn applied federal rather than state law to the delegation question).

With little elaboration, the Third Circuit also rejected the notion that the parties' relative sophistication had any bearing on the analysis:

> Silva [argues] that relying on incorporated rules is unreasonable in agreements involving "unsophisticated parties." But that likely stretches too far and would disregard the "clear and unmistakable" standard and ignore even the plainest of delegations.

App.6a. In reaching this conclusion, the Third Circuit did not discuss any of the district court decisions that have examined in depth party sophistication in relation to the "clear and unmistakable" standard, nor did it recognize that other Circuit courts have noted that incorporation by reference may constitute "clear and unmistakable" delegation when the parties are *sophisticated commercial entities*. Nor did the court consider that, if the parties had truly intended to delegate arbitrability, they could have said

so expressly (as was the case in the Richardson agreement). Indeed, rather than "ignor[ing] even the plainest of delegations" because one of the parties was unsophisticated, the District Court below did the opposite; the court enforced the delegation clause in the Richardson agreement, notwithstanding the fact that Richardson was likewise a relatively unsophisticated layperson. The Third Circuit's decision warrants further review from this Court, as set forth further below.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Decision Deepens a Split in Authority Regarding Whether an Unsophisticated Party Should Be Presumed to "Clearly and Unmistakably" Delegate Arbitrability Through Mere Incorporation of Arbitration Rules

Courts across the country have found that incorporation of the AAA Rules is sufficient to show "clear and unmistakable" intent to delegate arbitrability to an arbitrator, in cases in which the parties involved were commercial entities or otherwise sophisticated parties that negotiated the contents of the contract and would presumably understand its content. *See, e.g., Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 673 (5th Cir. 2012) (two oil companies negotiated a contract with one another); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1368 (Fed. Cir. 2006) (patent infringement case between two telecommunications corporation); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205 (2d Cir. 2005) (corporation sought to compel arbitra-

tion of indemnification dispute with manufacturer). These courts reasoned that such sophisticated parties must have understood the meaning of the terms they mutually negotiated and agreed upon and evinced a mutual intent to delegate arbitrability by incorporating the AAA rules.

Here, by contrast, the plaintiffs argued, and the District Court agreed, that where one party is unsophisticated and was presented with an adhesive agreement in the employment or consumer context, drafted entirely by a sophisticated corporation, the mere passing reference to the AAA Rules could not meet the "onerous burden", *Chesapeake Appalachia, LLC*, 809 F.3d at 763, to show "clear and unmistakable" evidence of an intent to delegate arbitrability to an arbitrator. App.17a-19a. Plaintiff Silva explained that he immigrated to the United States from Peru and that he was not able to read the franchise agreement containing the arbitration agreement and delegation clause because he does not speak, read, or understand English well. 18-3393, SA010-11 at ¶¶7-11. Silva was unable to negotiate any aspect of the franchise agreement, including the arbitration agreement and the alleged delegation clause. *Id.* at ¶12. He specifically noted that it was his "understanding that legal disputes in this country are decided in governmental courts and not with private organizations" and that he had no notion that he had agreed to arbitrate, much less have an arbitrator decide questions of arbitrability. *Id.* at ¶12. Indeed, Silva was the embodiment of the reality described by this Court in *First Options*: that the question of who decides arbitrability is "arcane" and that delegating such questions to an arbitrator goes against the "rea-

sonabl[e]" background expectation that "a judge, not an arbitrator, would decide…who should decide arbitrability." *First Options*, 514 U.S. at 945.

The Third Circuit reversed the District Court's holding and found that mere incorporation of the AAA Rules constituted clear and unmistakable evidence of delegation, notwithstanding Silva's lack of sophistication. In doing so, it put itself at odds with at least two Circuit Courts of Appeal that have suggested that where one party is an *unsophisticated* layperson, incorporation of the AAA Rules may not be sufficient to show a "clear and unmistakable" mutual intent to delegate arbitrability. *See Simply Wireless, Inc.*, 877 F.3d at 529 (the parties' clear and unmistakable intent was demonstrated when "*two sophisticated parties* expressly incorporate into a contract JAMS Rules") (emphasis added); *Oracle*, 724 F.3d at 1075, n. 2 ("We hold that as long as an arbitration agreement is between sophisticated parties to commercial contracts, those parties shall be expected to understand that incorporation of the UNCITRAL rules delegates questions of arbitrability to the arbitrator….We express no view as to the effect of incorporating arbitration rules into consumer contracts."). *See also* district court cases cited *supra* at note 1.

As these courts have recognized, a distinction based on the parties' sophistication makes sense because it is based in reality and is consistent with this Court's instruction that the inquiry regarding whether the parties have clearly and unmistakably agreed to delegate arbitrability is "an interpretive rule based on an assumption about the parties' expectations" that "contracting parties would likely

have expected a court to have decided [a] gateway matter" of arbitrability. *Rent-A-Ctr.*, 561 U.S. at 70, n. 1 (internal quotations omitted). It is only natural that the intent and expectations of the parties may vary depending on the nature of those parties. A layperson is unlikely to know what the AAA is, much less know the contents of its Commercial Rules, inside and out. To hold that a passing reference to the AAA Rules evinces "clear and unmistakable" evidence that an immigrant janitor who does not speak English well agreed to delegate arbitrability borders on the absurd. How he could know the contents of Rule 7, buried within 40 pages of AAA Rules, which were never presented to him and were merely mentioned in passing in the fine print of a lengthy franchise agreement, defies all reason.

Moreover, the fact that the AAA Rules *allow* the arbitrator the authority to decide questions of arbitrability does not mean that the arbitrator *must* do so or that the parties "clearly and unmistakably" *intended* for an arbitrator to exercise that authority. Given that Silva is not a sophisticated corporate party and is unfamiliar with the AAA and its Rules, it is patently absurd to expect that he would have read Rule 7 as *requiring* that an arbitrator rather than a court would decide arbitrability.

The Third Circuit regrettably ignored numerous well-reasoned decisions from courts in the Third, Fourth, and Ninth Circuits that have held that a cross-reference to the AAA rules does *not* constitute "clear and unmistakable" delegation of arbitrability when unsophisticated parties are involved. As one court explained, "incorporating forty pages of arbitra-

tion rules into an arbitration clause is tantamount to inserting boilerplate inside of boilerplate, and to conclude that a single provision contained in those rules amounts to clear and unmistakable evidence of an unsophisticated party's intent would be to take 'a good joke too far.' " *Allstate Ins. Co.*, 171 F. Supp. 3d at 429 (internal citation omitted); *see also Aviles*, 2015 WL 9810998, at *6 ("Plaintiff executed the [] agreement at Defendant's office without the benefit of counsel, and the parties dispute Plaintiff's English language competency. … It would strain credulity to conclude that Plaintiff held a clear and unmistakable intent to delegate questions of arbitrability to an arbitrator."); *In re Little*, 610 B.R. at 568-69 ("In transactions involving sophisticated parties, it is likely that the parties are experienced and knowledgeable on such matters or have retained counsel to review the agreement or that the parties were otherwise familiar with arbitration rules …The same cannot be said for consumer transactions…."); *Meadows*, 144 F. Supp. 3d at 1078 ("[T]he question is whether the language of an agreement provides 'clear and unmistakable' evidence of delegation. To a large corporation (like Oracle) or a sophisticated attorney (like Brennan), it is reasonable to conclude that it does. But applied to an inexperienced individual, untrained in the law, such a conclusion is likely to be much less reasonable."); *Chong*, 2019 WL 1003135, at *10 ("7-Eleven cannot dispute that it is more sophisticated than the plaintiffs. There is certainly no reason to have any confidence that these parties actually addressed the question of arbitrability.").

Other Circuit court decisions seem to have simply assumed that incorporation of arbitration

rules *always* constitutes "clear and unmistakable" evidence of delegation because the issue of the parties' relative sophistication was not raised or argued. *See, e.g.*, *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1329 (11th Cir. 2005). Indeed, it appears that only the Fifth Circuit in *Arnold v. Homeaway, Inc.*, 890 F.3d 546, directly confronted this question and explicitly concluded that the parties' sophistication did not matter.[5] Now, the Third Circuit decision in this case has joined the Fifth Circuit in expressly concluding that unsophisticated parties may "clearly and unmistakably" delegate arbitrability through mere incorporation of separate arbitration rules. These decisions are clearly in tension with the sound reasoning of the many courts cited *supra*, n. 1. Thus, further review from this Court is needed to provide clarity on this critical question.

II. The Third Circuit's Decision Sharpens a Circuit Split Over Whether the "Clear and Unmistakable" Standard is Governed by State or Federal Law

The Third Circuit decision in this case also raises an important issue regarding whether courts should apply federal or state law to the analysis of whether parties "clearly and unmistakably" delegat-

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[5] In *Awuah v. Coverall*, 554 F.3d at 12, the First Circuit appeared to recognize that it was problematic to presume that unsophisticated parties would understand that a mere cross-reference to the AAA rules would constitute "clear and unmistakable" delegation, but it felt bound by prior Circuit precedent.

ed arbitrability to an arbitrator. Here, the court acknowledged that "[s]tate law governs" the question whether there was a valid agreement to delegate questions of arbitrability to an arbitrator. App.4a. This holding is consistent with this Court's decision in *First Options*, which noted that "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally…should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944.[6]

However, despite stating that state law applies to determine whether the parties here agreed to have an arbitrator decide arbitrability, the Court did not cite New Jersey state law, nor acknowledge that the New Jersey Supreme Court expressly rejected delegation through reference to arbitration rules, *see Morgan*, 225 N.J. 289. Instead, the court relied on federal decisions to conclude that the mere incorporation by reference of the AAA Commercial Rules constituted clear and unmistakable evidence of delegation, notwithstanding Silva's lack of sophistication vis a vis Defendants.

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[6] The "qualification" referred to in *First Options* is that parties must provide "clear and unmistakable" evidence of their intent to delegate. Thus, state law applies to determine if the parties here agreed to delegate arbitrability to an arbitrator, provided that state law requires the parties show "clear and unmistakable" evidence of the delegation.

The inconsistency and confusion in the Third Circuit's opinion regarding which law to apply to the delegation question had serious consequences in this case. Had the court followed controlling New Jersey Supreme Court precedent in *Morgan*, it clearly would not have found clear and unmistakable delegation. In *Morgan*, the Court considered an arbitration clause which incorporated the AAA rules, and it ultimately struck the entire agreement, relying on its seminal opinion in *Atalese v. U.S. Legal Services Corp.*, 219. N.J. 430 (2014), *cert. denied* 135 S. Ct. 2804 (2015). The Court held that:

> [T]he arbitration provision and purported delegation clause do not meet the requirements of *First Options* and *Atalese* and do not satisfy the elements necessary for the formation of a contract, and therefore are unenforceable.

Id. at 310-11. Thus, in *Morgan*, mere incorporation by reference of a separate set of rules was insufficient to satisfy the requirements of mutual assent under New Jersey contract law. *Id.*; *see also Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 533 (App. Div. 2009), *certif. denied*, 203 N.J. 93 (2010) ("In order for there to be a proper and enforceable incorporation by reference of a separate document, the document to be incorporated must be described in such terms that its identity may be ascertained beyond *doubt* and the party to be bound by the terms must have had 'knowledge of and assented to the incorporated terms.'"); *Bacon v. Avis Budget*

Group, Inc., 357 F. Supp. 3d 401, 417, 423 (D.N.J. 2018) ("[E]ffective incorporation by reference requires that, before giving assent by signing the contract, the renter must have been able to identify beyond doubt the document that is referred to, and to ascertain the contents of the relevant terms.").

The Third Circuit's contradictory reasoning evinces the confusion that has been created among lower courts about how to apply the "clear and unmistakable" rule. Many courts have held that the "clear and unmistakable" rule is a rule of federal law and have looked to federal court precedents when determining whether parties delegated arbitrability to an arbitrator. *See, e.g., Blanton*, 962 F.3d at 846 (Sixth Circuit described split in authority on the question of whether the presence of "clear and unmistakable" evidence of delegation should be analyzed under state or federal law and concluding that the test is governed by federal law); *Arnold*, 890 F.3d at 552 ("[T]he Supreme Court has explained that the clear-and-unmistakable standard is a requirement of its own creation, framing it as a 'qualification' to the application of 'ordinary state-law principles that govern the formation of contracts' and holding that it would therefore follow its own precedent rather than Texas state law); *GNH Grp., Inc. v. Guggenheim Holdings, L.L.C.*, 2020 WL 4287358, at *4 (D. Del. July 27, 2020) ("[T]he Court is guided by federal law, since the 'clear and unmistakable evidence' standard is a principle of federal law, not state law").

Other courts have found that whether the parties agreed to delegate arbitrability is simply another

question of contract formation, which is unequivocally guided by *state law*, with the qualification that any evidence of delegation must be "clear and unmistakable." Indeed, this court made clear that a delegation clause is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce", *Henry Schein*, 139 S. Ct. at 529, and thus, its enforceability should be governed by state law, just like the enforceability of the arbitration agreement as a whole. Courts that have looked to state law view the "clear and unmistakable" rule as a backstop and guiding principle when applying state law to a delegation clause. *See, e.g., Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 (2d Cir. 2018) ("Applying Missouri's arbitration and contract law to those arbitration clauses, … we conclude, for the reasons below, that there is clear and unmistakable evidence that the parties in both cases before us intended to arbitrate all questions of arbitrability…"); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1245 (10th Cir. 2018) (applying "precedent from both this circuit and the state of Colorado" to conclude that the parties "clearly and unmistakably … intended for the arbitrator to decide all issues of arbitrability."). Thus, for example, where state law speaks to the incorporation by reference issue (as New Jersey law does here in the *Morgan* case), it should govern the analysis, with the caveat that any evidence of delegation must be "clear and unmistakable."

Here, the Third Circuit purported to apply state law but then seemingly applied federal law instead. In this sense, the opinion itself encapsulates the Circuit split (and confusion on this issue) de-

scribed *supra*, pp. 22-24, within a single decision. Indeed, the confusion embodied by the Third Circuit's illogical reasoning is representative of the confusion of many courts faced with this same question. This Court should grant the petition for review and should clarify whether the analysis regarding whether the parties agreed to delegate arbitrability to an arbitrator is a question of *state law*, as qualified by the "clear and unmistakable" rule, or one of purely federal law. Petitioner submits that New Jersey state law should have been applied in this case to determine whether the parties "clearly and unmistakably" intended to delegate arbitrability to the arbitrator, and that if it had been properly applied, New Jersey precedent would dictate that they did not. *See supra*, pp. 13-14. For these reasons, further review from this Court is warranted.

III. The Questions Presented Are Important, Recurring, and Ripe for Review

The question of whether parties agreed to delegate questions of arbitrability to the arbitrator is one of significant importance. After all, arbitration "is a matter of consent, not coercion." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664, 130 S. Ct. 1758, 1763, 176 L. Ed. 2d 605 (2010) (quoting *Volt v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). This Court has already held that determining whether the parties did in fact consent to have an arbitrator decide questions of arbitrability requires a heightened showing of "clear and unmistakable evidence." *First Options*, 514 U.S. at 944. It

is critical that clear, uniform rules apply to meet this showing.

One issue on which clarity is desperately needed is for courts to understand the role that the parties' relative sophistication should play in determining if mere incorporation of arbitration rules is sufficient to constitute "clear and unmistakable" evidence of delegation. This question is important for the potential impact it could have on consumer and employment disputes in particular. When a layperson signs an adhesive agreement in the consumer or employment context, which they are unable to negotiate, it strains credulity that a passing reference to a separate lengthy set of arbitration rules would provide evidence of their intent to delegate arbitrability, much less "clear and unmistakable" evidence. Failing to take the parties' sophistication into account when assessing whether incorporation of arbitration rules constitutes "clear and unmistakable" evidence of delegation makes it easier for large companies and employers to use their superior resources to impose arbitration on consumers and employees who had no intention of agreeing to arbitrate gateway questions of arbitrability.

As this Court has made clear, the default rule is that courts should decide the enforceability of arbitration agreements; interpreting "ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power … might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945. Employees and consumers may have good reasons for wanting a

court to decide arbitrability because allowing arbitrators to decide the bounds of their own jurisdiction and the enforceability of the very agreement that retains them to serve as arbitrator in the first instance creates troubling incentives to enforce agreements that may actually be unconscionable or void. *See* Faulkner, Richard and Philip J. Loree Jr., *Schein's Remand Decision: Should Scotus Review The Provider Rule Incorporation-be-Reference Issue?* 38 ALTERNATIVES, 5 (May 2020) at *81-82. Indeed, this Court has repeatedly held that due process is violated where decisionmakers have a financial interest in the outcome of a case. *Id.* at *82 (collecting cases).[7] This important concern cannot be understated, and a finding that parties have agreed to allow an arbitrator to decide such issues as the enforceability of their arbitration agreement should not be reached lightly.

Moreover, courts play an important function in tempering the tendency to overreach in drafting arbitration agreements by policing agreements that are unconscionable, fraudulent, or otherwise unenforceable at the outset, before compelling arbitration. Taking this function away from the courts and placing it

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[7] *See Tumey v. Ohio*, 273 U.S. 510 (1927) (violation of due process where judge was also the mayor and was paid from fines he levied); *Ward v. Monroeville*, 409 U.S. 57 (1972) (violation of due process where mayor presided over traffic offenses and fines he assessed were paid to the town); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (board of optometrists disqualified from presiding over a hearing against competing optometrists).

in the hands of arbitrators is not something that should be done lightly, as this Court recognized when it created a "reverse presumption" that courts should decide such questions. *Rent-A-Ctr.*, 561 U.S. at 79 (*quoting First Options*, 514 U.S. at 945). By failing to take a party's sophistication into account, the Third Circuit's decision below makes a mockery of the "clear and unmistakable" test.

The question presented here is also widely recurrent. Multiple Circuit Courts have confronted the issue of what role the party's sophistication should play in determining whether they agreed to delegate arbitrability[8], and numerous district courts have squarely addressed the question as well.[9] This Court should put the recurrent question to rest by clarifying the law in this area.

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[8] *Compare Arnold*, 890 F.3d at 552 (rejecting the notion that incorporation of the AAA Rules constitutes clear evidence of intent to delegation only in cases "involve[ing] negotiated contracts between sophisticated parties" as opposed to cases involving "a consumer contract of adhesion"); with *Oracle Am., Inc.*, 724 F.3d at 1075, n. 2 (9th Cir. 2013) ("We hold that as long as an arbitration agreement is between sophisticated parties to commercial contracts, those parties shall be expected to understand that incorporation of the UNCITRAL rules delegates questions of arbitrability to the arbitrator…..") (emphasis added).

[9] *See supra* n. 1.

Additionally, clarity is needed regarding whether courts should look to state or federal law in making the determination that the parties "clearly and unmistakably" delegated arbitrability. Resolving this question fairly and consistently requires that this court weigh in and provide guidance about how to apply the interpretative rule it created. Conflicting opinions by the Courts of Appeals "encourage and reward forum shopping," by allowing parties to bring suit in one jurisdiction or the other based on how they want their delegation clause interpreted. *Southland v. Keating*, 465 U.S. 1, 15 (1984) ("We are unwilling to attribute to Congress the intent, . . . to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted").

For instance, the Court might hold that state law governs the enforceability of a delegation clause, and the "clear and unmistakable" rule serves only as a guiding principle when applying state law to a delegation clause. In this sense, the "clear and unmistakable" principle would serve as a backstop against allowing arbitrators to decide the validity of an arbitration agreement without the parties' clear consent, but courts would still need to consider state law contract principles regarding mutual assent and contract formation to guide their analysis. *See, e.g.*, *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 (2d Cir. 2018) (looking to Missouri Supreme Court decision regarding incorporation by reference of separate arbitration rules). Alternatively, the Court might find that the "clear and unmistakable" rule is one invented by federal courts and that the body of federal law interpreting it is as far as courts

need look for guidance. *See, e.g.*, *Arnold*, 890 F.3d at 552 ("[T]o the extent our precedent diverges from Texas law, we follow our own interpretation of the 'clear and unmistakable' threshold."). In many cases like this one, the difference in which case law is applied may be outcome determinative.

Finally, the issues presented here are clearly ripe for review. The conflicts among the Circuits that have arisen on both issues in this case are squarely presented and require resolution by this Court. Conflicting interpretations are not likely to change or evolve meaningfully through additional decisions in other courts, as the numerous cases cited herein have exhaustively considered what role the parties' sophistication should play in the "clear and unmistakable" analysis and what law (state or federal) should apply. For all these reasons, the Court should grant certiorari and provide the Circuit Courts guidance on this important and increasingly prevalent issue.

CONCLUSION

The petition for a writ of certiorari should be granted. The Third Circuit's decision below highlights two critical issues regarding the proper interpretation of delegation clauses in arbitration agreements. Whether an unsophisticated party to an adhesive arbitration agreement "clearly and unmistakably" delegates arbitrability to an arbitrator through mere incorporation of a separate set of arbitration rules, and the proper body of law to apply to this inquiry, are both questions of vital importance, which urgently require this Court's guidance.

Respectfully submitted,

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November 2020

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED APRIL 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-3393, 18-3399

ERICKA RICHARDSON; LUIS A. SILVA, On behalf of themselves and all other similarly situated persons

v.

COVERALL NORTH AMERICA, INC.;
SUJOL, LLC, DBA Coverall of Southern, NJ;
ABC CORPS. 1-10; JANE & JOHN DOES 1-10,

SUJOL, LLC, DBA Coverall of Southern, NJ,

Appellant in Appeal No. 18-3393,

COVERALL NORTH AMERICA, INC.,

Appellant in Appeal No. 18-3399

On Appeal from the United States District Court
for the District of New Jersey.
(D.C. Civil No. 3:18-cv-00532).
District Judge: Hon. Michael A. Shipp.

November 20, 2019, Argued
April 28, 2020, Filed

Appendix A

Before: CHAGARES, MATEY, and FUENTES,
Circuit Judges.

OPINION*

MATEY, *Circuit Judge.*

Ericka Richardson and Luis Silva each wanted to open a commercial cleaning business. So each bought a franchise from Coverall North America, Inc. (CNA) through Sujol, LLC d/b/a Coverall of Southern New Jersey (Sujol). But disagreements followed the signed agreements, and Richardson and Silva filed a putative class action alleging they are the Defendants' employees, not independent contractors, under New Jersey law. We do not address who has the better argument, because the contracts both delegate that authority to an arbitrator. So we will reverse the District Court's Order in part and vacate in part and remand for further consideration.

I. Background

A. The Agreements

CNA sells commercial cleaning services. It operates a franchise business system through geographically designated territories. Sujol, known as a "master franchisee," owns one of these territories and entered into agreements with Richardson (in 2016) and Silva (in 2005)

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

to operate cleaning businesses. CNA is not a named party to either the Richardson or Silva agreement (collectively "the Agreements"). Rather, CNA has an agreement with Sujol allowing Sujol to sell franchises using CNA's trademarks and operating system.

Problems arose in 2017, as Richardson and Silva began to question their relationship with Sujol and, as a result, the fees due under the Agreements. So they filed a putative class action in the Superior Court of Middlesex County, New Jersey, claiming that while the Agreements label them as "independent contractors," they are really employees under New Jersey law. (App. at 38-48 (citing N.J. Stat. Ann. § 43:21-19(i)(6)).) Plaintiffs alleged that Defendants had violated the New Jersey Wage Payment Law (NJWPL), N.J. Stat. Ann. § 34:11-4.1 et seq., by allegedly misclassifying them as independent contractors, charging them for a job, and taking unlawful deductions from their wages. (App. at 38-48.) CNA and Sujol removed the matter to federal court, and then moved under Section 3 of the Federal Arbitration Act (FAA) to stay the proceedings in favor of arbitration. (App. at 7.)

B. The District Court's Interpretation of the Agreements

The District Court considered both the who and the what: whether the parties agreed to delegate questions of arbitrability to an arbitrator and, in Richardson's case, whether CNA could enforce the arbitration clause. First, the District Court found the incorporation of the American Arbitration Association (AAA) Commercial Arbitration

Rules in Silva's agreement did not satisfy the clarity needed for delegation, at least with an "unsophisticated party." Applying New Jersey law, the District Court also held that the arbitration agreement did not cover Silva's NJWPL claims. Second, the District Court found Richardson's agreement with Sujol delegated arbitrability questions to the arbitrator. But the court determined that CNA could not invoke the arbitration clause. Timely appeals by Sujol and CNA followed.[1]

II. Jurisdiction and the Appellate Standard of Review

The District Court had jurisdiction under 28 U.S.C. § 1332(d)(2), and we have jurisdiction under 9 U.S.C. § 16(a)(1)(A) to consider an order refusing a stay pending arbitration under 9 U.S.C. § 3. We largely review that decision de novo, except for underlying findings of fact, which we review for clear error. *See Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 221, 50 V.I. 1069 (3d Cir. 2008).

III. Analysis

We use a two-step process to evaluate an arbitration clause in a contract: 1) whether there is a valid agreement to arbitrate; and 2) whether that agreement encompasses the dispute at issue. *Jaludi v. Citigroup*, 933 F.3d 246, 254 (3d Cir. 2019). State law governs both steps. *See id.*

1. After the District Court's Order, Richardson dismissed her claim against Sujol, leaving only the three claims for which the Motion had been denied. As such, the part of the Order granting the Motion as to Richardson's claim against Sujol is now moot.

at 254-55; *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 522 (3d Cir. 2019). And parties are free to assign the resolution of these issues to an arbitrator. *See Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 335 (3d Cir. 2014). But that delegation requires "clea[r] and unmistakabl[e]" evidence of the parties' intent. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (alterations in original).

A. Arbitrability of Silva's Claim Against Sujol

We start with who decides, as the Defendants argue that the incorporation of the AAA Rules in Silva's arbitration clause constitutes clear and unmistakable evidence that the parties agreed to delegate arbitrability. We agree. Silva's agreement provides that "all controversies, disputes or claims between Coverall . . . and Franchisee . . . shall be submitted promptly for arbitration" and that "[a]rbitration shall be subject to . . . the then current Rules of the American Arbitration Association for Commercial Arbitration." (App. at 94.) Clearly and unmistakably then, the AAA Rules govern the arbitration of any dispute between Silva and Sujol. And Rule 7(a) of the AAA Rules states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Rule 7(a). That provision "is about as 'clear and unmistakable' as language can get." *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009). Nor is the rest of

Silva's contract so ambiguous or unclear that the meaning of the AAA Rules becomes murky.[2]

Silva responds that relying on incorporated rules is unreasonable in agreements involving "unsophisticated parties."[3] But that likely stretches too far and would disregard the "clear and unmistakable" standard and ignore even the plainest of delegations. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130-31 (9th Cir. 2015) ("Our holding today should not be interpreted to require that the contracting parties be sophisticated . . . before a court may conclude that incorporation of the AAA rules

2. While "[v]irtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability," we need not determine whether such a rule always applies. *Chesapeake Appalachia, LLC v. Scout Petrol., LLC*, 809 F.3d 746, 763-64 (3d Cir. 2016) (alterations in original) (quoting *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013)). Even where an agreement incorporates the AAA Rules, a contract might still otherwise muddy the clarity of the parties' intent to delegate. For example, in *Chesapeake Appalachia*, we held that the mere incorporation of unspecified AAA rules did not demonstrate an intent to delegate arbitrability in a class action. We explained that finding clear and unmistakable evidence in that case required jumping from 1) the contract, to 2) the reference to unspecified AAA rules, to 3) the AAA Commercial Rules and, lastly, to 4) the AAA Supplementary rules, which ultimately vested an arbitrator with the authority to decide class arbitrability. 809 F.3d at 761. But Silva's contract requires no such "daisy-chain" of inferences. *Id.*

3. Although it is not clear from the record that Silva lacks sophistication, we will assume as much.

constitutes 'clear and unmistakable' evidence of the parties' intent [to delegate arbitrability]."); *see also McGee v. Armstrong*, 941 F.3d 859, 863, 865-66 (6th Cir. 2019); *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 548-49, 551-52 (5th Cir. 2018); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 767-69 (8th Cir. 2011). Here, the clarity of Silva's agreement shows the intent to delegate the arbitrability. So we will reverse the District Court's contrary conclusion and remand.

B. CNA's Ability to Enforce the Arbitration Clauses

The District Court held that CNA could not enforce Richardson's arbitration clause, because it was not a third-party beneficiary of Richardson's agreement with Sujol. CNA advances several interpretive arguments, paired with pleas for equitable estoppel, all aimed at allowing CNA to compel arbitration. Some of these issues arise for the first time on appeal; others arose before the District Court only in a cursory manner. All are best fully considered by the District Court in the first instance, a path that follows from our conclusions on the Silva agreement. Because we hold that Silva and Sujol agreed to delegate arbitrability, we likewise will vacate the District Court's determination that Silva's arbitration clause does not encompass his claim against Sujol. That leaves undecided whether CNA can also enforce Silva's arbitration clause, an issue not raised in this appeal. And since CNA's rights in both the Silva and Richardson agreements may benefit from discovery, *see Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764, 774-76

(3d Cir. 2013), we will vacate the District Court's Order regarding whether CNA is a third-party beneficiary of the Richardson contract.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED SEPTEMBER 27, 2018

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 18-532 (MAS) (TJB)

September 27, 2018, Decided;
September 27, 2018, Filed

ERICKA RICHARDSON, LUIS A. SILVA,

Plaintiffs,

v.

COVERALL NORTH AMERICA, INC., SUJOL, LLC, ABC CORPS. 1-10, JANE & JOHN DOES 1-10,

Defendants.

MEMORANDUM OPINION

SHIPP, District Judge

This matter comes before the Court on Defendants Coverall North America, Inc. ("CNA") and Sujol, LLC d/b/a Coverall of Southern, NJ's ("Sujol") (collectively, "Defendants") Joint Motion to Stay this Action Pending Mediation and Arbitration. (ECF No. 12.) Plaintiffs Ericka Richardson ("Richardson") and Luis Silva ("Silva")

(collectively, "Plaintiffs") filed opposition (ECF No. 17) and Defendants replied (ECF No. 22).[1] Plaintiffs also submitted supplemental authority (ECF Nos. 33, 37) to which Defendants responded (ECF No. 35) and provided additional supplemental authority (ECF No. 34). The Court heard oral argument on June 22, 2018 (ECF No. 39) and the parties filed supplemental post-argument submissions (ECF Nos. 41, 42, 43), The Court has carefully considered the parties' positions and, for the reasons set forth below, Defendants' motion is GRANTED IN PART and DENIED IN PART.

I. Background

This putative class action arises out of two purported Franchise Agreements that Richardson and Silva entered into with Sujol. CNA is not a party to either Agreement. (Defs.' Moving Br. 9-12, ECF No. 12-1; Defs.' Reply Br. 5, ECF No. 22.)

According to Plaintiffs, Defendants employ workers to provide cleaning services across the country. (Compl. ¶ 10, ECF No. 1-2.) The workers are required to sign franchise agreements that classify them as independent contractors. (*Id.* ¶ 11.) Plaintiffs allege, however, that Defendants exercise such significant control over the

1. Also pending before the Court is Plaintiffs' Motion for Leave to File a Sur-Reply Brief in Further Opposition to Defendants' Joint Motion to Stay this Action Pending Mediation and Arbitration. (ECF No. 27.) This motion is GRANTED. The Court will consider all arguments before the Court (*see* ECF Nos. 27 and 30) that it finds relevant to the resolution of the motion.

workers that they are actually employees. (*Id.* ¶ 14.) For example, Plaintiffs allege that Defendants oversee their work, negotiate directly with customers, reassign business as Defendants see fit, and retain the right to terminate employees. (*Id.* ¶ 14.) Plaintiffs filed this lawsuit in New Jersey Superior Court alleging that they are employees—not independent contractors—and are therefore entitled to the protections of the New Jersey Wage Payment Law ("NJWPL"). Plaintiffs claim that Defendants misclassified them as independent contractors, charged them for a job, and took unlawful deductions from their wages in violation of N.J.S.A. § 34:11-4.4 *et. seq.* (Compl. ¶ 35.) Defendants removed the action to this Court on January 12, 2018 pursuant to the Class Action Fairness Act (ECF No. 1) and filed the instant motion to "stay pending mediation and arbitration." (ECF No. 12.)

Defendants argue that because the Agreements in question contain mandatory mediation and arbitration provisions and class-action waivers, the Court should stay this matter until the conclusion of individual arbitration. (Defs.' Moving Br. 1-3, ECF No. 12-1.) Defendants assert that the issue of arbitrability should be determined by an arbitrator pursuant to the terms of each Agreement (*id.* at 4-6), but if the Court determines it should decide the threshold issue of arbitrability, it should stay the action pending mediation and arbitration (*id.* at 7).

In response, Plaintiffs argue that no valid agreement exists because the agreement required three signatures and "Coverall" never signed. (Pls.' Opp'n Br. 8-11, ECF No. 17.) Additionally, Plaintiffs argue that even if a valid

agreement exists, the Court should determine arbitrability because the Silva Agreement does not contain a delegation clause and the Richardson Agreement's arbitration clause is unconscionable. (*Id.* at 12, 17.) Finally, Plaintiffs argue that their statutory NJWPL claims are outside the scope of the arbitration agreements, as their Agreements do not clearly cover these claims. (*Id.* at 27.)

II. Legal Standard

When a party files suit in district court "upon any issue referable to arbitration under an agreement in writing for such arbitration," the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. If a party, in accordance with its motion to compel arbitration, requests a stay, the court "[is] obligated under 9 U.S.C. § 3 to grant the stay once it decide[s] to order arbitration," and may not, instead, dismiss the matter. *Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 269 (3d Cir. 2004).

In order to compel arbitration, a court must determine that: "(1) a valid agreement to arbitrate exists, and (2) the particular dispute falls within the scope of the agreement." *Kirleis v. Dickie, McCainey & Chilcote, P.C.*, 560 F.3d 156, 160 (3d Cir. 2009) (citations omitted). Courts use state law principles governing contract formation to determine the existence of an agreement. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). A court seeking to determine whether a particular dispute falls within the scope of an arbitration agreement "is confined to ascertaining

whether the party seeking arbitration is making a claim which on its face is governed by the contract." *Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44, 55 (3d Cir. 2001) (citations omitted). Because federal policy favors arbitration, all doubts concerning the scope of an arbitration agreement should be resolved in favor of arbitration. *Id.*

III. Discussion

A. Validity of Agreements

Plaintiffs argue that no valid agreement exists because of the lack of a necessary signature. (Pls.' Opp'n Br. 11.) Specifically, Plaintiffs refer to a provision in the Franchise Agreements, drafted by Defendants, that states:

> AGREEMENT SHALL NOT BE VALID UNLESS SIGNED BY (i) FRANCHISEE, (ii) AN AUTHORIZED REPRESENTATIVE OF COVERALL'S REGIONAL OFFICE; AND (iii) A CORPORATE OFFICER AT COVERALL'S CORPORATE OFFICE.

(Silva Agreement 25,[2] ECF No. 12-3 (emphasis in original).)[3] On the signature page of each Agreement,

2. The Court cites to the pages of the Silva and Richardson Agreements using the pagination automatically generated by the ECF system.

3. The Richardson Agreement contains the same substance but slightly different language:

a representative of Sujol signed in the signature block designated for a representative of Coverall's Regional Office; however, no signature appears in the signature block designated for a Coverall corporate officer. (Silva Agreement 25; Richardson Agreement 25.) Defendants respond that the Agreements actually define "Coverall" as "Sujol." (Defs.' Reply Br, 5.)[4] According to Defendants, because the single signature of John Landolfi, President and CEO of Sujol, is actually sufficient for both signature lines (because Coverall corporate just meant Sujol corporate), his signature was sufficient to satisfy the requirement for both (ii) and (iii) of the provision. (*Id.*) In other words, Defendants argue that the Agreements do not explicitly require two distinct signatories, only the signature of an authorized regional representative and the signature of a corporate officer, who may be one and the same person. (*Id.*) In any event, Defendants argue that even if the Court were to find three signatures necessary to bind the parties to the Agreements, Plaintiffs waived their ability to challenge the Agreements on this ground now, after years of performing under the contracts and receiving the benefits of the Agreements. (*Id.* at 6.)

> THIS AGREEMENT SHALL NOT BE VALID UNLESS SIGNED BY (i) FRANCHISEE; (ii) AN AUTHORIZED REPRESENTATIVE OF COVERALL'S REGIONAL SUPPORT CENTER; AND (iii) AN OFFICER OF COVERALL.

(Richardson Agreement 25, ECF No. 12-4 (emphasis in original).)

4. "[B]oth agreements define the term "Coverall" to mean Defendant Sujol, *not* Defendant CNA. Therefore, when the Franchise Agreements refer to signatures from "Coverall's" regional and corporate offices, they are referring to Sujol, not CNA." (Defs.' Reply Br. 5 (internal citations omitted).)

The Court finds Defendants' argument persuasive. Both contracts clearly define the term "Coverall" as "Sujol, LLC" (Defs.' Moving Br. Ex. A at 2, ECF No. 12-3; Ex. B at 2, ECF No. 12-4), as acknowledged by Plaintiffs' briefing (Pls.' Opp'n Br. 6 n.2). Contractual definitions establish the meaning of terms within a contract. 5-24 *Corbin on Contracts* § 24.8. As the parties do not appear to contest that Sujol's President and CEO is a "corporate officer" and an "authorized representative" of Sujol's regional offices (Decl. of John Landolfi ¶¶ 1-2), the Court finds that the necessary signatures appear on the Agreements.[5]

B. Scope of Arbitration

Having found the existence of an Agreement, the threshold question is "whether the Court, as opposed to an arbiter, should determine the scope of the arbitrability provisions." *Espinal v. Bob's Discount Furniture, LLC*, No. 17-2854, 2018 U.S. Dist. LEXIS 83705, 2018 WL 2278106, at *5 (D.N.J. May 18, 2018). Defendants argue that both agreements delegate this responsibility to the arbitrator. (Defs.' Moving Br. 6, ECF No. 12-1; Defs.' Reply Br. 1-4, ECF No. 22.) Plaintiffs disagree and argue that the Silva Agreement does not have a delegation clause and that the Richardson Agreement's delegation clause is unconscionable. (Pls.' Opp'n Br. 12-25.)

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5. Further, even if a mandatory signature was missing, the Court agrees that Plaintiffs' performance would have waived their ability to challenge the signature requirement now. *See In re Score Bd., Inc.*, 238 B.R. 585, 592 (D.N.J. 1999) (citing *Selective Builders, Inc. v. Hudson City Sav. Bank*, 137 N.J. Super. 500, 349 A.2d 564 (N.J. Super. Ch. Div. 1975)).

Appendix B

1. Silva Agreement

a. Delegation of Arbitrability to the Arbitrator

"Although the FAA expresses a national policy favoring arbitration, the law presumes that a court, not an arbitrator, decides any issue concerning arbitrability." *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 137 A.3d 1168, 1177 (N.J. 2016) (citation omitted). "[T]o overcome the judicial-resolution presumption, there must be 'clea[r] and unmistakabl[e]' evidence 'that the parties agreed to arbitrate arbitrability.'" *Id.* (quoting *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)).

The Silva Agreement reads:

> all controversies, disputes or claims between Coverall . . . and Franchisee . . . arising out of or related to the relationship of the parties, this Agreement, any related agreement between the parties, and/or any specification, standard or operating procedure of Coverall, including those set forth in the Coverall Policy and Procedure Manual . . . shall be submitted promptly for arbitration.
>
> (1) Arbitration shall be subject to the Federal Arbitration Act and, except as otherwise provided in this agreement or agreed upon by the parties, the then current Rules of the American Arbitration Association for

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Commercial Arbitration.

. . .

(Silva Agreement ¶ 21(A).)

Defendants argue that the reference to "the then current Rules of the [AAA] for Commercial Arbitration" requires that arbitrability be resolved by an arbitrator. (Defs.' Moving Br. 5.) Plaintiffs, however, argue that under *Morgan*, the incorporation of these rules does not clearly and unmistakably delegate arbitrability to the arbitrator. (Pls.' Opp'n Br. 13.)[6] The Court agrees.

Defendants emphasize language from the Third Circuit where the Court, without addressing this issue, noted that "[v]irtually every circuit to have considered the issue has determined that incorporation of the [American Arbitration Association] rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763 (3d Cir. 2016) (citations omitted). As a district court within this Circuit noted, however, in evaluating the Third Circuit's statement, "this apparent consensus among the circuits is not as clear as it seems." *Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 427-29 (E.D. Pa. 2016). Not only

6. Plaintiffs also argue that the Richardson Agreement is unenforceable because it violates the National Labor Relations Act. (Pls.' Opp'n Br. 26, ECF No. 17.) The Supreme Court, however, has since resolved this issue in contradiction with Plaintiffs' position, rendering the argument moot. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018).

is this an open question in our Circuit, "[n]early every circuit to have addressed the issue . . . addressed the question in the context of arbitration agreements entered into by organizations, not unsophisticated individuals." *Id.* (collecting cases). This has caused splits among the district courts within circuits that have "resolved" the issue because the courts are unsure of how to treat such a reference in the context of unsophisticated parties. *Id.* (discussing split among district courts in Ninth Circuit).

Other Circuits have expressed doubt about their own decisions when it comes to unsophisticated parties. Notably, the First Circuit, *when evaluating a Coverall Franchise Agreement*, expressed doubt that a cross-reference to the rules of the American Arbitration Association is clear and unmistakable evidence that the parties intended to arbitrate disputes over arbitrability where the plaintiffs were alleged to be "far from sophisticated business men and women." *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 12 (1st Cir. 2009). While the First Circuit felt limited by precedent ("[i]f the matter were completely open in this circuit, we are not certain of the outcome"), this Court is not so constrained. *Awuah*, 554 F.3d at 10-11.

The Court finds *AllState* persuasive. A "cross-reference to a set of arbitration rules containing a provision that vests an arbitrator with the *authority* to determine his or her own jurisdiction does not automatically constitute clear and unmistakable evidence that the parties intended to arbitrate threshold questions of arbitrability—at least where those parties are unsophisticated." *Allstate Ins. Co.*, 171 F. Supp. 3d at 428 (emphasis added) (footnote omitted). This is not the type of clear and unmistakable evidence

required to effectively delegate the issue of arbitrability. As the *AllState* court noted, it is already a difficult proposition to find that a boilerplate arbitration clause is "clear and unmistakable evidence of an unsophisticated party's intentions." *Id.* at 429 (footnote omitted). To allow the boilerplate to incorporate another forty pages of arbitration rules "is tantamount to inserting boilerplate inside of boilerplate." *Id.* "[T]o conclude that a single provision contained in those rules amounts to clear and unmistakable evidence of an unsophisticated party's intent would be to take 'a good joke too far.'" *Id.* (citing *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948)). "[S]ilence or ambiguity in an agreement does not overcome the presumption that a court decides arbitrability," *Morgan*, 225 N.J. at 304, and the Court finds this cross-reference to the AAA rules to be exactly the type of ambiguity that is insufficient to overcome the presumption. As to the Silva Agreement, therefore, the Court must determine the issue of arbitrability.

b. Scope of Arbitration Provision

The Court must next determine whether Silva's statutory claims fall within the scope of the arbitration provision. The Third Circuit recently articulated a three-step test to determine the arbitrability of *New Jersey statutory claims. Moon v. Breathless Inc.*, 868 F.3d 209, 214 (3d Cir. 2017). In *Moon*, the Third Circuit analyzed three New Jersey Supreme Court cases to determine the arbitrability of the plaintiffs statutory claims.[7] The

7. The Third Circuit in *Moon* analyzed three decisions from the New Jersey Supreme Court that interpreted arbitration agreements and their scope. In *Garfinkel v. Morristown Obstetrics*

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Agreement: (1) "must identify the general substantive area that the arbitration clause covers"; (2) "must reference the types of claims waived by the provision"; and

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& Gynecology Assocs., 168 N.J. 124, 773 A.2d 665, 672 (N.J. 2001), the New Jersey Supreme Court found that an arbitration provision in an employment contract covering "any controversy or claim arising out of, or relating to, this Agreement or the breach thereof" was insufficient to cover plaintiff's statutory claims under the New Jersey Law Against Discrimination. *Id.* at 668, 672. The court found the lack of reference to statutory claims and the language limiting the scope to claims "arising out of or related to this agreement" was particularly relevant to its finding that the plaintiff did not clearly agree to arbitrate statutory claims. *Id.* On the other hand, the following year, in *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 800 A.2d 872, 883 (N.J. 2002), the New Jersey Supreme Court found that statutory claims were within the scope of an arbitration agreement that read, "I AGREE TO WAIVE MY RIGHT TO A JURY TRIAL IN ANY ACTION OR PROCEEDING RELATED TO MY EMPLOYMENT WITH [EMPLOYER]. I UNDERSTAND THAT I AM WAIVING MY RIGHT TO A JURY TRIAL VOLUNTARILY AND KNOWINGLY, AND FREE FROM DURESS OR COERCION." *Id.* at 875. The court found that plaintiffs' statutory claims were subject to arbitration because the contract contained no language limiting the scope to disputes about the agreement and the wording provided sufficient notice that the statutory claims would be resolved through arbitration. *Id.* at 883-84. Most recently, in *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430, 99 A.3d 306, 315 (N.J. 2014), a dispute between a customer and a service provider, the New Jersey Supreme Court reiterated the prior holdings and found that an arbitration agreement covering claims "related to this Agreement or related to any performance of any services related to this Agreement" did not establish that plaintiff agreed to arbitrate statutory claims because "the wording of the service agreement did not clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue statutory claims in court." *Id.* at 310, 316.

(3) "must explain the difference between arbitration and litigation" so that it clearly and unambiguously establishes "that there is a distinction between resolving a dispute in arbitration and in a judicial forum." *Id.* (internal citations omitted). "[T]he clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." *Id.* (quoting *Atalese*, 99 A.3d at 315-16).

Plaintiffs argue that the Silva Agreement is silent as to statutory claims and, therefore, Silva's claims cannot be submitted for arbitration. (Pls.' Opp'n Br. 27.) Additionally, Plaintiffs argue that the Silva Agreement fails to explain what arbitration is under *Atalese*. (*Id.* at 31.) Defendants respond that the plain language of the agreement encompasses Plaintiffs' statutory claims and that the Federal Arbitration Act ("FAA") preempts the New Jersey state law as it applies to arbitration agreements. (Defs.' Reply Br. 11.)

Defendants rely on *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017), to argue that the New Jersey requirements impermissibly restrict arbitration provisions. In *Kindred*, the Supreme Court invalidated a Kentucky law that limited the ability of a power of attorney to enter into an arbitration agreement. Under the law, "a power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so." *Kindred*, 137 S. Ct. at 1426 (emphasis in original). The Supreme Court found that the law discriminated against

arbitration agreements because they were not "on equal footing with all other contracts." *Id.* at 1424 (internal citations omitted).

Defendants argue that the third *Moon* factor, which requires that the agreement explain the difference between arbitration and litigation, is impermissibly anti-arbitration under *Kindred*. (Defs.' Reply Br. 11-14.)[8] The Court disagrees. In *Kindred*, the Court found that an otherwise valid general power of attorney, without any limitation, was still ineffective to enter into an arbitration agreement without a specific authorization. Here, the New Jersey courts are simply ensuring that mutual assent—a requirement of any valid agreement—exists when a party waives his or her rights, including when agreeing to arbitration. *Atalese*, 99 A.3d at 313-14. Unlike the requirement at issue in *Kindred*, New Jersey's requirement goes to a more fundamental question of contract formation. *Id.* at 313 ("The requirement that a contractual provision be sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right is not specific to arbitration provisions. Rather, under New Jersey law, any contractual waiver-of-rights provision must reflect that [the party] has agreed clearly and unambiguously to its terms.") (internal quotation omitted) (collecting cases). "Arbitration clauses—and other contractual clauses—will pass muster when phrased in

8. Recognizing that *Moon* is the controlling Third Circuit precedent and that *Moon* was decided after *Kindred*, Defendants argue that the issue of preemption is still open in this Circuit because the parties in *Moon* did not argue, and the Court did not analyze, whether the FAA preempts New Jersey's requirement.

plain language that is understandable to the reasonable consumer." *Id.* at 314. The Court, accordingly, finds that the New Jersey requirement is not preempted by the FAA and will next consider whether the arbitration provision covers Plaintiffs' statutory claims.

The Silva Agreement provides that claims "arising out of or related to the relationship of the parties, this Agreement, any related agreement between the parties, and/or any specification, standard operating procedure of Coverall" must be submitted to arbitration. (Silva Agreement ¶ 21 (A).) This language limits its scope to the relationship and agreements between the parties and is silent as to the parties' statutory rights. *See Espinal*, 2018 U.S. Dist. LEXIS 83705, 2018 WL 2278106, at *6-9. As discussed above, New Jersey contract law requires that all waiver of rights clauses must clearly and unambiguously express in plain language that a party is waiving its rights. In the case of arbitration, this language, for instance, might explain that the plaintiff is giving up her right to bring a claim in court. The Silva Agreement does not provide any plain language explanation of the purpose of this clause or explain that Silva was relinquishing certain rights by signing the agreement.[9] The Court,

9. Defendants argue, in response to Plaintiffs' argument that the agreement is unconscionable, that Plaintiffs received FTC disclosure documents "about two weeks before they signed their Franchise Agreements" and the disclosures explain the consequences of the arbitration clause. The disclosure documents, which Defendants do not allege were read or signed by Plaintiffs, read "THE FRANCHISE AGREEMENT REQUIRES THAT ALL DISAGREEMENTS BE RESOLVED BY BINDING

consequently, finds that the Silva Agreement did not adequately put Plaintiff on notice that she was waiving her statutory rights. Defendants' motion as to Silva, accordingly, is denied.

ARBITRATION AND NOT IN A COURT OF LAW. THIS MEANS THAT YOU AGREE YOU ARE NOT ELIGIBLE FOR TRIAL BY JURY IN A COURT OF LAW AND YOU FURTHER WAIVE THE RIGHT TO PROCEED AS A CLASS ACTION." (Defs.' Reply Br. 8 (citing Landolfi Decl. ¶¶ 4-5 Ex. A.)) First, the Court notes that there is no indication this document was signed or otherwise acknowledged. Second, even if it were, the Franchise Agreement itself expressly disclaims any representation made in another document:

> This is the full agreement of the parties. Any matter which is not actually written down and included in this document is not a term of this Agreement. To avoid any later misunderstanding about the exact terms of the Agreement, each Party affirms, by signing this Agreement, that it has not relied on any comment, promise, or representation not actually included in this Agreement. By signing this Agreement, the parties mutually agree that no evidence shall be admitted in any proceeding as to the existence of any term or promise claimed to be a part of the Agreement unless that term is explicitly stated within the Agreement. *DO NOT SIGN THIS AGREEMENT IF YOU ARE RELYING UPON ANY REPRESENTATION OR PROMISE NOT STATED IN THIS AGREEMENT.*

(Silva Agreement ¶ 24 (emphasis in original).) Defendants, the drafters of the document, cannot rely on strict language when it benefits them yet also ask the Court to consider extraneous documents provided to Plaintiffs, in direct contravention of the contractual language, to cure the deficiencies in their arbitration provision.

2. Richardson Agreement

The Richardson Agreement contains a similar reference to the AAA rules (Richardson Agreement ¶ 26(A), ECF No. 12-4), which is insufficient for the reasons discussed above. In addition, however, the Richardson Agreement also contains the following provision:

> Except as otherwise provided in this Agreement, all controversies, disputes or claims . . . arising out of or related to this Agreement or the validity of this Agreement or any provision thereof (including this arbitration agreement, the *validity and scope of which Coverall and Franchisee acknowledge and agree is to be determined by an arbitrator, not a court*), . . . shall be submitted promptly for binding arbitration.

(Richardson Agreement ¶ 26(A) (emphasis added).)

The Richardson agreement, therefore, contains language delegating the issue of arbitrability to the arbitrator, not a court. Plaintiffs argue, however, that the provision is unconscionable. (Pls.' Opp'n Br. 12-25.) Arbitration provisions "maybe invalidated by 'generally applicable contract defenses, such as fraud, duress, *or unconscionability*.'" *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010) (emphasis added) (quoting *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)). "The defense of unconscionability, specifically,

calls for a fact-sensitive analysis in each case." *Delta Funding Corp. v. Harris*, 189 N.J. 28, 912 A.2d 104, 111 (N.J, 2006). "Courts have generally recognized that the doctrine of unconscionability involves both 'procedural' and 'substantive' elements." *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003) (citations omitted). Procedural unconscionability "is generally satisfied if the agreement constitutes a contract of adhesion." *Id.* Substantive unconscionability "refers to terms that unreasonably favor one party to which the disfavored party does not truly assent." *Id.* "Courts generally have applied a sliding-scale approach to determine overall unconscionability, considering the relative levels of both procedural and substantive unconscionability." *Delta*, 912 A.2d at 111 (citations omitted).

Any unconscionability challenge to an arbitration provision with a delegation clause must be limited to the delegation clause itself. *See Rent-A-Center W.*, 561 U.S. at 73. This is because, if the delegation clause is valid, a challenge to the broader arbitration agreement is an issue for the arbitrator to decide. *Id.* at 72. Here, Richardson argues that the delegation clause is both procedurally and substantively unconscionable.

a. Procedural Unconscionability

Procedural unconscionability pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language. *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999). Richardson argues that the delegation clause is procedurally unconscionable

because: (1) it was within a contract of adhesion; (2) the delegation clause was obscurely buried in the arbitration agreement; and (3) her relative lack of sophistication left her with inferior bargaining power under the pressure of economic compulsion. (Pls.' Opp'n Br. 18-22.) Defendants respond that these are attacks on the broader arbitration provision, not the delegation clause, and, in any event, the arguments fail because: (1) Richardson was not under compulsion to buy the franchise; (2) the print of the Agreement was the same size and format; and (3) Plaintiffs received the disclosure document advising them that they waive the right to a jury trial two weeks before signing the Franchise Agreements. (Defs.' Reply Br. 4, 7-8.)

The Court does not find the delegation clause to be procedurally unconscionable. A clause is not procedurally unconscionable simply because it does not print the arbitration provision more prominently than other provisions. *Green Tree Fin. Corp.*, 183 F.3d at 182. While the Court is sympathetic to Richardson's argument that the parties were of unequal bargaining power, she "desperately needed a job," and that the "degree of economic compulsion" motivating her to accept the delegation clause was strong (Pls.' Opp'n Br. 19), considering these issues in light of all the other arguments, the Court is not persuaded that the agreement is procedurally unconscionable.

b. Substantive Unconscionability

Richardson also argues that the clause is substantively unconscionable because: (1) it contains a cost-splitting

provision which would have a "chilling effect" on someone of modest means contemplating an action; and (2) it requires the losing party to pay the prevailing party's attorney's fees which would deter the exercise of rights because someone contemplating a claim could be forced to incur thousands of dollars in the other side's fees just to to arbitrate arbitrability. (*Id.* at 22-25.)

Defendants respond that Richardson cannot establish substantive unconscionability because cost-splitting and attorney's fees provisions are permitted by New Jersey law and cost-splitting provisions are a part of the AAA rules. (Defs.' Reply Br. 9-10.) These issues, however, with the exception of the cost-splitting provision, are arguments about the arbitration provision generally—not the delegation clause. New Jersey law clearly permits cost-splitting and attorney's fees provisions in arbitration agreements. *See N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 730 A.2d 843, 848-49 (N.J. 1999). As such, the Court cannot find that the delegation clause is substantively unconscionable.

The Court, therefore, finds the delegation clause to be valid, with sufficiently clear language to establish that the parties intended an arbitrator decide the issue of arbitrability. The Court, however, limits this delegation of arbitrability to the dispute between Richardson and Sujol. In connection with the argument that no valid agreement exists because of the lack of a signature from CNA, Defendants argue that only Sujol is a party to the Agreement. The Court found the argument persuasive with respect to the validity issue, and also finds the

argument relevant here. The Richardson Agreement specifically provides that "Franchisee and Coverall agree that arbitration shall be conducted on an individual, not a class wide basis, and that *only Coverall* (and its officers, directors, agents, and/or employees) *and Franchisee* (and Franchisee's owners, officers, directors and/or guarantors) *may be parties to any arbitration proceeding*." (Richardson Agreement ¶ 26(B) (emphasis added).) As Defendants are the drafters of the Agreement, and the proponents of the argument that "Coverall" means "Sujol" only, the Court finds that the delegation of arbitrability is limited to Sujol. As to Richardson's claims against Coverall, therefore, the Court will determine the scope of the arbitration agreement, and, as CNA is not a party, or third party beneficiary, of the arbitration agreement, the Court finds that Richardson's claims against CNA are not subject to arbitration.

Defendants argue that CNA is a "third party beneficiary" of the agreement and can therefore compel arbitration even as a non-signatory. (Defs.' Moving Br. 9-12.) "Generally, arbitration agreements are enforceable only by signatories." *Jairett v. First Montauk Sec. Corp.*, 153 F. Supp. 2d 562, 581 (E.D. Pa. 2001) (citing *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1296 (3d Cir. 1996). Notwithstanding this general rule, however, a non-signatory may be able to compel arbitration under traditional principles of contract and agency law. *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194 (3d Cir. 2001). Under New Jersey law, the parties' intent is the key factor in determining whether a party is a third-party

beneficiary to a contract. *Kanoff v. Better Life Renting Corp.*, No. 03-2363, 2008 U.S. Dist. LEXIS 10994, 2008 WL 442145, at *5 (D.N.J. Feb. 14, 2008). "Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered." *Shadowbox Pictures, LLC v. Glob. Enters., Inc.*, No. 05-2284, 2006 U.S. Dist. LEXIS 1135, 2006 WL 120030, at *8 (E.D, Pa. Jan. 11, 2006) (citing *Jones v. Aetna Cas. & Sur. Co.*, 26 Cal. App. 4th 1717, 33 Cal. Rptr. 2d 291, 296 (Cal. Ct. App. 1994)); *see also Mut. Benefit Life Ins. Co. v. Zimmerman*, 783 F. Supp. 853, 866-67 (D.N.J. 1992) (The contract must "be made for the benefit of said third party within the intent and contemplation of the contracting parties. Unless such a conclusion can be derived from the contract or surrounding facts, a third party has no right of action under that contract despite the fact that he may derive an incidental benefit from its performance.").

In support of their argument that CNA is a third party beneficiary, Defendants argue that the Agreements recognize that Sujol and CNA are parties to a Master Franchise Agreement. (Defs.' Moving Br. 11-12.) This, however, is irrelevant to whether Plaintiffs and Sujol intended CNA to be a beneficiary of their contract. Next, Defendants argue that Plaintiffs' allegations target both Sujol and CNA without distinction, so that the claims are inevitably intertwined. (Defs.' Moving Br. 11.) This, again, however, is immaterial to the third-party beneficiary analysis. Finally, Defendants point to several places

where the Agreement "references . . . CNA by name." (*Id.*) For example, Defendants point to provisions that explain Coverall marks are the property of CNA, that CNA licenses the use of its name and mark, and that Sujol is sub-licensing the use of CNA's trademarks and system. (*Id.* at 11-12.) These references, however, are not the type of references that would evidence intent to make CNA a third-party beneficiary of the contract. *See, e.g., Torres v. Simpatico, Inc.*, 995 F. Supp. 2d 1057, 2014 WL 409157, at *5 (E.D. Mo. 2014) (finding third party beneficiary status where, among other provisions benefiting third party non-signatories, the portion of the agreement that contained the arbitration provision recited that "it is intended to benefit and bind certain third party non-signatories"). There is no clear evidence here that would allow the Court to find that the parties intended CNA to be a third-party beneficiary of the agreement. Further, even if CNA were a third-party beneficiary, the strict contractual language limiting the ability of any third party to participate in arbitration undermines Defendants' argument that CNA be pennitted to compel arbitration.[10] The Court, therefore,

10. To the extent this motion also requested that the Court compel mediation, Defendants have not set forth any case law that would suggest that is an appropriate remedy in this situation or at this time. To the extent that Defendants believe Plaintiffs breached the Agreements by failing to first submit the dispute to mediation, such a claim can form the basis for a breach of contract claim, but such a claim is not asserted (presumably because Defendants believe such a dispute must be submitted to an arbitrator). Further, if it was asserted, there is no evidence that the remedy of specific performance on a breach of contract claim is appropriate in this context. Unlike arbitration, which enjoys a heightened and deferential status pursuant to the FAA, the parties have not cited any authority or cases that support compelling mediation.

compels arbitration between Richardson and Sujol on the issue of whether the statutory dispute is covered by the arbitration provision, and stays this matter pending the outcome of the arbitration.

IV. Conclusion

For the reasons set forth above, Defendants' Joint Motion to Stay this Action Pending Mediation and Arbitration is granted in part and denied in part. An order consistent with this Opinion will be entered.

/s/ Michael A. Shipp
Michael A. Shipp
United States
District Judge

Dated: September 27, 2018

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JUNE 30, 2020

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-3393

ERICKA RICHARDSON; LUIS A. SILVA, On behalf of themselves and all other similarly situated persons

v.

COVERALL NORTH AMERICA, INC.; SUJOL, LLC, DBA Coverall of Southern, NJ; ABC CORPS. 1-10; JANE & JOHN DOES 1-10

SUJOL, LLC, DBA Coverall of Southern, NJ,

Appellant in Appeal No. 18-3393

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 3:18-cv-00532)
District Judge: Hon. Michael A. Shipp

PETITION FOR REHEARING

Appendix C

BEFORE: SMITH, *Chief Judge*, and MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and FUENTES,* *Circuit Judges*

The petition for rehearing filed by Appellees Ericka Richardson and Luis A. Silva in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the Court *en banc*. It is now hereby **ORDERED** that the petition is **DENIED**.

BY THE COURT,

/s/ Paul B. Matey
Circuit Judge

Dated: June 30, 2020

* Judge Fuentes's vote is limited to panel rehearing only.

APPENDIX D — STATUTES AND REGULATIONS 9 U.S.C.A. § 2, 9 U.S.C.A. § 3, 9 U.S.C.A. § 4 AND R-7. JURISDICTION

9 U.S.C.A. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

Currentness

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

Notes of Decisions (3702)

9 U.S.C.A. § 2, 9 USCA § 2
Current through P.L. 116-158.

Appendix D

9 U.S.C.A. § 3

§ 3. Stay of proceedings where issue therein referable to arbitration

Currentness

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

Notes of Decisions (889)

9 U.S.C.A. § 3, 9 USCA § 3
Current through P.L. 116-158.

Appendix D

9 U.S.C.A. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

Currentness

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in

default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

Notes of Decisions (1252)

9 U.S.C.A. § 4, 9 USCA § 4
Current through P.L. 116-158.

Appendix D

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.