APPENDIX

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADAN ORTIZ, an individual and on behalf of all others similarly situated, *Plaintiff-Appellee*, v. RANDSTAD INHOUSE SERVICES, LLC, a Delaware limited liability company; RANDSTAD NORTH AMERICA, INC., a Delaware corporation, *Defendants-Appellants*, and XPO LOGISTICS, INC., a Delaware corporation; XPO LOGISTICS, LLC, a Delaware corporation; XPO LOGISTICS SUPPLY CHAIN, INC.; DOES, 1 through 50, inclusive, *Defendants*.	No. 23-55147 D.C. No. 5:22-cv-01399-TJH-SHK OPINION

ADAN ORTIZ, an individual and on behalf of all others similarly situated, *Plaintiff-Appellee*, v. XPO LOGISTICS, INC., a Delaware corporation; XPO LOGISTICS, LLC, a Delaware corporation; XPO LOGISTICS SUPPLY CHAIN, INC., *Defendants-Appellants*, and RANDSTAD INHOUSE SERVICES, LLC, a Delaware limited liability company; RANDSTAD NORTH AMERICA, INC., a Delaware corporation; DOES, 1 through 50, inclusive, *Defendants*.	No. 23-55149 D.C. No. 5:22-cv-01399-TJH-SHK

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted December 4, 2023
Pasadena, California

Filed March 12, 2024

Before: Carlos T. Bea, Milan D. Smith, Jr., and Lawrence
VanDyke, Circuit Judges.

Opinion by Judge VanDyke

SUMMARY*

Arbitration

In this consolidated interlocutory appeal, the panel affirmed in part the district court's order denying appellants' motion to compel arbitration, insofar as it concluded that the transportation worker exemption precluded the application of the Federal Arbitration Act ("FAA") to the parties' arbitration agreement.

Plaintiff sued his former employers, appellants Randstad Inhouse Services, LLC, and GXO Logistics Supply Chain, Inc., and appellants moved to compel arbitration pursuant to an arbitration agreement in the employment contract. During the pertinent period of employment, plaintiff worked at a California warehouse facility operated by GXO, which received Adidas watches, apparel, and shoes from mostly international locations. The district court declined to compel arbitration. Appellants contend that the arbitration agreement is enforceable under the FAA.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that plaintiff belonged to a class of workers engaged in foreign or interstate commerce and was therefore exempted from the FAA. The panel considered the two-step analysis in *Saxon v. Southwest Airlines Co.*, 596 U.S. 450, 455-59 (2022). Applying *Saxon*'s first step, the panel considered plaintiff's job description and held that the district court properly concluded that plaintiff's job duties included exclusively warehouse work. Applying *Saxon*'s second step, the panel upheld the district court's conclusion that plaintiff belonged to a class of workers who played a direct and necessary role in the free flow of goods across borders and actively engaged in the transportation of such goods. Plaintiff's job description met all the benchmarks laid out in *Saxon* for plaintiff to qualify as an exempt transportation worker.

The panel rejected appellants' arguments to the contrary. An employee is not categorically excluded from the transportation worker exemption simply because he performs duties on a purely local basis. Though plaintiff moved goods only a short distance across the warehouse floor and onto storage racks, he nevertheless moved them, and with the direct purpose of facilitating their continued travel through an interstate supply chain. Finally, the panel held that an employee need not necessarily be employed by an employer in the transportation industry to qualify for the transportation worker exemption.

The panel addressed state law issues in a concurrently filed memorandum disposition.

COUNSEL

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Thomas A. Segal (argued), Chaim S. Setareh, and Farrah Grant, Setareh Law Group, Beverly Hills, California, for Plaintiff-Appellee.

OPINION

VANDYKE, Circuit Judge:

After several stints of temporary employment with Randstad Inhouse Services, LLC, and GXO Logistics Supply Chain, Inc., Adan Ortiz sued his former employers.[1] Pursuant to the arbitration agreement in Ortiz's employment contract, the employers moved to compel arbitration. Though the agreement covers Ortiz's claims, which generally relate to the conditions of his employment, Ortiz opposed arbitration on the grounds that the agreement cannot be enforced under either federal or state law. The district court agreed with Ortiz and declined to compel arbitration.

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[1]Ortiz sued several entities affiliated with Randstad Inhouse Services and several affiliated with GXO Logistics. At the time of his employment, GXO Logistics operated as XPO Logistics, and many of the affiliated entities retain the "XPO" label. This opinion refers to the Randstad defendants collectively as "Randstad" and the XPO/GXO defendants collectively as "GXO." Where the distinction between the two is immaterial, it refers to the defendants collectively as "the employers."

In this consolidated interlocutory appeal, the employers contend that the agreement is enforceable under the Federal Arbitration Act ("FAA") because Ortiz does not qualify for the FAA's transportation worker exemption. *See* 9 U.S.C. § 1. In the event the FAA does not apply, the employers argue that the agreement contemplates using state substantive law of arbitrability (here, California's) as an alternative means of enforcement. This opinion addresses only the applicability of the FAA.[2]

To determine whether the FAA applies, we must decide whether Ortiz belonged to a "class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, since such workers are exempted from the FAA. *Id.* Because we conclude that Ortiz is an exempt transportation worker, we affirm the district court's order insofar as it concluded that the FAA provides no basis to enforce the parties' arbitration agreement.

I.

Randstad is a staffing company. It hired Adan Ortiz three times: first from October 2011 to June 2013, again from August 2020 to February 2021, and finally from October to November 2021. During the second stint—the pertinent period of employment for present purposes—he worked at a California warehouse facility operated by GXO.

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[2]We address the state law issues—including (1) whether this court has interlocutory jurisdiction to decide whether state law applies on an alternative basis and (2) if so, whether the parties' agreement provides for such alternative enforcement—in a concurrently filed memorandum disposition.

GXO operates warehouse and distribution facilities for Adidas. The warehouse where Ortiz worked receives Adidas watches, apparel, and shoes from mostly international locations, including Asia, South America, and Central America. Products remain at the warehouse for anywhere from several days to a few weeks, after which they are shipped to end-use consumers and retailers in a variety of states.

GXO's role in the international supply chain for Adidas products is small but important. It receives and stores Adidas products after they arrive from international suppliers, then processes and prepares them for further distribution across state lines. GXO does not move Adidas products to or from its warehouse. Nor, as explained below, are GXO employees with Ortiz's job description responsible for unloading the products once they arrive or loading them when they are scheduled for departure. Those tasks—like every other step in the Adidas supply chain—are handled by other employees or entities.

Ortiz was employed by GXO as a "PIT / Equipment Operator." He described his duties as follows: (1) "unloading and picking up the packages and transporting them to the warehouse racks to organize them," (2) "transport[ing] the packages to the picking section of the warehouse," (3) "assisting Pickers in obtaining packages so they could be shipped out," and (4) "assist[ing] the Outflow Department to prepare packages to leave the warehouse for their final destination."

It is not entirely clear what Ortiz meant by "unloading ... the packages." GXO, for its part, asserted that PIT / Equipment Operators are not

responsible for unloading products from shipping containers after they arrive at the warehouse. "By the time the PIT / Equipment Operator handles Adidas products," a GXO employee familiar with the process explained, "they have already .. been unloaded at the [warehouse] by someone other than the PIT / Equipment Operator." Finding the record ambiguous as to whether Ortiz loaded or unloaded packages from shipping containers or not, the district court assumed for the sake of its analysis that Ortiz did not do so. We do the same.

When Ortiz was hired to work for GXO, he signed an arbitration agreement with Randstad. GXO was expressly designated as an intended third-party beneficiary of the agreement as a Randstad client to whom Ortiz "provide[d] services on assignment." The agreement applied to all claims "relat[ing] to [Ortiz's] recruitment, hire, employment, client assignments and/or termination including, but not limited to, those concerning wages or compensation, consumer reports, benefits, contracts, discrimination, harassment, retaliation, leaves of absence or accommodation for a disability." Finally, the agreement's choice-of-law clause expressed a preference for enforcement under the FAA, noting that the agreement "shall be governed by the Federal Arbitration Act" and that it "may be enforced … otherwise pursuant to the FAA."

Notwithstanding the arbitration agreement, Ortiz filed a class action in California state court in March 2022. The complaint alleges various violations of California labor law, all of which are covered by the broad language of the arbitration agreement. Randstad timely removed the case to federal court and

filed a motion to compel arbitration, which GXO joined.

The district court declined to compel arbitration. Relying on the Supreme Court's decision in *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022), and this court's opinion in *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), it concluded that the FAA did not apply because Ortiz qualified as an exempt "transportation worker."[3] Randstad and GXO each filed separate interlocutory appeals, which were briefed and argued on a consolidated basis.

II.

We have jurisdiction over the interlocutory appeal of an order denying a motion to compel arbitration pursuant to the FAA under 9 U.S.C. § 16(a)(1)(B). *Rittmann*, 971 F.3d at 909. Our review is de novo. *Id.*

III.

The FAA, which was enacted in "hostility of American courts to the enforcement of arbitration agreements," "compels judicial enforcement of a wide range of written arbitration agreements." *Circuit City Stores v. Adams*, 532 U.S. 105, 111 (2001). Though the FAA's pro-arbitration mandate is broad, its reach is not universal. Section 1, for example, exempts the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In

[3]It then concluded that the contract was ambiguous as to whether state law might apply in the alternative and construed that ambiguity against Randstad, the drafter. As noted above, we address that holding and related issues in a concurrently filed memorandum disposition.

keeping with the FAA's policy favoring arbitration, the Supreme Court has construed the residual clause in § 1 narrowly, applying it only to "contracts of employment of transportation workers." *Circuit City*, 532 U.S. at 119.

After *Circuit City*, questions remained about what an employee's job description must entail for that employee to qualify as an exempt "transportation worker." *See, e.g.*, *Rittmann*, 971 F.3d at 909 (considering whether an intrastate, last-mile delivery driver qualified as an exempt transportation worker). Especially considering the FAA's admonition that employees must be "engaged in foreign or interstate commerce" to qualify for the exemption, 9 U.S.C. § 1, employees like Ortiz, who do not transport products across great distances and interact with interstate commerce on a purely local basis, present a particularly difficult interpretive issue.

Fortunately, the Supreme Court recently confronted such a case in *Saxon v. Southwest Airlines Co.* Saxon worked for Southwest Airlines as a ramp supervisor. *Saxon*, 596 U.S. at 453. Like Ortiz, she did not cross state lines or transport goods across significant distances, and she played only a localized, supporting role in interstate commerce. *Id.* at 454, 462–63. To determine whether Saxon nevertheless qualified as an exempt transportation worker, the Court engaged in a two-step analysis. *Id.* at 455–59. First, the Court "defin[ed] the relevant 'class of workers' to which Saxon belong[ed]." *Id.* at 455. Then, it "determine[d] whether that class of workers is 'engaged in foreign or interstate commerce.'" *Id.*

At the first step, the Court considered Saxon's job description, which included "load[ing] and unload[ing] baggage, airmail, and commercial cargo on and off airplanes that travel across the country." *Id.* at 453; *see id.* at 456. In defining Saxon's class of workers, the Court considered the specific nature of her work, not her employer's status as a transportation company more generally. *Id.* at 456. Eschewing an "industrywide approach," it directed its "attention to 'the *performance* of work'" itself. *Id.* (quoting *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 541 (2019)). With that standard in mind, the Court concluded that Saxon "belong[ed] to a class of workers who physically load and unload cargo on and off airplanes on a frequent basis." *Id.*

At the second step, the Court disclaimed any strict requirement that a worker must personally transport goods interstate to qualify as a transportation worker. *See id.* at 457 (quoting *Balt. & Ohio Sw. R. Co. v. Burtch*, 263 U.S. 540, 544 (1924)) (considering it "too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it"). It then laid out a series of closely related standards detailing the required relationship between the class of workers and interstate commerce. First, "any such worker must at least play a direct and 'necessary role in the free flow of goods' across borders." *Id.* at 458 (quoting *Circuit City*, 532 U.S. at 121). Second, and "[p]ut another way," they must be "actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce." *Id.* Finally, workers who are "intimately involved with the

commerce (*e.g.*, transportation) of th[e] cargo" also qualify. *Id.*

Equally instructive are the categorical standards that *Saxon* declined to adopt. On one hand, the Court rejected Saxon's position that "virtually all employees of major transportation providers" are exempt. *Id.* at 461. On the other, it rejected Southwest's view that the provision applies only to "workers who physically move goods or people across foreign or international boundaries." *Id.* at 461–63.

Though the Court's different formulations of the test— direct and necessary, active engagement, and intimate involvement—all vary slightly, *Saxon*'s bottom line is that to qualify as a transportation worker, an employee's relationship to the movement of goods must be sufficiently close enough to conclude that his work plays a tangible and meaningful role in their progress through the channels of interstate commerce. Ultimately, the Court held that Saxon met the interrelated standards it had just pronounced because "when she is 'doing the work of unloading' or loading cargo from a vehicle carrying goods in interstate transit," "there could be no doubt that interstate transportation is still in progress,' and that [Saxon] is engaged in that transportation.'" *Id.* at 458–59 (quoting *Erie R. Co. v. Shuart*, 250 U.S. 465, 468 (1919)) (cleaned up). If the same can be said of Ortiz, then under *Saxon*, he too qualifies as an exempt transportation worker.

Saxon "recognize[d] that the answer will not always be so plain when the class of workers carries out duties further removed from the channels of interstate commerce or the actual crossing of borders." *Id.* at 457

n.2. In recent years, this court has dealt with at least three such cases: *Rittmann*, 971 F.3d 904; *Capriole v. Uber Technologies, Inc.*, 7 F.4th 854 (9th Cir. 2021); and *Carmona Mendoza v. Domino's Pizza, LLC*, 73 F.4th 1135 (2023), *petition for cert. filed* (U.S. Oct. 23, 2023) (No. 23-427). Unsurprisingly, the parties heavily engage with these cases in their briefs, and we consider each in turn.

In *Rittmann*, the court considered whether so-called "last mile" Amazon delivery drivers—contractors who deliver packages from a warehouse to end-use consumers on a predominantly intrastate basis—qualified for the exemption. 971 F.3d at 907. The panel concluded that they did, reasoning that workers may be "engaged in the movement of goods in interstate commerce, even if they do not cross state lines," *id.* at 915, because they "complete the delivery of goods that Amazon ships across state lines," *id.* at 917.[4]

Rittmann was decided before *Saxon*, and *Saxon* cites *Rittmann* as an example of a case in which the "answer will not always be so plain" because the workers in *Rittmann* were "further removed from ... the actual crossing of borders." 596 U.S. at 457 n.2.

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[4]Next came *Capriole*, a case involving Uber drivers, which approved of *Rittmann*'s analysis but distinguished its facts. 7 F.4th at 861 n.7. In *Capriole*, the court concluded that, unlike Amazon's last-mile delivery drivers, Uber drivers are not participants in "a single, unbroken stream of interstate commerce." *Id.* at 866–67 ("Uber stalwartly objects to any notion that interstate transportation is intrinsic to its service, and Plaintiffs have proffered no evidence undermining Uber's position.").

Carmona Mendoza, which followed *Rittmann*, was also decided for the first time before *Saxon*, but the Supreme Court vacated and remanded the first opinion in *Carmona Mendoza* for reconsideration in light of *Saxon*. *See Carmona Mendoza*, 73 F.4th at 1136 (detailing the appellate history). On remand, the panel in *Carmona Mendoza* again followed *Rittmann*, holding that "*Saxon* is not inconsistent, let alone clearly irreconcilable, with *Rittmann*, which continues to control [the] analysis." *Id.* at 1138–39. Therefore, it reaffirmed its prior conclusion that delivery drivers who make last-mile deliveries of pizza ingredients from Domino's supply centers to its franchisees' retail stores were exempt transportation workers. *Id.*

As *Saxon* notes, the questions raised by cases like *Rittmann* and *Carmona Mendoza*, which involved purely intrastate shipment of goods to the terminus of a supply chain, have not yet been settled by the Supreme Court, and the courts of appeals have reached different conclusions. In *Lopez v. Cintas Corp.*, for example, the Fifth Circuit considered whether local Cintas delivery drivers who pick up uniforms and deliver them to local customers fall under § 1's exemption. 47 F.4th 428, 430–32 (5th Cir. 2022) (citing *Rittmann*, 971 F.3d at 915–19). The Fifth Circuit said no, concluding that even though uniforms were sourced from out-of-state locations, "[o]nce the goods arrived at the Houston warehouse and were unloaded, anyone interacting with those goods was no longer engaged in interstate commerce." *Id.* at 433. And in *Hamrick v. Partsfleet, LLC*, the Eleventh Circuit reached the same conclusion as the Fifth, though it remanded the case to the district court to reconsider the issue using the correct standard. 1

F.4th 1337, 1351–52 (11th Cir. 2021) ("The district court concluded that the drivers fell within the transportation worker exemption because the goods at issue in this case originated in interstate commerce and were delivered, untransformed, to their destination. ... This was error.") (cleaned up).

But unlike *Rittmann*, *Carmona Mendoza*, *Lopez*, or *Hamrick*, this case does not concern last-mile delivery drivers. It presents no thorny questions about when the interstate transport of goods ends and the purely intrastate transport of the same goods begins. Nor does it involve an employee who handles goods at or near the logistical end of an interstate or international supply chain. Rather, as the following review of the district court's two-part *Saxon* analysis demonstrates, this case tracks *Saxon* in every important respect.

Regarding *Saxon*'s first step, the district court concluded that Ortiz's job duties included exclusively warehouse work: transporting packages to and from storage racks, helping other employees in obtaining packages so they could be shipped, and assisting the Outflow Department to prepare packages for their subsequent shipment. It rightly assumed that Ortiz was not involved in unloading shipping containers upon their arrival or loading them into trucks when they left the warehouse. It then properly defined Ortiz's class of workers by reference to his job description, as *Saxon* commands, and entirely without reference to GXO's line of business. The district court did not err at the first step.

And as to *Saxon's* second step, the district court correctly concluded that Ortiz's class of workers "play[ed] a direct and 'necessary role in the free flow of

goods' across borders" and "actively 'engaged in transportation'" of such goods. *Saxon,* 596 U.S. at 458 (quoting *Circuit City,* 532 U.S. at 121). Like Saxon, Ortiz handled Adidas products near the very heart of their supply chain. In each case, the relevant goods were still moving in interstate commerce when the employee interacted with them, and each employee played a necessary part in facilitating their continued movement.

For these reasons, Ortiz's job description meets all three benchmarks laid out in *Saxon.* Both Ortiz and Saxon fulfilled an admittedly small but nevertheless "direct and necessary" role in the interstate commerce of goods: Saxon ensured that baggage would reach its final destination by taking it on and off planes, while Ortiz ensured that goods would reach their final destination by processing and storing them while they awaited further interstate transport.

Both were also "actively engaged" and "intimately involved with" transportation: Saxon handled goods as they journeyed from terminal to plane, plane to plane, or plane to terminal, while Ortiz handled them as they went through the process of entering, temporarily occupying, and subsequently leaving the warehouse—a necessary step in their ongoing interstate journey to their final destination. *Id.* Both were actively engaged in the interstate commerce of goods. If Saxon is an exempt transportation worker, Ortiz is, too.

IV.

In response, the employers make multiple attempts to isolate Ortiz's job description from any discernable connection to the interstate transportation process. First, the employers emphasize Ortiz's purely

intrastate role as a warehouse worker, noting that he did not move goods anywhere but within the facility and did not load or unload them as they were transported to and from the facility. In their view, because Ortiz performed his duties on an entirely intrastate basis, his role did not relate to interstate transportation in any meaningful sense.

The employers are incorrect. If *Saxon* stands for anything, it is that an employee is not categorically excluded from the transportation worker exemption simply because he performs his duties on a purely local basis. In *Saxon*, the plaintiff's job description was physically confined to Chicago's Midway International Airport. 596 U.S. at 454. But that did not preclude the Court from concluding that she was sufficiently connected to interstate commerce. *Id.* at 463. *Saxon* is clear on this issue: what matters is not the worker's geography, but his work's connection with—and relevance to—the interstate flow of goods. *Id.* at 458.

To further illustrate this point, consider the following historical example. In late 1860, the short-lived but nationally famous Pony Express hit full stride. Nevada, with its 47 waystations and 417 miles of trail, sat right in the heart of the route. At maximum, riders rode the trail for 100 miles per shift, meaning that on average, at least five riders were needed to cross Nevada alone. Even though some of these riders would have crossed Nevada's territorial boundaries and others would not, all of them performed the same task (carrying the mail) using the same means (a horse) along the same route. There is no meaningful distinction between the interstate and intrastate riders, all of whom were "actively engaged in," "intimately involved with," and "play[ed] a direct

and necessary role" in transporting interstate the very same letters from east to west.[5] *Saxon*, 596 U.S. at 458. The mere fact that some riders' routes were confined entirely within Nevada's borders does not divorce their role from the task of interstate transportation, and concluding otherwise requires willful blindness to the broader supply chain. So too here. Ortiz is perfectly capable of participating in the interstate supply chain for Adidas products even though he fulfills his role entirely within one state's borders.

Second—and returning to our era of planes, trains, and automobiles—the employers argue that Ortiz's role is insufficiently connected to interstate transportation because he did not transport the goods across any appreciable distance. But *Saxon* forecloses this argument, too. As a baggage handler, Saxon carried airport baggage over only a relatively small distance as she unloaded it from the plane and onto the tarmac (or vice versa). *Saxon*, 596 U.S. at 454. The basic fact that Saxon moved the bags across only a small distance does not change that she moved the baggage as part of its interstate travel. Movement over a short distance is movement nonetheless. And more importantly, the distance also does not affect the nature of the task or its inherent connection to interstate commerce. Without airport tarmac staff to load and unload cargo, bags would not make it on or off planes, and the interstate commerce of baggage would immediately grind to a halt.

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[5]These historical facts were sourced from the National Pony Express Association and are available online at https://nationalponyexpress.org/historic-pony-express-trail/stations/.

The same is true of employees like Ortiz who move Adidas products around GXO's warehouse. Though Ortiz moved goods only a short distance across the warehouse floor and onto and off of storage racks, he nevertheless moved them. And not only did he move them, he did so with the direct purpose of facilitating their continued travel through an interstate supply chain. Without employees like Ortiz, Adidas products that arrived at GXO's warehouse would not be properly processed, organized, stored, or prepared for the next leg of their interstate journey. Indeed, as GXO itself readily admits, although its employees do not actively transport Adidas products themselves, its warehouses act as intermediary "warehouse and distribution facilities" where products are "receive[d]," "store[d]," and "processe[d]" for further "distribution to businesses or end consumers" in other states. That process—and Ortiz's undisputed role in directly facilitating it—is a necessary step in an unbroken foreign and interstate supply chain for Adidas products.

Third, the employers correctly note that not every connection to commerce will suffice, no matter how tenuous the connection may be. *See id.* at 462 (quoting *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 198 (1974)) ("Being only 'perceptibly connected to .. instrumentalities' of interstate commerce [i]s not enough."). It is true that Ortiz did not perform stereotypical transportation work, like driving a semi-truck or flying a freight plane. But this fact—true though it may be—does not end our analysis. As *Saxon* has made clear, the exemption is not limited to only those who themselves actually transport goods across state boundaries. And in cases where courts

have found an *insufficiently* close relationship, the employee's job description was much further removed from physically handling the goods than Ortiz was here.

For example, the employers cite a case involving a security guard who worked at a train station. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). And in *Saxon*, Southwest cited a case involving janitorial services. *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271 (1975). *See* 596 U.S. at 462. But nothing about the work conducted by security guards or janitors is intrinsically connected to interstate commerce. As important as their jobs may be, neither physically handles goods or contributes *directly* to the flow of goods in interstate commerce. Even security guards and janitors whose employment with a transportation company creates a coincidental relationship to interstate commerce have nowhere near the connection to the actual transportation of goods that Ortiz had. Under *Saxon*, our focus is on "the *performance* of work," not the remote incidental relationships created by employment with a certain type of company. *Id.* at 456 (quoting *New Prime*, 139 S. Ct. at 541).

Fourth, the employers contend that this court may conclude that Ortiz is a transportation worker only if it improperly shifts its focus away from Ortiz's work and on to the goods themselves. This argument reveals the extent to which the employers underappreciate how observations about the broader supply chain should inform the court's view of the work performed by the relevant class of employees. The Supreme Court in *Saxon* did not improperly shift its focus away from Saxon's work by accounting for the

inescapable fact that her job required her to handle goods that were currently in interstate commerce. Rather, the Court could only understand the extent to which Saxon contributed to the interstate commerce of baggage after it understood that Saxon's job, though performed on a purely local basis, involved handling bags as they traveled interstate. *Id.* at 463.

Nor, as the employers contend, does this mode of analysis necessarily transform *Saxon*'s standard into a "flow of commerce" test. Done properly, the analysis focuses not on the flow of goods themselves but on the employee's relationship with the flow of goods and the extent to which his role enables them to flow in interstate commerce. That inevitably requires an examination of the employee's role in context. Unsurprisingly, such context usually involves an understanding of how, when, and where goods move through the supply chain. But as demonstrated above, the flow of goods is hardly the only or even the primary consideration. The crux of the court's analysis remains the work accomplished.

Fifth and finally, the employers suggest that the nature of GXO's business—warehousing, not transportation—is further evidence that Ortiz is not a transportation worker. While the employers concede that *Saxon* rejects an "industrywide approach" when determining the class of workers to which a plaintiff belongs, *id.* at 456, they contend that rejection is limited to the first step, leaving parties free to rely on the employer's industry at the second step.

In support of this argument, the employers rely on two out-of-circuit decisions: *Hamrick*, 1 F.4th 1337, and *Bissonnette v. LePage Bakeries Park Street, LLC*,

49 F.4th 655 (2d Cir. 2022), *cert. granted* --- S. Ct. ----, 2023 WL 6319660 (Sept. 29, 2023). While *Hamrick* was decided before *Saxon* and Bissonnette was decided after it, both relied on the same categorical rule: only workers employed in the transportation industry qualify for the transportation worker exemption. *Hamrick*, 1 F.4th at 1349 ("The transportation worker exemption applies if the employee is part of a class of workers: (1) employed in the transportation industry; and (2) that, in the main, actually engages in foreign or interstate commerce."); *Bissonnette*, 49 F.4th at 660 ("[T]he FAA exclusion is limited to workers involved in the transportation industry....").

Bissonnette, for example, involved truckers who delivered bread and other baked goods produced by Flower Foods, Inc., and its subsidiary bakeries. 49 F.4th at 657. Plaintiffs, who possessed distribution rights within the state of Connecticut, "pick[ed] up the baked goods from local Connecticut warehouses and deliver[ed] the goods to stores and restaurants within their assigned territories." *Id.* at 658. Nevertheless, the Second Circuit concluded that the transportation worker exemption did not apply to the plaintiffs "even though they drive trucks, because they are in the bakery industry, not a transportation industry." *Id.* at 657.

To the extent that the employers advance a similar categorical approach here, we find *Bissonnette* hard to square with *Saxon*'s reasoning. To begin, we are unconvinced that *Saxon*'s rejection of an industrywide approach applied only to the first step of the analysis. After all, the Court explicitly "reject[ed] Saxon's argument that § 1 exempts virtually all employees of

major transportation providers," suggesting the Court's skepticism to an industrywide approach pervaded its entire analysis, not just its consideration of the relevant class of workers. 596 U.S. at 461.

And even assuming the employers are correct that, technically speaking, *Saxon* forbade such reasoning only at the first step, they ignore the reason why the employer's industry is irrelevant to properly defining the class of workers. Again, *Saxon*'s guiding principle is that courts should focus on the work employees perform, not the industry employers occupy. That principle applies as equally to *Saxon*'s second step as it does to its first.[6]

Saxon's reasoning in this regard is consistent with the fundamental reality that within any given company, different classes of employees often have markedly different roles. That is true even if an employer is situated comfortably within one industry. For example, under *Saxon*, a janitor would not qualify as a transportation worker even if he was employed by Southwest Airlines because his role is not direct or necessary to, actively engaged in, or intimately involved with transportation. *See id.* at 460–62. On

[6]As GXO correctly notes, *Saxon* did not decide whether a plaintiff's employment outside the transportation industry was fatal to his claim "because there the plaintiff worked for an airline." *Bissonnette*, 49 F.4th at 661. The Supreme Court has recently granted certiorari in *Bissonnette*, presumably to answer this exact question. The question presented is as follows: "To be exempt from the Federal Arbitration Act, must a class of workers that is actively engaged in interstate transportation also be employed by a company in the transportation industry?" Petition for Writ of Certiorari at i, *Bissonnette v. LePage Bakeries Park St., LLC*, No. 23-51 (July 17, 2023), 2023 WL 4680058.

the other hand, a truck driver employed by a bakery or a temporary employee employed by a warehousing company might qualify despite the overarching nature of their employers' business because their particular job descriptions meet the standards laid out in *Saxon*. For these reasons, we conclude that an employee need not necessarily be employed by an employer in the transportation industry to qualify for the transportation worker exemption.[7]

* * *

At bottom, the employers cannot overcome the fact that § 1 "directs the interpreter's attention to the *performance* of work." *Id.* at 456 (internal quotations omitted). When, as *Saxon* commands, we consider the nature of the work performed by Ortiz's class of employees, we conclude that his role is "direct and necessary" to, "actively engaged in," and "intimately involved with" the interstate commerce of Adidas products. *See id.* at 458 (internal quotations omitted). None of the employers' contrary arguments compel a different conclusion. As such, the district court was correct to conclude that Ortiz qualifies for the FAA's transportation worker exemption, 9 U.S.C. § 1, and the parties' arbitration agreement cannot be enforced under the FAA.

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[7]For the same reasons, appellants' motion to stay appellate proceedings (in 23-55147, ECF No. 34, and in 23-55149, ECF No. 32) pending the Supreme Court's decision in *Bissonnette* and its disposition of the petition for certiorari in *Carmona Mendoza* is **DENIED**.

V.

For these reasons, the district court's order denying appellants' motion to compel arbitration is **AFFIRMED IN PART**, insofar as it concluded that the transportation worker exemption precludes the application of the FAA to the parties' agreement.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADAN ORTIZ, an individual and on behalf of all others similarly situated, Plaintiff-Appellee, v. RANDSTAD INHOUSE SERVICES, LLC, a Delaware limited liability company; RANDSTAD NORTH AMERICA, INC., a Delaware corporation, Defendant-Appellants, and XPO LOGISTICS, INC., a Delaware corporation; et al., Defendants.	No. 23-55147 D.C. No. 5:22-cv-01399-TJH-SHK MEMORANDUM*

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

ADAN ORTIZ, an individual and on behalf of all others similarly situated, Plaintiff-Appellee, v. XPO LOGISTICS, INC., a Delaware corporation; et al., Defendant-Appellants, and RANDSTAD INHOUSE SERVICES, LLC, a Delaware limited liability company; et al., Defendants.	No. 23-55149 D.C. No. 5:22-cv-01399-TJH-SHK

Appeal from the United States District Court for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted December 4, 2023
Pasadena, California

Before: BEA, M. SMITH, and VANDYKE, Circuit Judges. Partial Concurrence and Partial Dissent by Judge BEA.

When Adan Ortiz was hired by Randstad Inhouse Services to perform temporary work for GXO Logistics

Supply Chain, he agreed to arbitrate any future claims against his employers pertaining to the terms and conditions of his employment.[1] After his temporary employment concluded, Ortiz filed suit against his former employers, bringing claims covered by the agreement. The employers filed a motion to compel arbitration of Ortiz's claims pursuant to the parties' agreement, which the district court denied.

In this consolidated interlocutory appeal, the parties dispute (1) whether their arbitration agreement is enforceable under the Federal Arbitration Act ("FAA") and (2) if not, whether it is alternatively enforceable under any state's substantive law of arbitrability. In a concurrently filed opinion, we affirm the district court's order insofar as it concluded the FAA does not apply. This memorandum disposition considers whether the parties' agreement contemplates enforcement under state law if the FAA does not apply. Concluding that it does, we reverse the district court's decision to the contrary, hold that California law applies, and remand the parties' remaining issues for consideration in the first instance by the district court.

Before turning to the proper interpretation of the arbitration agreement, we must first address Ortiz's contention that we lack jurisdiction over the state law portions of this case. Advancing a narrow view of our jurisdiction, Ortiz asserts that under 9 U.S.C. § 16(a)(1)(B), which provides that "[a]n appeal may be

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[1] Like the concurrently filed opinion, this memorandum disposition refers to the Randstad entities as "Randstad," the GXO entities as "GXO," and the defendant employers collectively as "the employers."

taken from … an order … denying a petition under section 4 of [the FAA] to order arbitration to proceed," this court has interlocutory jurisdiction to review only the applicability of the FAA, not the state law portions of the district court's order.

While at least one circuit has endorsed Ortiz's view, *see Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1352–54 (11th Cir. 2021), this court has yet to address it.

Because an alternative basis for exercising jurisdiction exists, we need not do so here. This court has held that "an order denying a motion to compel arbitration is immediately appealable as tantamount to a denial of injunctive relief under 28 U.S.C. § 1292(a)(1)." *Jackson v. Amazon.com, Inc.*, 65 F.4th 1093, 1097 (9th Cir. 2023). Consistent with *Jackson*, we treat the district court's order "as tantamount to a denial of injunctive relief" and exercise jurisdiction under 28 U.S.C. § 1292(a)(1).

With our jurisdiction established, we now turn to the substance of the arbitration agreement. Its choice-of-law provision reads as follows:

> This Agreement shall be governed by the Federal Arbitration Act ("FAA"). Any federal, state or local laws preempted by the FAA shall not apply to this Agreement or its interpretation. I agree that this Agreement may be enforced and administered by a court of competent jurisdiction through the filing of a petition to: compel arbitration; confirm, vacate or modify an arbitration award; or otherwise pursuant to the FAA.

The district court, reasoning that "there are two semantically reasonable interpretations of the second

sentence," concluded that the clause was ambiguous and construed that ambiguity against Randstad, the drafter.

"The interpretation and meaning of contract provisions are questions of law that we review de novo." *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 909 (9th Cir. 2020). The parties assume that California's law of contract interpretation applies. Under California law, a "contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting." Cal. Civ. Code § 1636. "California courts interpret contracts containing arbitration provisions by application of the plain meaning rule—words of a contract are given their usual and ordinary meaning." *Johnson v. Walmart, Inc.*, 57 F.4th 677, 682 (9th Cir. 2023). They will not "strain to create an ambiguity where none exists." *Int'l Bhd. of Teamsters v. NASA Servs., Inc.*, 957 F.3d 1038, 1044 (9th Cir. 2020) (quoting *Waller v. Truck Ins. Exch., Inc.*, 900 P.2d 619, 627 (Cal. 1995)).

Applying these principles, we conclude that the choice-of-law provision unambiguously contemplates application of both the FAA and state law to the extent it is not preempted by the FAA. Both the first sentence, which provides "[the] [a]greement shall be governed by the Federal Arbitration Act," and the third, which contemplates enforcement "pursuant to the FAA," clearly express the parties' intent to apply the FAA. But here, as we conclude in the concurrently filed opinion, applying the FAA provides no basis to enforce the arbitration agreement because Ortiz qualifies as an exempt transportation worker.

"It does not follow, however, that the arbitration clause is unenforceable" simply because it is "outside the scope of the FAA." *Chappel v. Lab'y Corp. of Am.*, 232 F.3d 719, 725 (9th Cir. 2000). Instead, "[w]hile the distinctive procedural apparatus and presumption of arbitrability of the FAA would fall away" under these circumstances, Ortiz might "still be required under the law of contract to arbitrate in accordance with the clause." *Id.; see also Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("Although the applicability of the FAA may be significant in the sense that the statute prescribes certain procedural rules that might not otherwise obtain, we have little doubt that, even if an arbitration agreement is outside the FAA, the agreement still may be enforced.").

Here, as *Chappel* anticipates, the parties' agreement also clearly expresses their intent to alternatively enforce the arbitration agreement under state law. The second sentence of the choice-of-law clause provides that "[a]ny … state … laws preempted by the FAA shall not apply to this Agreement." From this provision, it stands to reason that the parties expected state laws not preempted by the FAA—including state laws that guarantee the enforceability of arbitration agreements—to apply to the agreement. This reading of the contract is consistent with both the FAA itself, which nowhere indicates that it provides the sole remedy for parties who agree to arbitrate pursuant to its terms, and with *Chappell*.

The questions, then, are (1) which state's law applies and (2) whether that state's substantive law of arbitrability is within the class of state laws that are not preempted by the FAA.

The threshold question is which state's law should apply. Though the parties' agreement contemplates the application of *some* state's law, it does not dictate which state. Where "no effective choice of law has been made," California courts fall back on traditional choice-of-law principles espoused in the Restatement (Second) of Conflicts to decide which law has the most significant relationship to the parties and the transaction. *E.g., Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*, 14 Cal. App. 4th 637, 646 (Cal. Ct. App. 1993). Here, the factors relevant to the most-significant relationship analysis favor California law. Restatement (Second) of Conflicts § 188(2)(a)–(e) (1971).

Having decided that the state law contemplated by the contract is California's, we must next determine whether California's substantive law of arbitrability is within the class of state laws that are not preempted by the FAA and therefore incorporated by the choice-of-law clause. We conclude that it is. "In most important respects, the California statutory scheme on enforcement of private arbitration agreements is similar to the FAA," and California "Code of Civil Procedure section 1281, like section 2 of the FAA, provides that predispute arbitration agreements are valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract." *Lagatree v. Luce, Forward, Hamilton & Scripps LLP*, 88 Cal. Rptr. 2d 664, 676 (Cal. Ct. App. 1999) (cleaned up; internal quotations omitted). *Compare* Cal. Code Civ. Proc. § 1281, *with* 9 U.S.C. § 2. Because the parties contemplated the application of state law not preempted by the FAA, and because California's substantive guaranty in favor of arbitrability is not, in

fact, preempted by the FAA, we conclude that the parties unambiguously agreed to apply California law when, as here, the FAA provides no basis to enforce the agreement.[2]

In concluding otherwise, the dissent overreads both the language of the Agreement's choice-of-law provision and the relevant provisions of the FAA. First, the dissent concludes the Agreement establishes an *exclusive* preference in favor of the FAA by using the phrase "[t]his Agreement *shall* be governed by the [FAA]" (emphasis added). The dissent is of course correct that the word "shall" imposes a mandatory duty on the parties to apply the FAA to their agreement to arbitrate. But the dissent errs by conflating that mandatory obligation with an exclusive choice of law favoring the FAA.

The dissent applies the *expressio unius* canon to conclude that the parties' use of the phrase "shall be governed by the [FAA]" implies the exclusion of all other potentially applicable law. But as this court has recognized, "[t]he force of any negative implication … depends on context." *Castillo v. Metro. Life Ins. Co.*, 970 F.3d 1224, 1232 (9th Cir. 2020) (quoting *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017)). Therefore, "the *expressio unius* canon applies only when 'circumstances support a sensible inference that the term left out must have been meant to be excluded.'" *Castillo*, 970 F.3d at 1232 (quoting *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (cleaned up)). Here, the context makes clear that the parties could

[2] Because the choice-of-law provision is not ambiguous as to whether state law may apply, we do not address the district court's decision to construe any ambiguity against the employers.

not possibly have intended the FAA to apply to the exclusion of all other law because the very next sentence of the Agreement's choice-of-law clause states that only "state … laws *preempted by the FAA* shall not apply to this Agreement" (emphasis added). Taken together in context, the plain meaning of these two sentences precludes the dissent's exclusive reading of the use of the word "shall."

To get around that problem, the dissent adopts an overly restrictive view of the relevant provisions of the FAA. In the dissent's view, the phrase "[a]ny… state … laws preempted by the FAA shall not apply to this Agreement" excludes a state's substantive guarantees in favor of arbitrability because "the FAA expressly provides the governing standard: Ortiz is exempt from arbitration under 9 U.S.C. § 1."

But that is not what § 1 of the FAA says. Section 1 is a limitation on the scope of the FAA's reach. In relevant part, it provides that "nothing herein contained shall apply to … any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Among the provisions that do not apply to such contracts is the substantive guarantee in favor of arbitrability in § 2 of the FAA, which reads "[a] written provision in any maritime transaction … to settle by arbitration a controversy thereafter arising out of such contract … shall be valid, irrevocable, and enforceable." *Id.* § 2.

As the accompanying opinion concludes, we unanimously agree that Ortiz is categorically excluded from § 2's guarantee favoring arbitrability on account of § 1. But as this court decided in *Chappel*, "[i]t does not follow" that Ortiz is necessarily exempt from

arbitration altogether. *Chappel*, 232 F.3d at 725. An exemption from a federal substantive guarantee of arbitrability is not the same thing as a definitive statement that such contracts are categorically unenforceable in all circumstances. Thus, after applying the FAA as the parties intended, the arbitrability of the dispute is left indeterminate. The dissent has therefore provided no reason why state substantive law favoring arbitration of the Agreement would be among the class of state laws that is inconsistent with—and therefore preempted by—the FAA. And by the clear import of the choice-of-law provision's second sentence, such laws apply to the Agreement.

The dissent's related charge that enforcing the CAA "means that a directly applicable FAA provision—§ 1—does *not* govern the agreement" is wrong for the same reasons. No one disputes that § 1 continues to govern the Agreement. That is, of course, why Ortiz cannot be compelled to arbitrate *pursuant to the FAA's terms*. But here, where the FAA neither compels *nor forecloses* arbitration, the second sentence of the choice-of-law clause clearly expresses the parties' intent for non-preempted state law to continue to apply to the Agreement. The CAA is one such source of non-preempted law.

Having decided that California law applies and is not preempted by the FAA, all that remains is to determine whether the parties' arbitration agreement is enforceable under California law. Because the district court concluded that the parties did not agree to apply state law, it did not consider Ortiz's substantive challenges to enforceability, and the parties spent comparatively little time on such issues

in their briefing and argument before this court. "Where an argument has been briefed only cursorily before this court and was not ruled on by the district court," the prudent course is to remand for the district court to first consider the issue. *Shirk v. United States ex rel. Dep't of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014) (cleaned up). We therefore remand all of Ortiz's remaining issues to be addressed by the district court in the first instance.

For these reasons, the district court's order denying appellants' motion to compel arbitration is **REVERSED IN PART**, insofar as it concluded that state law does not apply in the alternative, and all remaining issues are **REMANDED** to the district court. The parties shall bear their own costs associated with this appeal.

Adan Ortiz v. Randstad Inhouse Services, LLC, and *XPO Logistics, Inc.*, Nos. 23-55147, 23-55149

BEA, Circuit Judge, concurring in part and dissenting in part:

I join the concurrently filed opinion, which holds that Ortiz is an exempt transportation worker under § 1 of the Federal Arbitration Act ("FAA"), in full. *See* 9 U.S.C. § 1; *Sw. Airlines Co. v. Saxon*, 596 U.S. 450 (2022). I also agree that we have jurisdiction over the state law portions of this appeal under 28 U.S.C. § 1292(a)(1). *See Jackson v. Amazon.com, Inc.*, 65 F.4th 1093, 1097 (9th Cir. 2023).

But in my view, the arbitration agreement unambiguously limits its enforcement to and by the FAA and, therefore, precludes enforcement under the California Arbitration Act ("CAA"). Because Ortiz is exempt from the FAA, there is no law under which the arbitration agreement can be enforced. *See Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 920 (9th Cir. 2020) (explaining that state law cannot be used to enforce an arbitration agreement where the "express contractual language . . . precludes its application"). I would thus affirm the district court's order which denied the defendants' motion to compel arbitration. I respectfully dissent.

1. "California courts interpret contracts containing arbitration provisions by application of the plain meaning rule—words of a contract are given their usual and ordinary meaning." *Johnson v. Walmart, Inc.*, 57 F.4th 677, 682 (9th Cir. 2023). "An essential element of any contract is the consent of the parties or

mutual assent," and the scope of the parties' assent "is to be ascertained solely from the contract that is reduced to writing, if possible." *Martinez v. BaronHR, Inc.*, 51 Cal. App. 5th 962, 967 (Cal. Ct. App. 2020).

Here, the first sentence of the written arbitration agreement provides: "This Agreement shall be governed by the Federal Arbitration Act ("FAA")."[1] The only acceptable meaning of the word shall "under strict standards of drafting" is: "has a duty to," or "is required to." *Shall*, Black's Law Dictionary (11th ed. 2019); see *Hewitt v. Helms*, 459 U.S. 460, 471–72 (1983) (explaining that the word shall is "of an unmistakable mandatory character"). Indeed, the most fundamental semantic rule of interpretation is that "[w]ords are to be understood in their ordinary everyday meanings—unless the context indicates that they bear a technical sense." Antonin Scalia & Bryan A. Garner, *Reading Law: Interpretation of Legal Texts*, 69. And under the *expressio unius* canon, the reference to the FAA as the governing law "implies the exclusion of other[]" laws, including the CAA. *Id.* at 107.

In my view, then, the ordinary meaning of the words "shall be governed by the [FAA]" unambiguously mandates application of the FAA, and no other law, to determine the enforceability of the arbitration agreement. *See Nedlloyd Lines B.V. v. Superior Ct.*, 834 P.2d 1148, 1153–55 (Cal. 1992) ("When a rational businessperson enters into an agreement establishing a transaction or relationship and provides that

[1] The third sentence of the arbitration clause, moreover, reiterates that the agreement "may be enforced and administered . . . pursuant to the FAA."

disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to all disputes arising out of the transaction or relationship."). Put in other terms, when Ortiz signed the arbitration agreement, he did not assent to enforcement of the arbitration under any law other than the FAA. *See Martinez*, 51 Cal. App. 5th at 967.

Hence, the law under which the agreement "shall be governed" is the FAA, *including* its § 1 exemption. And applying the FAA here, the defendants cannot compel arbitration, because Ortiz is exempt under § 1. There is nothing in the contract that can be construed to say that the CAA can be used, in the *alternative*, to compel arbitration whenever the FAA does not provide for arbitration.

In concluding to the contrary, the majority relies on *Chappel v. Laboratory Corporation of America*, in which we held that an arbitration agreement can be enforced under the law of the contract, even if a plaintiff is exempt under the FAA. 232 F.3d 719, 725 (9th Cir. 2000). I do not take issue with that principle in a case, unlike this one, in which the contract does not specify that the FAA "shall" govern the dispute. But the arbitration clause signed by the parties in *Chappel* stated merely that the plaintiff could "appeal the matter to an impartial arbitrator." *Id*. at 722. It did not specify which law should govern the enforceability of the arbitration clause. *Id*. In contrast, the arbitration clause here singles out the FAA as the only law available to enforce arbitration. Thus, unlike in *Chappel*, where the "law of the contract" involved a general agreement to arbitrate, the "law of the contract" here is to arbitrate *under the*

terms of the FAA. *See id*. at 725. And as we all agree, Ortiz is exempt from arbitration under the FAA. *See* 9 U.S.C. § 1. The majority's holding that Ortiz is, nonetheless, *not* exempt from arbitration under a conflicting state law renders the § 1 exemption inoperative whenever a state enacts its own arbitration law. It should go without saying that a state cannot nullify Congress's commands in this way.

2. The majority next relies on the second sentence of the arbitration agreement, which provides: "Any . . . state . . . laws preempted by the FAA shall not apply to this Agreement or its interpretation." The majority reasons that this sentence demonstrates that the parties expected some state laws—namely, those state laws that are not preempted by the FAA, such as the CAA—would apply. It thus concludes that the contract allows state law to *supersede* the FAA with respect to issues, such as enforceability, over which the FAA directly governs. I cannot agree.

For one, the Supreme Court has held that the FAA incorporates certain aspects of state law, because the FAA itself provides that an arbitration clause is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Construing that language, the Court has reasoned that, when an arbitration clause *is otherwise enforceable under the FAA*, the FAA incorporates, and thus does not preempt, "generally applicable contract defenses" that derive solely from state law, such as fraud, duress, or unconscionability. *Kindred Nursing Centers Ltd. v. Clark*, 581 U.S. 246, 251 (2017); *see Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues

concerning the validity, revocability, and enforceability of contracts generally."). Moreover, ordinary state-law principles govern with respect to interpreting arbitration clauses that are enforceable under the FAA. *See, e.g., Cape Flattery*, 647 F.3d at 920. Hence, the parties expected that such state laws *could* be used alongside the FAA *when* the FAA is applied to enforce the agreement. But the necessary predicate for the use of state law—that the FAA can be used to enforce the agreement—is absent here. And nothing in the second sentence demonstrates that the parties expected state law could supersede a *directly applicable* FAA provision such as § 1.

Meanwhile, the FAA does preempt any state-law contract principle that "discriminat[es] on its face against arbitration." *Clark*, 581 U.S. at 251. For example, when enforcement under the FAA *is* available, a state could not render all arbitration agreements unconscionable. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011). It is *those* state laws, which would have invalidated the arbitration clause even if it were enforceable under the FAA, that the second sentence of the arbitration agreement clarifies may not apply. Contrary to the majority's reasoning, the second sentence does not thereby say that once the FAA does not compel enforcement, *other* state laws, such as the CAA—which would never have applied if the agreement were enforceable under the FAA—may suddenly trump the unambiguous choice-of-FAA provision in the first sentence. Indeed, once the FAA exempts arbitration, there is nothing for the FAA to preempt and, therefore, no state law that *could* implicate the second sentence. Surely, a state could discriminate against arbitration

if the FAA itself does not require arbitration. Hence, once a plaintiff is exempt under the FAA, the second sentence loses all meaning, because in that case, *no* state laws would ever be "preempted by the FAA." The majority's assertion that the CAA can apply because it is not "inconsistent" with the FAA's general preference in favor of arbitration is therefore irrelevant when, as here, the FAA does *not* express a preference in favor of arbitration.

In turn, the second sentence is most naturally read to reiterate the mandate of the first sentence: when the FAA articulates a rule—relating to enforceability or arbitration procedures—the FAA, not state law, "shall" govern. At the same time, state laws that apply *alongside* the FAA—for which the FAA does not articulate a standard—are available to apply and interpret the contract, as in all FAA cases, so long as those laws do not discriminate against arbitration. *See Clark*, 581 U.S. at 251. Here, however, the FAA expressly provides the governing standard: Ortiz is exempt from arbitration under 9 U.S.C. § 1. The majority's conclusion that the CAA can be used to compel arbitration means that a directly applicable FAA provision—§ 1—does *not* govern the agreement, despite the contract's express directive that the FAA "shall" govern the agreement. The majority is incorrect to "rewrite the contract" in this manner. *See Rittman*, 971 F.3d at 921.

In sum, the plain meaning of the arbitration clause contemplates that the FAA, and only the FAA, can be used to enforce the arbitration agreement. And because Ortiz is exempt from the FAA, there is no law under which the arbitration clause can be enforced. Hence, I would affirm the district court's order which

denied the defendants' motion to compel arbitration. I respectfully dissent.

APPENDIX C

United States District Court
Central District of California
Western Division

ADAN ORTIZ, Plaintiff, v. RANDSTAD INHOUSE SERVICES LLC, *et al.*, Defendants.	ED CV 22-01399 TJH (SHKx) **Order** [19]

The Court has considered the motion to compel arbitration [dkt. # 19] filed by Defendants Randstad Inhouse Services, LLC and Randstad North America, Inc. [collectively, "Randstad"], together with the moving, opposing and supplemental papers.

The following facts are not in dispute for this motion.

Randstad is a staffing agency that provides workers to, *inter alia,* Defendants XPO Logistics, Inc., XPO Logistics, LLC, and/or XPO Logistics Supply Chain, Inc. [collectively, "XPO"]. In September, 2021, XPO was renamed GXO, but continues to be referred to, here, as XPO.

From August, 2020, to February, 2021, Plaintiff Adan Ortiz was employed by Randstad and assigned to work at an XPO warehouse in San Bernardino County that received, stored, and processed Adidas shoes, watches, and apparel. Specifically, the warehouse received merchandise—at least some of it from abroad—and, then, distributed it to domestic consumers and retailers in California and other states. Ortiz's job duties included, *inter alia*, transporting packages of merchandise after they arrived at the warehouse and preparing packages of merchandise to leave the warehouse.

During Randstad's onboarding process, Ortiz signed an Agreement to Arbitrate, which required the arbitration of any claims concerning his "recruitment, hire, employment, client assignments and/or termination including, but not limited to, those concerning wages or compensation." The Agreement to Arbitrate, also, included a waiver of class action claims; a provision that any Randstad client to which Ortiz provided services was an intended beneficiary; and a provision that the Agreement to Arbitrate was governed by the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq*. ["the FAA"].

On October 25, 2021, Ortiz applied, again, to work for Randstad and signed another, largely identical, Agreement to Arbitrate. Randstad rehired Ortiz on October 26, 2021, and, then, terminated him on November 2, 2021. The record is not clear as to whether Ortiz was assigned to work for XPO during that second employment period.

On March 1, 2022, Ortiz filed this putative class action in the Los Angeles County Superior Court

against Randstad and XPO, alleging various California wage and hour claims; a claim under California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*.; and a claim under the Private Attorney General Act, Cal. Lab. Code §§ 2689, *et seq*.

Ortiz's Complaint proposed four subclasses: (1) All persons employed by Randstad and XPO and/or any staffing agency and/or any other third parties in hourly or non-exempt positions in California, from four years prior to the filing of this case until judgment is entered; (2) All persons employed by Randstad and XPO in California, from one year prior to the filing of this case until judgment is entered; (3) Those members of subclass 1 who were employed by Randstad and XPO in California; and (4) All persons employed by Randstad and XPO in California, from four years prior to the filing of this case until judgment is entered.

On August 8, 2023, Randstad removed pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(c),(d)(2) . On August 25, 2022, this case was transferred to this Court as a related case to *Emerita Corado-Cortez v. XPO Logistics, Inc.*, CV 19-00670 TJH (SHK), a wage and hour class action that was settled in 2021.

Randstad, now, moves to compel arbitration. XPO joined the motion.

The Court's role when deciding a motion to compel arbitration is limited to three determinations: (1) Whether there is a valid agreement to arbitrate; (2) Whether the agreement to arbitrate encompasses the dispute at issue; and (3) Whether there was a waiver of arbitration. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir.

2000); *Newirth by & through Newirth v. Aegis Senior Cmtys., LLC,* 931 F.3d 935, 940 (9th Cir. 2019).

Randstad has the initial burden, here, to establish the existence of an agreement to arbitrate between the parties. *See Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 963 n.9 (9th Cir. 2007). If Randstad meets its initial burden, the burden will, then, shift to Ortiz to establish that the agreement to arbitrate is not enforceable. *See Wynn Resorts, Ltd. v. Atl.–Pac. Capital, Inc.*, 497 F. App'x 740, 742 (9th Cir. 2012) (citing *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986)).

The FAA grants the District Court authority to compel arbitration if there is an enforceable arbitration agreement. *In re Van Dusen*, 654 F.3d 838, 842 (9th Cir. 2011). Thus, "when confronted with an arbitration clause, the [D]istrict [C]ourt must first consider whether the agreement at issue is of the kind covered by the FAA." *In re Van Dusen*, 654 F.3d at 844. Here, Ortiz argued that the Agreement to Arbitrate is not covered by the FAA because he falls under the FAA's transportation worker exemption, 9 U.S.C. § 1, for "contracts of employment of seamen, railroad employees, or any class of workers engaged in foreign or interstate commerce."

In *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), the Ninth Circuit held that if one party to an arbitration agreement is exempt under 9 U.S.C. § 1, and the agreement is governed solely by the FAA, then that agreement is invalid. In *Rittmann,* the employee was entitled to § 1 exemption, and the employer argued that arbitration should, nevertheless, be compelled under the law of

Washington state, which supplied the relevant state law, instead of the FAA. *Rittmann*, 971 F.3d at 919-20. The Circuit applied Washington contract interpretation laws to construe the agreement and concluded that the agreement was ambiguous as to whether the parties intended Washington law to apply if the FAA did not. *Rittmann*, 971 F.3d at 920. Washington law requires ambiguities to be construed against the contract's drafter—in that case, the employer. *Rittmann*, 971 F.3d at 920. Thus, the Circuit concluded that neither the FAA nor state law applied to the agreement; therefore, "[b]ecause there is no law that governs ... there is no valid arbitration agreement." *Rittmann*, 971 F.3d at 920-21.

Applicability of Federal Arbitration Act's Exemption

Ortiz argued that he was exempt from the FAA because, while working at XPO, he was a transportation worker engaged in foreign and interstate commerce. To determine whether Ortiz was an exempt transportation worker, the Court must, first, determine the class of workers to which Ortiz belonged, and, then, determine whether that class of workers was engaged in foreign or interstate commerce. *See Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022).

To determine the relevant class of workers, the Court must consider the nature of Ortiz's work, not the nature of XPO's business. *See Southwest Airlines*, 142 S. Ct. at 1788. Ortiz declared that he worked at XPO as an Equipment Operator and that his duties included "unloading and picking up the packages and transporting them to the warehouse racks to organize

them"; "transport[ing] the packages to the picking section of the warehouse"; "assisting Pickers in obtaining packages so they could be shipped out to individuals and/or stores in various states"; and "assist[ing] the Outflow Department to prepare packages to leave the warehouse for their final destination."

While Randstad mostly did not dispute Ortiz's description of his work duties, it did dispute that he unloaded packages. Randstad relied on declarations from two XPO supervisors. The first declaration, from Yvonne Holland, a contingent workforce director at GXO Logistics Corporate Services, Inc., stated that, according to XPO's records, Ortiz was assigned to XPO as a "PIT/Equipment Operator." The second declaration, from Primitivo Estrada, a senior manager at GXO Logistics Supply Chain, Inc., stated that, at the time Ortiz worked at XPO, "the PIT/Equipment Operator [was] not responsible for unloading the products from shipping containers. Instead, a different position first interact[ed] with the products."

Because neither Ortiz, nor XPO's declarants, defined the scope of "unload" in their declarations, it is not clear whether Ortiz personally removed packages from a shipping container, or whether the parties, actually, disagree over Ortiz's duties. Regardless, the Court will proceed on the assumption that Ortiz's duties at XPO included only those activities that XPO did not dispute. Thus, the Court will not consider, here, that Ortiz might have personally loaded or unloaded shipping containers. Accordingly, the Court defines the relevant class of workers as those who engaged in the undisputed activities that Ortiz

performed at XPO. *See Southwest Airlines*, 142 S. Ct. at 1789.

Next, the Court must consider whether that class of workers engaged in foreign or interstate commerce. *See Southwest Airlines*, 142 S. Ct. at 1789. To do so, the Court must determine whether the class of workers "play[ed] a direct and 'necessary role in the free flow of goods' across borders" and "actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce." *Southwest Airlines*, 142 S. Ct. at 1790 (quoting *Circuit City*, 532 U.S. at 121).

In *Southwest Airlines*, the United States Supreme Court held that airline ramp agents and supervisors were engaged in interstate commerce "when they handle[d] goods traveling in interstate and foreign commerce, either to load them for air travel or to unload them when they arrive." *Southwest Airlines*, 142 S. Ct. at 1792. The Supreme Court did not limit the transportation worker exemption to only those workers who physically load and unload cargo. *Southwest Airlines*, 142 S. Ct. at 1789 n.1. Rather, the Supreme Court explained that the handling of interstate goods by airline ramp workers was only one particularly plain example of work within the flow of interstate commerce. *Southwest Airlines*, 142 S. Ct. at 1789, 1792.

Prior to the opinion in *Southwest Airlines*, the Ninth Circuit held that delivery drivers were engaged in interstate commerce when they made local, last mile deliveries of goods that had been shipped across state lines. *Rittmann*, 971 F.3d at 907, 915. Because those deliveries constituted a step of the interstate travel of

goods—albeit the last, typically intrastate step—those delivery drivers "form[ed] a part of the channels of interstate commerce[.]" *Rittmann*, 971 F.3d at 917. However, work that is only tangentially connected to interstate commerce does not qualify for the FAA exemption. *Rittmann*, 971 F.3d at 911. Tangential activities include the intrastate sale of asphalt that is later used in the construction of an interstate highway, *Southwest Airlines* (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974)); the intrastate provision of janitorial services to a company engaged in interstate commerce, *Southwest Airlines* (citing *United States v. American Bldg. Maint. Indus.*, 422 U.S. 271 (1975); and the work of a transportation carrier's customer service representative, who, *inter alia*, "'never handle[s] any of the packages that the carrier deliver[s]," *Rittmann*, 971 F.3d at 911 (quoting *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 351-52 (8th Cir. 2005)).

Here, it is not disputed that Ortiz "handle[d] goods traveling in interstate and foreign commerce." *Southwest Airlines*, 142 S. Ct. at 1789-90. Ortiz used a pallet jack to move packages that arrived at the warehouse—that someone else might have, first, removed from a shipping container—to warehouse racks for temporary storage before the packages were shipped out to consumers and retailers. Ortiz, later, moved those packages from storage to a "drop zone" as part of the process of preparing the packages to leave the warehouse. Unlike, for instance, a salesperson, janitor, or customer service representative who has *some* relationship to interstate goods, but never, actually, handles them, Ortiz, while working at XPO,

was personally involved in the movement of those goods. *See Rittmann* 971 F.3d at 911.

Accordingly, Ortiz was among a class of workers engaged in interstate commerce when he worked at XPO moving pallets of goods in the flow of interstate commerce. Consequently, the FAA exemption applies to him. *See Circuit City,* 532 U.S. at 119.

Whether the FAA's transportation worker exemption, also, applies to all of the putative class members, here, is beyond the scope of this motion. However, because the proposed putative subclasses are defined very broadly in the Complaint, it appears likely that some of the putative class members might not be entitled to that exemption.

Effect of the Transportation Worker Exemption

Randstad argued that the Agreement to Arbitrate is enforceable under California law, even if it is not enforceable under the FAA. Therefore, the Court will consider whether Ortiz could be compelled to arbitrate under California law. *See Rittmann*, 971 F.3d at 920.

In *Rittmann*, the Ninth Circuit, in determining whether Washington state law could be used to compel arbitration pursuant to an agreement governed by the FAA, applied two Washington contract interpretation laws: (1) Contract provisions may be severed if doing so does not rewrite the contract; and (2) Ambiguities must be construed against the drafting party. *Rittmann*, 971 F.3d at 920. The arbitration agreement presented to the Circuit was part of an independent contractor agreement. *Rittmann*, 971 F.3d at 908. That agreement contained a provision requiring arbitration of all disputes, as well as a separate section —Section 11—that waived the right to bring class or

collective actions. *Rittmann*, 971 F.3d at 908. A separate, general provision in the independent contractor agreement stated that the entire agreement was "governed by the law of the state of Washington without regard to its conflict of laws principles, *except for Section 11 of [the] Agreement, which is governed by the [FAA] and applicable federal law*." *Rittmann,* 971 F.3d at 908 (emphasis added).

After considering the independent contractor agreement, the Ninth Circuit, first, concluded that the "except for" clause could not be severed from the agreement without rewriting the agreement because the parties clearly intended to treat Section 11 differently from the agreement's other provisions. *Rittmann,* 971 F.3d at 920. The Ninth Circuit, ultimately, concluded that the agreement was ambiguous as to whether, in the event that the FAA did not apply to Section 11, the parties intended for Washington law to apply instead, like it did to the rest of the agreement. *Rittmann*. The Ninth Circuit construed the ambiguity against the employer and held that *no* law governed Section 11, thereby invalidating it. *Rittmann*.

Contrary to Randstad's argument, here, the problem is not that the Agreement to Arbitrate lacks a choice of law clause, but that the Agreement to Arbitrate *contains* a choice of law clause—one that requires the application of the FAA in a situation where the FAA is not applicable given the application of the transportation worker exemption. Thus, like in *Rittmann*, the question, now, is whether the Agreement to Arbitrate allows for the application of California law when the FAA cannot be applied.

As in *Rittmann*, the Court must begin with the appropriate state's laws of contract interpretation. In California, "[t]he principal rule of contract interpretation is to give effect to the parties' intent as expressed in the terms of the contract." *Regional Steel Corp. v. Liberty Surplus Ins. Corp.*, 226 Cal. App. 4th 1377, 1390 (2014). That is, the Court must use the contract's written terms to discern the intent of the parties, provided that the language is clear, explicit, and does not create an absurd result. *Revitch v. DIRECTV, LLC*, 977 F.3d 713, 717 (9th Cir. 2020) (citing *Kashmiri v. Regents of Univ. of Cal.*, 156 Cal. App. 4th 809, 831 (2007). Further, the "[l]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case[.]" *Regional Steel*, 226 Cal. App. 4th at 1390.

Additionally, in California, the Court may sever unenforceable provisions of a contract, unless doing so would substantively rewrite the agreement, *Harper v. Ultimo*, 113 Cal. App. 4th 1402, 1412 (2003); and, if an employment contract's language is ambiguous, the ambiguities must be construed against the drafting employer, *Sandquist v. Lebo Auto., Inc.,* 1 Cal. 5th 233, 248 (2016). Those two laws are nearly identical to the Washington laws that the Ninth Circuit applied in *Rittmann*.

Here, the choice of law provision in the Agreement to Arbitrate is composed of three sentences:

> This Agreement shall be governed by the [FAA]. Any federal, state or local laws preempted by the FAA shall not apply to this Agreement or its interpretation. I agree that this Agreement may be enforced and administered by a court of

> competent jurisdiction through the filing of a petition to: compel arbitration; confirm, vacate or modify an arbitration award; or otherwise pursuant to the FAA.

The first sentence is clear, explicit, and unambiguous—it provides for the application of the FAA to the entire agreement, and does not provide for the application of any other law. Similarly, the third sentence is clear, explicit, and unambiguous—it affirms either party's right to enforce the agreement, but provides for only one vehicle to do so—the FAA.

The second sentence, if construed in context, means that any law that is preempted by the FAA cannot be applied to the Agreement to Arbitrate. *See Regional Steel*, 226 Cal. App. 4th at 1390. Arguably, the second sentence could, also, be construed to mean that any law that is *not* preempted by the FAA *can* be applied, thereby allowing for the application of state law, here. Indeed, the FAA does preempt some California contract laws—specifically, those that "discriminate against" arbitration agreements—but it does not preempt all of them. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1917 (2022). However, the second sentence does not, itself, clearly state that some other state or federal law would govern if the FAA were inapplicable, nor does any other part of the agreement.

At best, there are two semantically reasonable interpretations of the second sentence—one that merely precludes the application of any preempted law, and one that goes further and affirmatively allows the application of any non-preempted law. That, by definition, is an ambiguity. *California Nat'l*

Bank v. Woodbridge Plaza LLC, 164 Cal. App. 4th 137, 143-44 (2008). Because the Agreement to Arbitrate was drafted by Randstad, the ambiguity must be construed against it. *See Sandquist*, 1 Cal. 5th at 248. Accordingly, the Court must construe the choice of law provision to mean that the Agreement to Arbitrate can be governed only by the FAA, and no other laws, including California laws.

Thus, because Ortiz is entitled to the FAA's transportation worker exemption, the FAA does not apply, here, and no other law governs the Agreement to Arbitrate. *See Rittmann*, 971 F.3d at 920-21. Therefore, no law confers authority on the Court to compel arbitration pursuant to the Agreement to Arbitrate. *See In re Van Dusen*, 654 F.3d at 842. Consequently, Randstad failed to meet its initial burden to establish the existence of a valid Agreement to Arbitrate. *See Sanford,* 483 F.3d at 963 n.9.

Accordingly,

It is Ordered that the motion to compel arbitration be, and hereby is, Denied.

Date: January 18, 2023

Terry J. Hatter, Jr.
Senior United States District Judge

APPENDIX D

Agreement to Arbitrate

As consideration for accepting or continuing my employment with Randstad (hereinafter "Company"), Company and I agree to use binding arbitration, instead of going to court, for any "Covered Claims" that arise between me and Company, including its divisions, operating companies, affiliates, related companies, subsidiaries and parent company, and/or their current or former employe

es ("Agreement"). I also understand that any Company clients to which I provide services on assignment are intended third-party beneficiaries of this Agreement.

"**Covered Claims**" are any legal claims belonging to me or to Company that relate to my recruitment, hire, employment, client assignments and/or termination including, but not limited to, those concerning wages or compensation, consumer reports, benefits, contracts, discrimination, harassment, retaliation, leaves of absence or accommodation for a disability.

Covered Claims under this agreement *do not* include:

- any claims I cannot be required to arbitrate as a matter of law. The parties agree, however, that if any claim brought in court arises out of an underlying dispute that is subject to arbitration, the judicial action for

that claim will be stayed pending completion of the arbitration;

- claims for workers' compensation or unemployment compensation; and
- claims or charges with any governmental or administrative agency.

If a claim or charge is filed with a governmental or administrative agency and a demand for arbitration is made as to the same or similar claim or charge, either party shall have the right to obtain a stay of the arbitration proceedings pending the agency's final resolution of the administrative claim or charge if the claimant would be precluded from bringing the same or similar claim or charge in court prior to an agency determination. Both parties also agree that they will not oppose and will consent to any such stay of the arbitration at the request of the other party. Both parties understand that under no circumstances can there be a duplicative award from the governmental or administrative agency and the arbitrator.

I understand that under the National Labor Relations Act, I am not prevented from acting in concert with others to challenge this Agreement in any forum, and understand that I will not be retaliated against if I act with others to challenge this agreement.

I understand and agree that:

- **to the extent permitted by law, the arbitrator's award is the sole remedy for Covered Claims;**
- **arbitration is the only forum for resolving Covered Claims, and that both Company and I are waiving the right to**

a trial before a judge or jury in federal or state court in favor of arbitration;

- **for small Covered Claims, instead of arbitration, I may take a Covered Claim to the small claims court closest to where I work or last worked for Company if the total amount that I am seeking from Company is less than the claim limit for that court. If I choose this option, Company and I agree that the decision of the small claims court judge will be final and binding, will not be appealed and will not be binding on any other claim; and**
- **Covered Claims will only be arbitrated on an individual basis, and that both Company and I waive the right to participate in or receive money from any class, collective or representative proceeding. I may not bring a claim on behalf of other individuals, and any arbitrator hearing my claim may not combine more than one individual's claim or claims into a single case, or arbitrate any form of a class, collective, or representative proceeding. I understand and agree that any ruling by an arbitrator combining the covered claims of two or more employees or allowing class, collective or representative arbitration would be contrary to the intent of this agreement and would be subject to immediate judicial review.**

I agree that all proceedings under this Agreement are private and confidential, unless applicable law provides to the contrary. I understand, however, that I may make disclosures to others as reasonably necessary to arbitrate and/or defend against any Covered Claims. The arbitrator shall have the authority to make appropriate rulings to safeguard confidentiality.

Procedure

This Agreement shall be governed by the Federal Arbitration Act ("FAA"). Any federal, state or local laws preempted by the FAA shall not apply to this Agreement or its interpretation. I agree that this Agreement may be enforced and administered by a court of competent jurisdiction through the filing of a petition to: compel arbitration; confirm, vacate or modify an arbitration award; or otherwise pursuant to the FAA. Prior to filing a demand for arbitration, I am encouraged (but not required) to first present my concerns in writing to a Company HR manager to see if a resolution can be reached. To initiate arbitration, I must prepare a written demand setting forth my claim(s) and submit it to the American Arbitration Association ("AAA") Case Filing Services, 1101 Laurel Oak Road, Suite 100, Voorhees, NJ 08043), and send a copy of the demand to Company's Legal Department at 3625 Cumberland Boulevard, Suite 600, Atlanta, GA 30339. For Company to initiate arbitration, it must also prepare a written demand setting forth its claim(s) and submit it to AAA Case Filing Services, and send a copy of the demand to me at my last home address of record. A party's written demand for arbitration must be received within the time period allowed pursuant to the statute, regulation, or other

law applicable to the alleged act or omission giving rise to the covered claim, unless otherwise agreed by the parties. For covered claims that would require me to file a charge, complaint or claim with an administrative agency before filing a lawsuit in court, the demand for arbitration must be received within the time period allowed for filing such administrative charge, complaint, or claim under the statute, regulation, or other law applicable to the act or omission giving rise to the covered claim. For more detailed information on the process, I understand I may contact my human resources representative. I also understand that I can obtain further information by contacting the AAA at its toll free assistance number (877) 495-4185, by e-mail at casefiling@adr.org or by visiting the AAA website (www.adr.org).

The Employment Arbitration Rules of AAA (linked here and attached) will apply, except as follows: (a) Company will pay the arbitrator's fees and the arbitration filing and administrative fees, and any other costs uniquely attributable to arbitration (including the filing fee); (b) Company and I will each have the opportunity to "rank" our preference for the appointed arbitrator from a list of proposed arbitrators provided by AAA; (c) the parties shall have an opportunity to conduct discovery sufficient to present a meaningful prosecution or defense of the claims; (d) where permitted by law, the arbitrator shall have the authority to issue an award or partial award without conducting a hearing on the grounds that there is no claim on which relief can be granted or that there is no genuine issue of material fact to resolve at a hearing, consistent with Rules 12 and 56 of the Federal Rules

of Civil Procedure; and (e) the arbitrator must issue his or her award in writing, setting forth in summary form the factual findings, evidence cited and reasons for the arbitrator's determination. The arbitrator shall have the authority to award only such remedies as could be awarded by a court under the applicable substantive law, which may include injunctive or other equitable relief.

I understand that each side must pay its own legal fees and costs unless I win and applicable law provides for an award of legal fees and costs.

At-Will Employment

I understand and agree that this Agreement does not change my status as an at-will employee, and that Company or I may terminate my employment at any time, with or without cause or notice.

Change or Termination of Agreement

Except as prohibited by applicable law, I understand and agree that Company may change or terminate this agreement after giving me 90 days written or electronic notice. The change or termination will not apply to a pending claim.

I acknowledge that I have received and read or have had the opportunity to read this Arbitration Agreement before signing it. By signing below, I acknowledge that I've entered into this Agreement voluntarily.

Adan Ortiz	
Employee name (printed)	Jay P. Ferguson, Jr., Chief Legal Officer
Digitally signed by Adan T. Ortiz Location: ortizaden84@yahoo.com 10/25/2021 03:02:48 PM -07:00	10/25/2021 Date
Employee signature	
10/25/2021	
Date	