



1 rough handling of the box occurs.” (*Id.*) Plaintiff reports that “[t]he 75G Shock Watch sticker  
2 contained the following words: “HANDLE WITH CARE; RED INDICATES ROUGH HANDLING.  
3 IF RED, NOTE ON THE BILL OF LADING AND INSPECT PRODUCT.” (*Id.*) Plaintiff asserts he  
4 “noted on paper with UPS the SG had a value of \$27,000 and paid \$528 for the item to be shipped.”  
5 (*Id.*, ¶ 10)

6 Plaintiff alleges that when the box arrived in Hawaii, “the 75 G Shock Watch sticker was red  
7 showing that it had been extremely mishandled and the box was crushed and had been taped together.”  
8 (Doc. 1 at 2, ¶ 11) He asserts the SG “was a total loss.” (*Id.*)

9 Plaintiff asserts UPS was notified of the damage and sent an inspector, who “claimed that the  
10 equipment was packaged improperly in a ‘used’ single walled box.” (Doc. 1 at 3, ¶12) Plaintiff  
11 contends this was untrue, and “the box appeared used because it had been mishandled badly.” (*Id.*) In  
12 addition, Plaintiff reports that when a UPS driver picked up the box, “he indicated it was packaged  
13 adequately and that all high value items were inspected at the facility before being shipped.” (*Id.*, ¶ 13)  
14 Plaintiff contends he “assumed by said representation that had the SG been packaged inappropriately,  
15 UPS would have informed Plaintiff of this after it was inspected.” (*Id.*)

16 Plaintiff made a claim to UPS, “and a claims representative from Crawford and Company was  
17 assigned.” (Doc. 1 at 3, ¶ 14) He reports that the representative “informed Plaintiff he would hear  
18 from an agent of UPS,” but “Plaintiff never heard from an agent of UPS accepting or denying the  
19 claim.” (*Id.*) Plaintiff contends that he hired counsel, who mailed a letter to the claims representative.  
20 (*Id.*, ¶ 15) On June 26, 2015, UPS sent a letter “finally denying the claim.” (*Id.*)

21 Plaintiff contends that UPS “is liable for the value of the SG, or \$27,000 pursuant to the terms  
22 of the Carmack Amendment, 49 U.S.C. 14706.” (Doc. 1 at 4, ¶ 20) Defendant filed its answer on  
23 March 18, 2016, asserting the “claim is subject to a mandatory arbitration provision contained in the  
24 UPS Tariff/Terms and Conditions of Service.” (Doc. 6 at 2) Accordingly, Defendant seeks to compel  
25 arbitration pursuant to the terms of the arbitration agreement. (Doc. 16)

## 26 **II. The UPS Terms**

27 The “UPS Tariff/Terms and Conditions of Service” (“UPS Terms”) are applicable to UPS  
28 “shipments within and originating in the United States.” (Doc. 18 at 2, Liberatore Decl. ¶ 1) The UPS

1 Terms “contains the general terms conditions of contract under which ... [UPS] is engaged in the  
2 transportation of Package shipments itself and jointly through interchange with its affiliates.” (Doc.  
3 18-1 at 5) The UPS Terms include a section entitled “Claims and Legal Actions: Individual Binding  
4 Arbitration of Claims,” which provides:

5 Claimant and UPS agree that, except for disputes that qualify for state courts of limited  
6 jurisdiction (such as small claims, justice of the peace, magistrate court, and similar  
7 courts with monetary limits on their jurisdictions over civil disputes), any controversy or  
8 claim, whether at law or equity, arising out of or related to the provision of services by  
9 UPS, regardless of the date of accrual of such dispute, shall be resolved in its entirety by  
10 individual (not class-wide nor collective) binding arbitration.

11 (Doc. 18-1 at 27, emphasis omitted) Shippers are informed that both parties “are waiving the right to  
12 trial by jury,” and “giving up the ability to participate in a class, mass, consolidated or combined action  
13 or arbitration.” (*Id.*, emphasis omitted) The UPS Terms—including the arbitration provision—is  
14 intended to apply to all shipments, whether processed through the UPS WorldShip program or the  
15 company’s website. (*Id.* at 5; *see also* Doc. 18-2 at 5-6, Libertore Decl. ¶¶ 8-9)

16 Pursuant to the UPS Terms, “[a]ll issues are for the arbitrator to decide,” though issues related  
17 “to the scope, application, and enforceability of the arbitration provision” are reserved for the court.  
18 (Doc. 18-1 at 28) Further, the UPS Terms indicate “[t]he Federal Arbitration Act governs the  
19 interpretation and enforcement of [the] provision.” (*Id.*)

### 20 **III. Legal Standard**

21 The Federal Arbitration Act (“FAA”) applies to arbitration agreements in any contract affecting  
22 interstate commerce. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); 9 U.S.C. § 2.  
23 Here, it is undisputed that Defendant’s operate nationwide and its shipping business affects interstate  
24 commerce. Thus the FAA governs the arbitration policy.

25 Under the FAA, written arbitration agreements “shall be valid, irrevocable, and enforceable,  
26 save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. A  
27 party seeking to enforce arbitration agreement may petition the Court for “an order directing the parties  
28 to proceed to arbitration in accordance with the terms of the agreement.” 9 U.S.C. § 4.

The court’s role in applying the FAA is “limited to determining (1) whether a valid agreement  
to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” *Chiron  
Corp. v. Ortho Diagnostic Systems*, 207 F.3d 1126, 1130 (9th Cir. 2000), citing 9 U.S.C. § 4. “If the

1 response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration  
2 agreement in accordance with its terms.” *Id.*; *see also* 9 U.S.C. § 4 (“The court shall hear the parties,  
3 and upon being satisfied that the making of the agreement for arbitration or the failure to comply  
4 therewith is not in issue, the court *shall* make an order directing the parties to proceed to arbitration in  
5 accordance with the terms of the agreement” (emphasis added)). Importantly, because the FAA “is  
6 phrased in mandatory terms,” “the standard for demonstrating arbitrability is not a high one [and] a  
7 district court has little discretion to deny an arbitration motion.” *Republic of Nicaragua v. Standard*  
8 *Fruit Co.*, 937 F.2d 469, 475 (9th Cir. 1991).

9 A party opposing arbitration has the burden to demonstrate the claims at issue should not be  
10 sent to arbitration. *Green Tree Fin. Corp.- Alabama v. Randolph*, 531 U.S. 79, 81 (2000); *see also*  
11 *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013) (“the parties  
12 challenging the enforceability of an arbitration agreement bear the burden of proving that the provision  
13 is unenforceable”). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor  
14 of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

#### 15 **IV. Discussion and Analysis**

##### 16 **A. Validity of the arbitration agreement**

17 When determining whether a valid and enforceable agreement to arbitrate has been established  
18 for the purposes of the FAA, the Court should apply “ordinary state-law principles that govern the  
19 formation of contracts to decide whether the parties agreed to arbitrate a certain matter.” *First Options*  
20 *of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Circuit City Stores v. Adams*, 279 F.3d 889, 892  
21 (2002). Because Plaintiff is a resident of California and Defendant seeks to compel arbitration in Kern  
22 County, California, the Court looks to the state’s law to determine whether there is a valid arbitration  
23 agreement between the parties.

24 Pursuant to California contract law, the elements for a viable contract are “(1) parties capable  
25 of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration.” *United*  
26 *States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999) (citing Cal. Civ. Code § 1550;  
27 *Marshall & Co. v. Weisel*, 242 Cal. App. 2d 191, 196 (1966)). An arbitration agreement may be  
28 “invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but

1 not by defenses that apply only to arbitration or that derive their meaning from the fact that an  
 2 agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333 (2011); *see*  
 3 *also* Cal. Code Civ. Proc. § 1281 (explaining an arbitration agreement may only be invalidated upon  
 4 the same “grounds as exist for the revocation of any contract”).

5 Plaintiff contends there is not a binding contract because “there [was] no affirmative action  
 6 required to demonstrate assent to the terms and conditions.”<sup>1</sup> (Doc. 20 at 3) In addition, Plaintiff  
 7 contends the terms of the arbitration provision are unconscionable and should not be enforced by the  
 8 Court. (*Id.* at 5-10)

9 1. Consent to arbitrate

10 Generally “a party cannot be required to submit to arbitration any dispute which he has not  
 11 agreed so to submit.” *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648  
 12 (1986). ““While new commerce on the Internet has exposed courts to many new situations, it has not  
 13 fundamentally changed the principles of contract.”” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171,  
 14 1175 (9th Cir. 2014), quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004). One  
 15 principle that remains unchanged is that “[m]utual manifestation of assent, whether by written or  
 16 spoken word or by conduct, is the touchstone of contract.” *Id.*, quoting *Specht v. Netscape Comm.*  
 17 *Corp.*, 306 F.3d 17, 29 (2d Cir. 2002).

18 Contracting parties manifest mutual assent when a “specific offer is communicated to the  
 19 offeree, and an acceptance is subsequently communicated to the offeror.” *Netbula, LLC v. BindView*  
 20 *Dev. Corp.*, 516 F. Supp. 2d 1137, 1155 (N.D. Cal. 2007), citing *Russell v. Union Oil Co.*, 7 Cal. App.  
 21 3d 110, 114 (Ct. Cal. App. 1970). With the Internet and digital software, the Court must examine how  
 22 the terms of an agreement were presented to a user, and how a user indicated his or her consent to the  
 23 terms. *Nguyen*, 763 F.3d at 1176-77. The Ninth Circuit explained:

24 Contracts formed on the Internet come primarily in two flavors: “clickwrap” (or “click-  
 25 through”) agreements, in which website users are required to click on an “I agree” box  
 26 after being presented with a list of terms and conditions of use; and “browsewrap”  
 27 agreements, where a website’s terms and conditions of use are generally posted on the  
 28 website via a hyperlink at the bottom of the screen.

---

<sup>1</sup> Plaintiff does not dispute that the parties are capable of entering a contract, that there was a lawful object, or the existence of consideration. Rather, Plaintiff argues only the lack of consent to the arbitration agreement.

1 *Id.*, 763 F.3d at 1175-76. Defendant appears to assert it used a “clickwrap” agreement (*see* Doc. 21 at  
2 6), while Plaintiff argues UPS uses a “browsewrap” agreement that should not be enforced by the Court  
3 (Doc. 20 at 1-3).

4 A “clickwrap” agreement requires an affirmative action to indicate consent to terms. *Nguyen*,  
5 763 F.3d at 1176; *see also Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837-38 (S.D.N.Y. 2012)  
6 (describing “pure-form clickwrap agreement” as one in which the website “forces the user to actually  
7 examine the terms before assenting”); *Register.com, Inc.*, 356 F.3d at 429 (“under a clickwrap  
8 arrangement, potential licensees are presented with the proposed license terms and forced to expressly  
9 and unambiguously manifest either assent or rejection prior to being given access to the product”).  
10 Given the indication of assent, courts have “routinely upheld” clickwrap agreements. *United States v.*  
11 *Drew*, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009).

12 In contrast, with a “browsewrap” agreement, the user “gives his assent simply by using the  
13 website.” *Nguyen*, 763 F.3d at 1176 (quotation omitted). Generally, “the website will contain a notice  
14 that – by merely using the services of, obtaining information from, or initiating applications within the  
15 website – the user is agreeing to and is bound by the site’s terms of service.” *Drew*, 259 F.R.D. at 462  
16 n.22; *Fteja*, 841 F. Supp. 2d at 837 (same). When there is no evidence users “had actual knowledge” of  
17 an agreement, the Court must consider the “design and content of the website and the agreement’s  
18 webpage.” *Nguyen*, 763 F.3d at 1177. “[T]he validity of the browsewrap agreement turns on whether  
19 the website puts a reasonably prudent user on inquiry notice of the terms of the contract.” *Id.* Thus, the  
20 Court must consider the “design and content of the website and the agreement’s webpage.” *Id.*

21 Kenneth Liberatore, Functional User Manager at UPS, reports that when using the UPS  
22 WorldShip program, “[b]efore a shipper can transmit information (e.g., package size, weight, and  
23 destination to UPS..., the shipper must confirm its acceptance of the UPS Terms.” (Doc. 18 at 5,  
24 Liberatore Decl. ¶ 8) A window on the screen asks, “Are you ready to close today’s shipping and send  
25 the information to UPS?” (*Id.*) The shipper is informed: “By clicking the Yes button, you agree to the  
26 UPS Tariff/Terms and Conditions,” and provides a link to the UPS Terms. (*Id.*) If a shipper selects  
27 the “No” button, the shipping information is not transmitted to UPS and no transaction occurs. (*Id.*)  
28

1 Similarly, the UPS website requires consent to the UPS Terms. (Doc. 18 at 6, Liberatore ¶ 9)  
2 The first time a user processes a package for shipment through the website, and anytime thereafter if  
3 the UPS Terms have been amended, the user “is automatically directed” to a screen entitled “Service  
4 Terms and Conditions Update.” (*Id.*) The screen directs the user to “Review Terms and Conditions:”

5 The Service Terms and conditions have been updated since your last visit. Select View  
6 Terms and Conditions to see the current Service Terms and Conditions or Continue to  
proceed with your shipping request.

7 UPS is making changes to the UPS Tariff/Terms and Conditions of Service, UPS  
8 Freight’s Rules and Charges (UPGF102), UPS Express Critical Terms and Conditions  
of Contract, and the UPS Air Freight Terms and Conditions of Contract beginning  
9 December 30, 2013.

10 **The documents will include a new section providing for binding arbitration of**  
11 **claims, except as otherwise noted in the terms.** To view the Individual Binding  
Arbitration of Claims section in the UPS Tariff/Terms and Conditions of Service, click  
on the View button below.

12 The changes pertaining to UPS Freight®, UPS Express Critical and UPS Air Freight  
13 will contain substantially the same terms as provided in the Individual Binding  
Arbitration of Claims Section.

14 (*Id.* at 7, ¶12) (emphasis added) At the bottom of the page, the user could either click “Continue” or  
15 click to “View Terms and Conditions.” (*Id.*) If the user selected to view the terms, the next screen  
16 contains a list of links, including to “UPS Tariff/Terms and Conditions and Services” and “Claims and  
17 Legal Actions: Individual Binding Arbitration of Claims.” (*Id.*, ¶ 13) By clicking either link, users are  
18 directed to information that includes the UPS requirement to arbitrate claims. (*Id.* at 8, ¶ 14)

19 Mr. Liberatore reports, “UPS’s billing group was able to identify the Subject Package as a  
20 package tendered to UPS on January 5, 2015 with tracking number 1Z37W6200361921507.” (Doc. 18  
21 at 4, ¶ 4) According to Mr. Liberatore, though Plaintiff identified the tracking number as  
22 1Z37W6200361172728, UPS believes this was an error based upon the description of the package  
23 alleged in the Complaint because “only the package associate with the tracking number ending in 1507  
24 matches the alleged \$528 charge.” (*Id.* ¶ 6 n.1) Regardless, Mr. Liberatore reports “both packages  
25 were shipped under Plaintiff’s account, processed through the WorldShip® shipping system and billed  
26 in the same manner.” (*Id.*) In addition, Mr. Lliberatore reports the records of Plaintiff’s account  
27 indicate “the user . . . clicked through the Service Terms and Conditions Update on ups.com numerous  
28 times, including on January 22, 2014.” (*Id.* at 6, ¶ 10)

1           Significantly, the WorldShip and ups.com systems could best be described as a modified  
2 clickwrap agreement, because the screens asked the user to confirm acceptance of the UPS Terms,  
3 though the terms were not identified on the same page. *See, Swift v. Zynga Game Network, Inc.*, 805 F.  
4 Supp. 2d 904, 911-912 (N.D. Cal. 2011) (defining “modified clickwrap” agreement as an agreement  
5 where “the plaintiff was provided notice and an opportunity to review terms of service prior to  
6 acceptance”). In *Swift*, the court rejected the plaintiff’s argument that she was not given notice of the  
7 contractual terms to which she consented “[b]ecause Plaintiff was provided with an opportunity to  
8 review the terms of service in the form of a hyperlink immediately under the ‘I accept’ button and she  
9 admittedly clicked ‘Accept.’” *Id.* at 912. Likewise, here, the UPS shipper was informed: “By clicking  
10 the Yes button, you agree to the UPS Tariff/Terms and Conditions.” (Doc. 18 at 5, ¶ 8) In addition,  
11 immediately below this statement, and above the “Yes” button, a hyperlink to the “Terms and  
12 Conditions” was provided. (*Id.*) Because it is undisputed that Plaintiff had the opportunity to view the  
13 Terms and Conditions and clicked the “Yes” button to process the shipment, the Court finds Plaintiff  
14 manifested assent to the UPS Terms when arranging the shipment at issue.<sup>2</sup> Accordingly, Plaintiff’s  
15 argument that there was no binding contract due to lack of consent fails.

## 16           2. Unconscionability

17           A contract “is unenforceable if it is both procedurally and substantively unconscionable.” *Davis*  
18 *v. O’Melveny & Myers*, 485 F.3d 1066, 1072 (9th Cir. 2007)). Procedural unconscionability focuses on  
19 “oppression and surprise,” while substantive unconscionability focuses upon “overly harsh or one-sided  
20 results.” *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519, 1532 (1997) (citations omitted). Both forms  
21 of unconscionability must be present in order for a court to find a contract unenforceable, but it is not  
22 necessary that they be present in the same degree. *Davis*, 485 F.3d at 1072; *Stirlen*, 51 Cal. App. 4th at  
23 1532. Consequently, “[c]ourts apply a sliding scale: ‘the more substantively oppressive the contract  
24 term, the less evidence of procedural unconscionability is required to come to the conclusion that the  
25 term is unenforceable, and vice versa.’” *Id.* (quoting *Armendariz v. Foundation Health Psychcare*

---

26  
27           <sup>2</sup> Moreover, Defendant presented evidence that Plaintiff also processed shipments through the website and  
28 received notice of the arbitration requirement by clicking through the “Service Terms and Conditions Update” screen when  
processing other shipments with UPS. (*See* Doc. 18 at 6, ¶ 10) Accordingly, Plaintiff received adequate notice of the UPS  
Terms through that system as well, and indicated consent by placing the orders. *See Nguyen*, 763 F.3d at 1177.



1 *Services, Inc.*, 24 Cal. 4th 83, 99 (2000)).

2 a. Procedural Unconscionability

3 Procedural unconscionability focuses on the “manner in which the contract was negotiated and  
4 the circumstances of the party at the time.” *Kinney v. United Healthcare Servs., Inc.*, 70 Cal. App. 4th  
5 1322, 1329 (1999). The Court must consider both oppression and surprise “due to unequal bargaining  
6 power.” *Armendariz*, 24 Cal. 4th at 114. Oppression derives from a lack of “real negotiation and an  
7 absence of meaningful choice,” while surprise arises from the terms of the bargain being “hidden in a  
8 prolix printed form,” or drafted in “fine-print terms.” *Bruni v. Didion*, 160 Cal. App. 4th 1272, 1288  
9 (2008); *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 911 (2015).

10 i. *Oppression*

11 The threshold issue for oppression with procedural unconscionability “is whether the subject  
12 arbitration clause is part of a contract of adhesion.” *Stirlen*, 51 Cal. App. 4th at 1532; *see also Soltani*  
13 *v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1042 (9th Cir. 2001). A contract of adhesion “is a  
14 standardized contract, which, imposed and drafted by the party of superior bargaining strength,  
15 relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Graham*  
16 *v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 817 (1981). An arbitration clause on a “take it or leave it” basis  
17 demonstrates “quintessential procedural unconscionability.” *Aral v. Earthlink, Inc.*, 134 Cal.App.4th  
18 544, 557 (2005). Accordingly, the Court must examine “the manner in which the contract was  
19 negotiated and the circumstances of the parties at that time.” *Kinney v. United Healthcare Services*,  
20 70 Cal. App. 4th 1322, 1327 (1999).

21 It is undisputed that the UPS Terms were offered on a “take it or leave it” basis—giving users  
22 the option to either accept the UPS Terms or find another shipping service. Accordingly, the  
23 “oppression” element is satisfied.

24 ii. *Surprise*

25 Plaintiff contends the arbitration agreement was “procedurally unconscionable as the plaintiff  
26 was not even aware an arbitration provision was found in the hyperlinked terms and conditions.”  
27 (Doc. 20 at 6) Specifically, David Brown, the “shipping manager/customer service representative” for  
28 Northwest Metrology, reported:

1 In performing my job duties I have utilized the defendant (“UPS”) for the  
2 shipping needs for Northwest Metrology, and use that company’s website for our  
3 shipping materials. In doing so, I would merely hit the prompts that require me to  
4 continue until I am able to confirm a shipping label is printed.

5 During the four years of working as the shipping manager/customer service  
6 representative for Northwest Metrology, I have never read the terms and conditions of  
7 UPS while utilizing the UPS online database for shipping. Until I learned of this  
8 motion, I was unaware of any arbitration provision or clauses found on the UPS  
9 website or within UPS’ terms and conditions, and was surprised to learn of their  
10 existence.

11 (Doc. 20-2 at 3, Brown Decl. ¶¶ 2-3)

12 Significantly, under California law, Plaintiff cannot avoid the terms of a contract by asserting a  
13 representative failed to read the UPS Terms when provided with an opportunity to do so, or that he  
14 does not recall receiving notice of the UPS Terms. *See Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d  
15 1185, 1198 (N.D. Cal. 2015) (explaining that “it is essentially irrelevant whether a party actually reads  
16 the contract or not, so long as the individual had a legitimate *opportunity* to review it” (emphasis in  
17 original); *Marin Storage & Trucking, Inc.*, 89 Cal.App.4th at 1049 (“A party cannot avoid the terms of  
18 a contract on the ground that he or she failed to read it before signing”); *Bolanos v. Khalatian*, 231  
19 Cal.App.3d 1586, 1590 (1991) (finding a party “with the capacity of reading and understanding an  
20 instrument” may not avoid terms of a contract “on the ground he failed to read it before signing”). As  
21 discussed above, Plaintiff received notice of the UPS Terms—including the requirement for binding  
22 arbitration—through use of the WorldShip program and ups.com. Though Mr. Brown elected to  
23 “merely hit the prompts” rather than read the notifications, Plaintiff fails to show “surprise” because the  
24 terms were not hidden from view or drafted in “fine-print terms.” *See Bruni*, 160 Cal. App. 4th at 1288;  
25 *Sanchez*, 61 Cal. 4th at 911.

26 c. Conclusion

27 Because the agreement to submit to the dispute resolution program was offered on a “take it or  
28 leave it” basis, the agreement was procedurally unconscionable. *Circuit City Stores, Inc. v. Adams*,  
279 F.3d 889, 893 (9th Cir. 2002). However, the lack of surprise supports a conclusion that the level  
of procedural unconscionability is lessened. *See Stirlen*, 51 Cal.App.4th at 1532 (directing the court to  
consider both “oppression and surprise”).

///





- 1 ii. require the parties to update their exchanges of the documents on which they intend to  
2 rely as such documents become known to them;
- 3 iii. require the parties, in response to reasonable document requests, to make available to  
4 the other party documents, in the responding party's possession or custody, not  
5 otherwise readily available to the party seeking the documents, reasonably believed  
6 by the party seeking the documents to exist and to be relevant and material to the  
7 outcome of disputed issues; and
- 8 iv. require the parties, when documents to be exchanged or produced are maintained in  
9 electronic form, to make such documents available in the form most convenient and  
10 economical for the party in possession of such documents, unless the arbitrator  
11 determines that there is good cause for requiring the documents to be produced in a  
12 different form. The parties should attempt to agree in advance upon, and the arbitrator  
13 may determine, reasonable search parameters to balance the need for production of  
14 electronically stored documents relevant and material to the outcome of disputed  
15 issues against the cost of locating and producing them.

16 (Doc. 20-1 at 27-28, AAA R-22) Thus, Plaintiff argues the AAA Rules “do[] not allow depositions at  
17 all,” and “there is nothing like the Federal Rules of Civil Procedure to give guidance in relation to  
18 discovery.” (Doc. 20 at 9) Plaintiff notes that “in *Martinez v. Master Protection Corp.* (2004) 118  
19 Cal.App.4th 107, the court found the discovery limitation evidenced the otherwise one-sidedness of the  
20 agreement:

21 We recognize that in many employment disputes restricting a plaintiff to a single  
22 deposition and document request could place him at a serious disadvantage if testimony  
23 from numerous witnesses is necessary to prepare his case. We also are aware the same  
24 restriction could operate to the employer's advantage, because it has ready access to  
25 most of the relevant documents and many of the witnesses remain in its employ.  
26 Consequently, the employer has far less need for discovery in order to prepare for  
27 arbitration than the employee which is not limited by the terms of the agreement.”

28 (*Id.*) Further, Plaintiff observes that in *Fitz v. NCR Corp.*, the court determined a limitation to two  
depositions was unconscionable where a provision “[g]ranted the arbitrator discretion to determine  
whether additional discovery is necessary, as the ACT policy does, is an inadequate safety valve.” (*Id.*  
at 13, quoting *Fitz*, 118 Cal. App. 4th 702, 717 (2004)).

In *Fitz*, there was a limitation on depositions “unless the arbitrator finds a compelling need to  
allow it.” *Id.*, 118 Cal. App. 4th at 716. The arbitration agreement “require[d] the arbitrator to limit  
discovery as specified in the agreement unless the parties can demonstrate that a fair hearing would be  
*impossible* without additional discovery.” *Id.* (emphasis added). The court found that despite the  
provision allowing the arbitrator to grant additional discovery, the arbitrator was “constrained” by the  
“impossibility standard.” *Id.* at 717. The court explained, “we do not believe that an employee should

1 be forced to demonstrate this impossibility to an arbitrator before being granted access to the type of  
2 discovery that is necessary for a fair opportunity to vindicate her claim.” *Id.* at 719. Accordingly, the  
3 court determined that the provision regarding discovery was substantively unconscionable. *Id.* In  
4 contrast, here, the arbitrator is not held to an “impossibility” standard, and no party has a burden of  
5 proof in seeking additional discovery.

6 Similarly, the UPS Terms may be distinguished from the provisions before the court in  
7 *Martinez*, where the arbitration agreement, “absent a demonstration of ‘substantial need,’ restrict[ed]  
8 discovery to a single deposition and a document request.” *Id.*, 118 Cal. App. 4th at 118. Under the  
9 UPS Terms, there is no requirement for parties to show a “substantial need” before the arbitrator may  
10 approve a request for additional discovery. Because the AAA Rules allow the arbitrator to authorize  
11 discovery, either on his own initiative or by a request—without a showing of either a “substantial need”  
12 that a fair hearing would be “impossible” without such discovery—the discovery provision is not  
13 substantively unconscionable. *See, e.g., Jacovides v. Future Foam, Inc.*, 2016 U.S. Dist. LEXIS 57530  
14 at \*31 (N.D. Cal. Apr. 25, 2016) (finding the initial limitation to one deposition in an arbitration  
15 agreement was not substantively unconscionable where it allows “discovery without the limitation of a  
16 high standard such as “impossib[ility]” of a fair hearing without such discovery ... or “substantial  
17 need”) (internal citations omitted).

18 v. *Remedies*

19 Remedy provisions that “fail[] to provide for all the types of relief that would otherwise be  
20 available in court” by limiting an employee’s total and punitive damages are substantively  
21 unconscionable. *Adams*, 279 F.3d at 895 (citing *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1482  
22 (9th Cir. 1997)). The UPS Terms grants the arbitrator the authority to “the same damages and relief  
23 that a court can award under the law.” (Doc. 18-1 at 27) Because the available remedies are not  
24 improperly limited, the provision is not substantively unconscionable.

25 vi. *Unilateral amendment and termination*

26 The UPS Terms provide that “UPS reserves the right to unilaterally modify or amend any  
27 portion of the Service Guide or the Terms at any time without prior notice.” (Doc. 18-1 at 33) When,  
28 as here, a provision of an agreement permits a company to unilaterally amend or terminate the

1 agreement, even with written notice, that provision is substantively unconscionable. *See, e.g., Ingle*,  
2 328 F.3d at 1179; *Ramirez-Baker v. Beazer Homes*, 636 F. Supp. 2d 1008, 1021-22 (E.D. Cal. 2008).  
3 Consequently, the provision governing “future changes” is substantively unconscionable.

4 *vii. Confidentiality requirement*

5 Plaintiff contends, “The arbitration provision is substantively unconscionable due to his  
6 confidentiality requirement.” (Doc. 20 at 7, emphasis omitted) Specifically, the UPS Terms provide  
7 in relevant part:

8 **Confidentiality of Arbitration**

9 Notwithstanding anything to the contrary in the AAA Rules, UPS and Claimant agree  
10 that the filing of arbitration, the arbitration proceeding, any documents exchanged or  
11 produced during the arbitration proceedings, any briefs or other documents prepared for  
12 the arbitration, and the arbitral award shall all be kept fully confidential and shall not be  
13 disclosed to any other party, except to the extent necessary to enforce this arbitration  
14 provision, arbitral award or other rights of the parties, or as required by law or court  
15 order. This confidentiality provision does not foreclose the American Arbitration  
16 Association from reporting certain consumer arbitration case information as required by  
17 state law.

18 (Doc. 18-1 at 29) Plaintiff asserts “[t]his confidentiality clause, although facially mutual, in reality is  
19 not.” (Doc. 20 at 8, citing *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003)).

20 In *Ting v. AT&T*, the Ninth Circuit examined a confidentiality clause that provided: “Any  
21 arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content or  
22 results of any arbitration or award, except as may be required by law or to confirm and enforce an  
23 award.” *Id.*, 319 F.3d at 1151, n.16. The Court observed that “confidentiality provisions usually favor  
24 companies over individuals,” explaining that a company could “place[] itself in a far superior legal  
25 posture by ensuring that none of its potential opponents have access to precedent while, at the same  
26 time, [the company] accumulates a wealth of knowledge on how to negotiate the terms of its own  
27 unilaterally crafted contract.” *Id.* at 1151-52. In addition, the Court observed that “the unavailability  
28 of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a  
case of intentional misconduct or unlawful discrimination.” *Id.* at 1152.

On the other hand, as Defendant argues, California law does not mandate a finding that a  
confidentiality provision is “per se unconscionable.” (Doc. 21 at 16, citing *Sanchez v. Carmax Auto  
Superstores Cal., LLC*, 224 Cal.App.4th 398, 408 (2014). In *Sanchez*, the Court found the “provision

1 requiring confidentiality is not unconscionable.” *Id.*, 224 Cal.App.4th at 408 (citing *Woodside Homes*  
2 *of Cal., Inc. v. Superior Court*, 107 Cal.App.4th 723, 732 (2003)) Rather, California law recognizes  
3 that a confidentiality requirement may be imposed to protect “a legitimate commercial need” as well  
4 as a company’s “trade secrets and proprietary and confidential information” from public disclosure.  
5 *See Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1250 (2016).

6 Defendant has not identified any commercial need for the proceedings to remain confidential,  
7 and it appears the confidentiality requirement places UPS in a superior legal posture. *See Ting*, 319  
8 F.3d at 1151. Consequently, the Court finds the confidentiality provision is substantively  
9 unconscionable. However, this provision may be severed from the remainder of the agreement. *See,*  
10 *e.g., Grabowski v. C.H. Robinson Co.*, 817 F. Supp. 2d 1159 (S.D. Cal. 2011) (finding three  
11 substantively unconscionable provisions could be severed from an arbitration agreement which was  
12 not “permeated by unconscionability,” thus rendering the agreement enforceable); *Stacy v. Brinker*  
13 *Rest. Corp.*, 2012 U.S. Dist. LEXIS 150345, at \* 31-32 (E.D. Cal. Oct. 18. 2012) (explaining the  
14 substantively unconscionable provision could be severed because it was “collateral to the Agreement  
15 and does not permeate the Agreement with unconscionability”).

16 *viii. Agreement as a whole*

17 California law provides: “If the court as a matter of law finds the contract or any clause of the  
18 contract to have been unconscionable at the time it was made the court may refuse to enforce the  
19 contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may  
20 so limit the application of any unconscionable clause as to avoid any unconscionable result.” Cal. Civ.  
21 Code § 1670.5(a). Refusing to enforce an arbitration agreement is appropriate “only when an  
22 agreement is permeated by unconscionability.” *Armendariz*, 24 Cal.4th 83 at 122 (internal quotation  
23 marks omitted). Courts often look to whether the offending provisions “indicate a systematic effort to  
24 impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum  
25 that works to the employer’s advantage.” *Id.* at 124; *see also Ferguson*, 298 F.3d at 787-88. For  
26 example, the Ninth Circuit found an arbitration agreement was “permeated by unconscionable  
27 clauses” where there was a “lack of mutuality regarding the type of claims that must be arbitrated, the  
28 fee provision, and the discovery provision.” *Ferguson*, 298 F.3d at 788.



1 In this agreement, the provisions of the UPS Terms appearing substantively unconscionable are  
 2 those regarding the confidentiality and granting unilateral amendment and termination of the dispute  
 3 resolution program. However, the EDR Program provisions regarding claims subject to arbitration,  
 4 discovery, fees, costs, and remedies are not permeated by unconscionability and do not establish an  
 5 inferior forum that works to Defendant's advantage. *See Armendariz*, 24 Cal. 4th 83 at 122.  
 6 Significantly, the unconscionable provisions are not relevant to Plaintiff's claims, and may be severed  
 7 from the agreement. *See Grabowski*, 817 F. Supp. 2d 1159; *Stacy*, 2012 U.S. Dist. LEXIS 150345 at \*  
 8 31-32. Accordingly, the terms, taken as a whole, do not appear substantively unconscionable.

9 **B. Whether the Agreement encompasses the Disputed Issue**

10 Plaintiff contends its single cause of action arising under the Carmack Amendment<sup>4</sup> is not  
 11 encompassed within the arbitration agreement. (Doc. 20 at 4-5) The Carmack Amendment preempts  
 12 any state common law action against a common carrier for damage to belongings transported in  
 13 interstate commerce. *See Adams Express Co. v. Croninger*, 226 U.S. 491, 505-06 (1913); *Hughes*  
 14 *Aircraft v. North American Van Lines*, 970 F.2d 609, 613 (9th Cir. 1992). “[T]he Carmack Amendment  
 15 is the exclusive cause of action for interstate-shipping contract claims alleging loss or damage to  
 16 property.” *Hall v. North American Van Lines, Inc.*, 476 F.3d 683, 688 (9th Cir. 2007). It establishes “a  
 17 nationally uniform policy governing interstate carriers’ liability for property loss.” *New York. N. H. &*  
 18 *H. R. Co. v. Nothnagle*, 346 U.S. 128, 131 (1953). As such, the Ninth Circuit determined “the Carmack  
 19 Amendment constitutes a complete defense to common law claims alleging all manner of harms.” *Hall*  
 20 at 687.

21 Plaintiff contends that because the Carmack Amendment is a federal statute, the failure to  
 22 specifically reference it in the arbitration agreement is a “fatal flaw.”<sup>5</sup> (Doc. 20 at 4) As Plaintiff  
 23

24 \_\_\_\_\_  
 25 <sup>4</sup> Defendant disputes that the Carmack Amendment applies because the Amendment applies only to contracts for shipping  
 26 over rail or by truck. UPS notes that the package was shipped to Hawaii which means, by necessity, that the package was  
 27 not shipped by rail or truck and surmises it was shipped by air. Whether by air or cargo vessel, the Carmack Amendment  
 28 would not apply. However, it is probable that the package was shipped via truck or rail initially after the plaintiff tendered  
 it. UPS fails to discuss whether the Carmack Agreement applies in this type of situation. See e.g.,  
*Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 101 (2010) Carmack Amendment applies where the  
*receiving* carrier—as opposed to the *connecting* carrier—issues a Carmack-compliant bill of lading.]

<sup>5</sup> Notably, “The [FAA]’s centerpiece provision makes a written agreement to arbitrate ‘in any maritime transaction or a  
 contract evidencing a transaction involving commerce ... valid, irrevocable, and enforceable, save upon such grounds as

1 observes, courts have determined that “arbitration provisions concerning federal statutory rights are  
 2 only enforceable where the arbitration clause “clearly and unmistakably” designates the federal statute  
 3 at issue is subject to arbitration.” (Doc. 20 at 4, citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 248  
 4 (2009) (emphasis omitted)). In enacting the Carmack Amendment, Congress prohibited forced  
 5 arbitration of disputes related to shipping household goods, but did not provide an exception for  
 6 disputes arising from shipping contracts for any other goods. *Smallwood v. Allied Van Lines, Inc.*, 660  
 7 F.3d 1115, 1124 (9th Cir. 2011). Thus, the FAA applies unless the plaintiff demonstrates “Congress  
 8 intended to preclude a waiver of a judicial forum” for the claim. *Gilmer v. Interstate/Johnson Lane*  
 9 *Corp.*, 500 U.S. 20, 26 (U.S. 1991).

10 Notably, court have held there must “be at least a knowing agreement to arbitrate employment  
 11 disputes before an employee may be deemed to have waived the comprehensive statutory rights,  
 12 remedies and procedural protections prescribed in Title VII and related state statutes.” *Prudential Ins.*  
 13 *Co. of Am. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994). However, the plaintiff does not cite to any  
 14 authority that a similar knowing waiver is required in other cases outside of the employment arena.  
 15 Indeed, while not holding that the FAA applies to Carmack Amendment claims, the Ninth Circuit has  
 16 upheld arbitration awards under the FAA in these cases. *White v. Mayflower Transit, L.L.C.*, 543 F.3d  
 17 581, 586 (9th Cir. 2008).

18 In any event, the UPS Terms indicate they apply to “[a]ny controversy or claim arising out of  
 19 or related to the provision of services by UPS.” (Doc. 18-1 at 28) Thus, the plain language of the  
 20 UPS Terms indicates that the disputed issue—which arises from the handling of a package Plaintiff  
 21 shipped with UPS—is encompassed within the arbitration provision, and has not been excluded from  
 22 arbitration. “In the absence of any express provision excluding a particular grievance from arbitration  
 23 . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.”  
 24 *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-86 (1960). The  
 25 Court holds that because the Carmack Amendment governs *all* disputes related to shipment of goods<sup>6</sup>  
 26

---

27 exist at law or in equity for the revocation of any contract.’ 9 U.S.C. § 2.” *Mitsubishi Motors Corp. v. Soler Chrysler-*  
*Plymouth, Inc.*, 473 U.S. 614, 625 (1985). “Commerce” includes shipping between states. 9 U.S.C. § 1.

28 <sup>6</sup> *White*, 543 F.3d 586 [All claims arising from the “same conduct as the claims for delay, loss or damage to shipped property” are preempted by the Carmack Amendment.

1 and because it provides the “exclusive cause of action for interstate-shipping contract claims alleging  
2 loss or damage to property” (*Hall*, 476 F.3d at 688), requiring the UPS Terms to specifically reference  
3 the Carmack Amendment would be redundant and would cause confusion rather than provide clarity.

4 **V. Conclusion**

5 Plaintiff and Defendant entered into a valid arbitration agreement, which encompasses the issue  
6 in dispute. As a result, “there is a presumption of arbitrability” and Defendant’s motion to compel  
7 arbitration should not be denied. *See AT&T Tech., Inc.*, 475 U.S. at 650.

8 Accordingly, **IT IS HEREBY ORDERED:**

- 9 1. The clauses governing amendment, and confidentiality are severed from the UPS Terms;
- 10 2. Defendant’s motion to compel arbitration is **GRANTED**;
- 11 3. The matter is **STAYED** to allow the completion of the arbitration;
- 12 4. Within 120 days and every 120 days thereafter, counsel **SHALL** file a joint status  
13 report. In addition, within 10 days of the determination by the arbitrator, counsel  
14 **SHALL** file a joint status report; and
- 15 5. The Court retains jurisdiction to confirm the arbitration award and enter judgment for  
16 the purpose of enforcement.

17  
18 IT IS SO ORDERED.

19 Dated: July 7, 2016

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE