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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UTTAM CHAND RAKESH KUMAR, an
Indian general partnership, et al.,

Plaintiffs,

v.

DERCO ASSOCIATES, INC., a California
corporation d/b/a DERCO FOODS,

Defendant.

No. 1:21-cv-00692-DAD-HBK

ORDER DENYING PLAINTIFFS’ MOTION
FOR A TEMPORARY RESTRAINING
ORDER AND A PRELIMINARY
INJUNCTION

(Doc. No. 3)

On April 26, 2021, plaintiffs Uttam Chand Rakesh Kumar, Rakesh Kumar Bhatia, Akshay Kumar Bhatia, and UCRK Agros Private Ltd. (collectively, “plaintiffs”) filed a complaint against defendant Derco Associates, Inc. d/b/a Derco Foods (“defendant” or “Derco”), seeking a declaratory judgment that the arbitration agreement between the parties is unenforceable and that a release of liability is enforceable against defendant. (Doc. No. 1 (“Compl.”).) Plaintiffs also seek a permanent injunction prohibiting defendant from pursuing contract claims against plaintiffs through arbitration proceedings. (*Id.*) With their complaint plaintiffs also filed a motion for a temporary restraining order and preliminary injunction. (Doc. No. 3.) Pursuant to General Order No. 617 addressing the public health emergency posed by the coronavirus pandemic, on April 27, 2021, the court took this matter under submission to be decided on the

1 papers, without holding a hearing. (Doc. No. 11.) For the reasons explained below, the court will
2 deny plaintiffs’ motion for a temporary restraining order and a preliminary injunction.

3 BACKGROUND

4 In their complaint, plaintiffs allege the following. Plaintiffs Uttam Chand Rakesh Kumar
5 and UCRK Agros Private Ltd. are international tree nut import businesses located in India that
6 entered into multiple contracts with defendant Derco, an international tree nut export business
7 located in Fresno, California, for the purchase and delivery of almonds to India. (Compl. at ¶¶ 8–
8 9.) Between December 6, 2019 and March 20, 2020, plaintiffs entered into forty-four (44)
9 contracts (collectively, “Seller Contract”) for the purchase of containers of almonds from
10 defendant, who would ship the almonds from defendant’s facility in California to plaintiffs in
11 Mumbai, India. (*Id.* at ¶ 9.) Each of the 44 contracts contained identical provisions except as to
12 the purchase quantities and prices. (*Id.* at ¶ 9, fn.1.) Each of the Seller Contracts contained an
13 identical arbitration provision (the “Arbitration Agreement”) that stated as follows:

14 This contract is subject to all of the Specialty Crop Trade Council
15 (SCTC) terms and conditions for dried fruit, tree nuts and kindred
16 products, including, but not limited to, the provision which requires
17 buyer and seller to submit any and all disputes to binding arbitration
18 to be administered by JAMS pursuant to its Streamlined Rules &
19 Procedures. Judgment on the award may be entered in any court
20 having jurisdiction. Any and all claims between the parties,
21 including, but not limited to, any claims relating to this contract, shall
22 be governed by the laws of the [S]tate of California. Any and all
23 disputes which are not arbitrated shall be determined by the federal
24 courts in the Eastern District of California and each party submits to
25 the exclusive jurisdiction of such courts. The prevailing party in any
26 action (including a lawsuit or arbitration) relating to this contract
27 shall be entitled to recover costs and attorneys’ fees from the other
28 party.

(*Id.* at ¶ 9; *see e.g., id.*, Ex. A at 22–24, 26.)

23 On May 7, 2020, defendant signed two separate Declarations cum Undertaking
24 (collectively, the “Release”) that were substantively identical except that each listed different
25 Seller Contracts that together encompassed all 44 Seller Contracts between the parties. (*Id.* at
26 ¶ 10, fn.2; *see also id.*, Ex. C at 104, 105.) The Release, signed only by defendant and not by
27 plaintiffs, provided that the parties “have agreed to cancel the abovementioned Seller Contracts,”
28 and specifically that “all the Seller Contracts executed between [defendant] Derco and the

1 [plaintiff] Consignee shall come to an end and either of the parties shall have no legal or financial
2 claim of whatsoever nature against the other with respect to the said Seller Contracts” upon
3 defendant’s receipt of “No Objection Certificates” (“NOC”) issued by plaintiffs. (*Id.* at ¶ 10–11;
4 *id.*, Ex. C at 104, 105.) NOCs are certificates that stated plaintiffs, as the purchasers of the
5 almonds, did not object to the release at the Mumbai, India port of the almonds to defendant’s
6 possession. (Compl. at ¶ 10.) The Release also provided a release of liability:

7 That we undertake that upon receipt of the abovementioned NOCs,
8 Derco (or any person claiming under Derco) shall have no legal or
9 financial claim/right/remedy/liability of whatsoever nature against
10 the Consignee with respect to the abovementioned Seller Contracts.
11 We further undertake not to initiate any legal action either civil or
12 criminal in any court of jurisdiction (including arbitration
13 Proceedings) against the Consignee arising, either directly or
14 indirectly, out of the abovementioned Seller Contracts.

12 (*Id.* at ¶ 11 (emphasis omitted); *id.*, Ex. C at 104, 105.) The Release further stated that defendant
13 acknowledged “to have executed this Declaration cum Undertaking voluntarily and without any
14 force/coercion/duress.” (*Id.* at ¶ 11; *id.*, Ex. C at 104, 105.) All parties were represented by
15 counsel in negotiating the terms of the Release. (Compl. at ¶ 13.) Plaintiffs issued NOCs
16 pursuant to the terms of the Release and defendant subsequently sold the almonds to another
17 purchaser. (*Id.* at ¶ 12.)

18 On June 17, 2020, defendant initiated arbitration proceedings before JAMS in Los
19 Angeles, California, alleging that plaintiffs breached the Seller Contract by refusing to accept or
20 pay for the contracted-for almonds and seeking damages totaling approximately \$1.5 million. (*Id.*
21 at ¶ 15.) Defendant’s Demand for Arbitration alleged that defendant signed the Release under
22 duress, rendering the Release invalid and unenforceable. (*Id.* at ¶ 16.) On July 31, 2020, the
23 Honorable Ann Kough (Ret.) was appointed as the arbitrator of the parties’ dispute. (*Id.* at ¶ 18.)
24 On September 14, 2020, plaintiffs sought leave to submit a motion to dismiss on the grounds that
25 JAMS lacked jurisdiction over the parties’ dispute because there was no valid arbitration
26 agreement between the parties, arguing that the Release both extinguished the Seller Contract
27 containing the Arbitration Agreement and barred defendant’s contract claims. (*Id.* at ¶ 18, Ex. E
28 at 117–18.) On September 30, 2020, after hearing oral argument, the arbitrator issued a

1 memorandum denying Plaintiff's request to submit a motion to dismiss finding that the issue was
2 not an issue involving jurisdiction or arbitrability. (*Id.* at ¶ 19, Ex. F at 120.)

3 On October 2, 2020, plaintiffs sought reconsideration of that denial and, in the alternative,
4 leave to file a motion for summary adjudication. (*Id.* at ¶ 20.) Defendant submitted an Amended
5 Demand for Arbitration on October 5, 2020, which added an allegation that plaintiffs fraudulently
6 induced defendant to enter into the Release by representing that plaintiffs were insolvent and thus
7 judgment-proof, such that arbitration of the alleged contract breaches would be economically
8 unreasonable. (*Id.* at ¶ 21, Ex. H at 141–42.) At oral argument on their motion, plaintiffs sought
9 a bifurcated hearing to first determine whether the Release was valid such that arbitration could
10 be enforced. (*Id.* at ¶ 22.) Following oral argument, the arbitrator issued Amended Order No. 1
11 that confirmed the denial of leave to file a motion to dismiss, denied plaintiff's request for leave
12 to file a motion for summary adjudication, permitted defendant to file the Amended Demand, and
13 denied plaintiff's request for a bifurcated hearing. (*Id.* at ¶¶ 23–24.)

14 As the arbitration moved forward, plaintiffs sought reconsideration of the denial of their
15 request for a bifurcated hearing. (*Id.* at ¶ 27.) After additional briefing by both parties addressing
16 the issue, the arbitrator again denied bifurcation and set the arbitration hearing, to encompass both
17 defendant's claims as well as plaintiffs' argument that the parties' Release voids the Arbitration
18 Agreement and defendant's claims, for June 7–9, 2021. (*Id.*)

19 While the parties engaged in the arbitration proceedings, plaintiffs filed suit against
20 defendant in the High Court of Delhi, New Delhi, India, seeking an order enjoining defendant
21 from enforcing the Arbitration Agreement against plaintiffs in California. (*Id.* at ¶ 28.) On
22 November 9, 2020, the Indian court denied plaintiff's request for an injunction. (*Id.*) Plaintiffs
23 subsequently appealed from that denial on November 25, 2020, where the matter remains pending
24 before the appellate division of the Delhi court. (*Id.*) Oral argument in the Indian appeal was set
25 for January 25, 2021, but was continued first to March 17, 2021 when defendant failed to appear,
26 and then continued again to April 5, 2021 pursuant to defendant's request. (*Id.* at ¶ 29.)

27 On March 26, 2021, plaintiffs sought a temporary stay of the arbitration proceeding and a
28 continuance of the pre-hearing deadlines from the JAMS arbitrator until after the appellate

1 division of the Delhi court ruled on plaintiffs' pending appeal before that court. (*Id.* at ¶ 30.) The
2 pre-hearing deadlines plaintiff sought to continue included the payment of a \$26,900 fee due
3 April 8, 2021 that would become non-refundable on April 26, 2021 and the May 7, 2021 deadline
4 for filing pre-hearing submissions on the evidence and listing the witnesses plaintiffs expected to
5 rely upon during the arbitration hearing. (*Id.*) Defendant opposed the stay, arguing that the
6 arbitration schedule should proceed unmodified because the Indian lower court had already
7 denied plaintiffs' request for an injunction. (*Id.* at ¶ 32.) On April 4, 2021, the arbitrator denied
8 plaintiffs' request for a temporary stay. (*Id.* at ¶ 33.)

9 The appellate division of the High Court of Delhi heard oral arguments in the Indian
10 appeal on April 5, 9, and 15, 2021, with an additional hearing scheduled for April 19. (*Id.* at
11 ¶ 35.) On April 18, 2021, the High Court of Delhi adjourned all hearings, including plaintiffs'
12 appellate hearing, other than extremely urgent matters due to the severe rise of COVID-19 cases
13 in India. (*Id.*) Plaintiffs' Indian counsel sought to appear before the High Court of Delhi to
14 provide notice of plaintiffs' intent to file the instant action in this court, but the High Court issued
15 an order on April 23, 2021 adjourning all hearings until July 9, 2021 due to the ongoing severe
16 rise of COVID-19 infections in that country. (*Id.*) Plaintiffs filed an application in the High
17 Court on April 24, 2021, requesting a temporary stay of the JAMS proceeding pending the ruling
18 in the Indian appeal or, alternatively, permission to pursue remedies in the United States without
19 prejudice to the pending Indian appeal. (*Id.*) The High Court denied plaintiffs' request that the
20 application be heard as an urgent matter, adjourning the request for a stay of the JAMS
21 proceeding until July.

22 On April 26, 2021, plaintiffs filed their complaint against defendant in this court seeking
23 declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, *et seq.* (Compl.) As noted
24 above, plaintiffs seek (1) a declaratory judgment that the Release is valid and enforceable such
25 that it renders the Arbitration Agreement unenforceable and (2) an injunction prohibiting
26 defendant Derco from pursuing arbitration proceedings before JAMS and enforcing the
27 Arbitration Agreement against plaintiffs. (*Id.* at ¶¶ 46, 48.) Plaintiffs filed the pending motion
28 for a temporary restraining order and a preliminary injunction on the same day. (Doc. No. 3.) On

1 May 3, 2021, defendant filed its opposition to plaintiffs’ motion and a request for judicial notice.¹
2 (Doc. No. 13.) Plaintiffs filed their reply thereto on May 4, 2021. (Doc. No. 20.)

3 **LEGAL STANDARD**

4 The standard governing the issuing of a temporary restraining order is “substantially
5 identical” to the standard for issuing a preliminary injunction. *See Stuhlberg Int’l Sales Co. v.*
6 *John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). “The proper legal standard for
7 preliminary injunctive relief requires a party to demonstrate ‘that he is likely to succeed on the
8 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
9 balance of equities tips in his favor, and that an injunction is in the public interest.’” *Stormans,*
10 *Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council,*
11 *Inc.*, 555 U.S. 7, 20 (2008)); *see also Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th
12 Cir. 2011) (“After *Winter*, ‘plaintiffs must establish that irreparable harm is likely, not just
13 possible, in order to obtain a preliminary injunction.’”); *Am. Trucking Ass’n, Inc. v. City of Los*
14 *Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). A plaintiff seeking a preliminary injunction must
15 make a showing on all four of these prongs. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
16 1135 (9th Cir. 2011). The Ninth Circuit has also held that “[a] preliminary injunction is
17 appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were
18 raised and the balance of hardships tips sharply in the plaintiff’s favor.” *Id.* at 1134–35 (quoting

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22 ¹ Defendant asks the court to take judicial notice of: (1) the JAMS Streamlined Arbitration Rules
23 and Procedures; (2) records from the High Court of Delhi at New Delhi related to the matters
24 filed by plaintiffs in the Indian court; and (3) Sections 48 and 150 of India’s Customs Act, 1962.
25 (Doc. No. 19 at 2–3.) The court hereby takes judicial notice of the JAMS Streamlined Arbitration
26 Rules and Procedures because it is “not subject to reasonable dispute” and “can be accurately and
27 readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R.
28 Evid. 201(b); *O’Connor v. Uber Techs., Inc.*, 150 F. Supp. 3d 1095, 1098 n.2 (N.D. Cal. 2015).
Furthermore, “a court may take judicial notice of public records of governmental entities and
authoritative sources of foreign law.” *Color Switch LLC v. Fortafy Games DMCC*, 377 F. Supp.
3d 1075, 1089 n.6 (E.D. Cal. 2019) (internal citations omitted). The court therefore takes judicial
notice of the records from the High Court of Delhi, New Delhi and of India’s Customs Act, 1962.

1 *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*)).² The party seeking the
2 injunction bears the burden of proving these elements. *Klein v. City of San Clemente*, 584 F.3d
3 1196, 1201 (9th Cir. 2009); *see also Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674
4 (9th Cir. 1988) (citation omitted) (“A plaintiff must do more than merely allege imminent harm
5 sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a
6 prerequisite to preliminary injunctive relief”). Finally, an injunction is “an extraordinary remedy
7 that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”
8 *Winter*, 555 U.S. at 22.

9 ANALYSIS

10 Here, plaintiffs seek a temporary restraining order and a preliminary injunction barring
11 defendant from enforcing the Arbitration Agreement embedded in the Seller Contract between the
12 parties. (Doc. No. 3 at 2.) Plaintiffs’ sole cause of action is for declaratory judgment and
13 injunctive relief under 28 U.S.C. § 2201. Plaintiffs bear the burden of demonstrating that they are
14 likely to succeed on the merits of this action or, at the very least, that “serious questions going to
15 the merits” have been raised. *All. for the Wild Rockies*, 632 F.3d at 1131. Plaintiffs have not met
16 this burden.

17 The Declaratory Judgment Act permits the federal courts to “declare the rights and other
18 legal relations of any interested party seeking such declaration, whether or not further relief is or
19 could be sought.” 28 U.S.C. § 2201(a). Although the Act “enlarged the range of remedies
20 available in the federal courts, [it] did not extend their jurisdiction.” *Skelly Oil Co. v. Phillips*
21 *Petroleum Co.*, 339 U.S. 667, 671 (1950). When a plaintiff seeking declaratory relief “asserts a
22 claim that is in the nature of a defense to a threatened or pending action, the character of the
23 threatened or pending action determines whether federal question jurisdiction exists with regard
24 to the declaratory judgment action.” *Morgan Stanley & Co., LLC v. Couch*, 134 F. Supp. 3d

25 ² The Ninth Circuit has found that this “serious question” version of the circuit’s sliding scale
26 approach survives “when applied as part of the four-element *Winter* test.” *All. for the Wild*
27 *Rockies*, 632 F.3d at 1134. “That is, ‘serious questions going to the merits’ and a balance of
28 hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction,
so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the
injunction is in the public interest.” *Id.* at 1135.

1 1215, 1221 (E.D. Cal. 2015), *aff'd*, 659 F. App'x 402 (9th Cir. 2016) (quoting *Levin Metals Corp.*
2 *v. Parr–Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir.1986)). If the underlying
3 threatened or pending action for which plaintiff seeks a declaratory judgment could have been
4 brought in federal court, jurisdiction exists for the action in which declaratory relief is sought. *Id.*

5 As the Ninth Circuit has explained,

6 [Defendant] contends the agreement is expired, but “where . . . the
7 agreement contains a broad arbitration clause covering all disputes
8 concerning the meaning of the terms and provisions of the
9 agreement..... [d]isputes over expiration or termination must be
10 submitted to arbitration.” [*Brotherhood of Teamsters & Auto Truck*
11 *Drivers Local No. 70 v. Interstate Distrib. Co.*, 832 F.2d 507, 510
12 (9th Cir. 1987)]; *see also Nolde Bros.*, 430 U.S. at 252, 97 S. Ct.
1067. We have reaffirmed this principle and clearly stated “a dispute
over whether a contract has expired or has been terminated or
repudiated...is for the arbitrator if the breadth of the arbitration
clause is not in dispute.”

12 *Optimum Prods. v. Home Box Off.*, 839 F. App'x 75, 78 (9th Cir. 2020)³ (quoting *McKinney v.*
13 *Emery Air Freight Corp.*, 954 F.2d 590, 593 (9th Cir.1992)). Whereas “[i]ssues regarding
14 the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an
15 arbitrator, [...] challenges to the *existence* of a contract as a whole must be determined by the
16 court” and not the arbitrator. *Sanford v. Memberworks, Inc.*, 483 F.3d 956, 962 & n.18 (9th
17 Cir.2007). Moreover, the presence of broad arbitration clauses in the contract generally requires
18 that disputes regarding termination of the contract be submitted to arbitration. *McKinney*, 954
19 F.2d at 593 (“Precepts laid down instruct us to distinguish between a dispute over whether a
20 contract ever existed and a dispute over whether a contract has expired or has been terminated or
21 repudiated. In the former case, the issue is for the court; in the latter, the issue is for the arbitrator
22 if the breadth of the arbitration clause is not in dispute”); *Camping Constr. Co. v. District Council*
23 *of Iron Workers*, 915 F.2d 1333, 1338–39 (9th Cir. 1990) (An agreement to arbitrate any
24 grievance or controversy “ordinarily requires us to hold that the parties have provided for
25 arbitration of disputes regarding termination—and repudiation as well[.]”).

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28 ³ Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule
36-3(b).

1 Federal substantive law governs the question of arbitrability. *Simula, Inc. v. Autoliv, Inc.*,
2 175 F.3d 716, 719 (9th Cir. 1999). However, the general federal policy favoring arbitration is
3 inapplicable when determining whether a valid agreement to arbitrate between the parties exists.
4 *See Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.11 (9th Cir. 2006). Rather, in determining the
5 validity of an agreement to arbitrate, courts “should apply ordinary state-law principles that
6 govern the formation of contracts.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944
7 (1995); *Comer*, 436 F.3d at 1104 n.11 (concluding that ordinary contract principles determine
8 who is bound by arbitration agreements). “Thus, generally applicable contract defenses, such as
9 fraud, duress, or unconscionability, may be applied” to find an arbitration agreement invalidated.
10 *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (2000); *Ticknor v. Choice Hotels Int’l,*
11 *Inc.*, 265 F.3d 931, 936–37 (9th Cir.2001).

12 Here, plaintiffs first contend that this court has jurisdiction over their declaratory relief
13 claim because federal courts have jurisdiction over such claims seeking to enjoin arbitration when
14 the court “would have jurisdiction over the claim being arbitrated if brought in federal court.”
15 (Doc. No. 3 at 21) (citing *Morgan Stanley*, 134 F. Supp. 3d at 1223). Plaintiffs note that there is
16 an actual controversy between the parties involving enforcement of the arbitration agreement and
17 that the parties here are completely diverse and the amount in controversy requirement is met,
18 such that the court would have diversity jurisdiction over the arbitration claims if they had been
19 brought in this court. (*Id.* at 21–22.) Plaintiffs note that the Arbitration Agreement is subject to
20 the terms and conditions of the Specialty Crop Trade Council’s (“SCTC”) arbitration provision,
21 which “provides only for arbitration for ‘disputes regarding export sales arising under the
22 agreement between Buyer and Seller, including disputes arising out of the SCTC terms and
23 conditions.” (*Id.* at 23–24.) Plaintiffs argue that this court must determine arbitrability because
24 the Arbitration Agreement and the SCTC arbitration provision “‘requires buyer and seller to
25 submit any and all disputes to binding arbitration,’ but does not specify that such disputes include
26 questions of arbitrability.” (*Id.* at 23.) Plaintiffs assert that the court may “resolve questions
27 about the jurisdiction of an arbitrator *de novo* pursuant to the Declaratory Judgment Act,”
28 emphasizing that the arbitrator has ordered the parties to participate in a full hearing on both the

1 effect of the Release on the Arbitration Agreement as well as on the merits of defendants' claim.
2 (*Id.* at 24) (citing *Orion Pictures Corp. v. Writers Guild of Am., W., Inc.*, 946 F.2d 722, 725 (9th
3 Cir. 1991)).

4 Plaintiffs further argue that the Arbitration Agreement is not enforceable because the
5 Release provides that the parties "have agreed to cancel the abovementioned Seller Contracts,"
6 including the embedded Arbitration Agreements. (*Id.* at 24–25.) Plaintiffs emphasize that the
7 Release specifically provided that defendant "undertake not to initiate any legal action either civil
8 or criminal in any court of jurisdiction (including arbitration Proceedings)" for claims rising
9 directly or indirectly from the Seller Contracts. (*Id.* at 25.) In plaintiffs' view, the Release was
10 validly supported by consideration because both parties mutually released any "legal or financial
11 claim of whatsoever nature" related to the Seller Contracts and because plaintiffs agreed to issue
12 NOCs in exchange for the Release. (*Id.* at 26.) Plaintiffs also argue that no economic duress or
13 fraud occurred in the negotiation of the Release, pointing to their prior payments to defendant
14 totaling approximately \$20 million for contracts executed between April 2019 and March 21,
15 2020 as proof of their solvency. (*Id.* at 27–28.)

16 In its opposition, defendant Derco argues that the Arbitration Agreement delegated the
17 question of arbitrability to the arbitrator, pointing to the incorporation of the terms and conditions
18 of SCTC's arbitration provision into the Seller Contracts, which "requires buyer and seller to
19 submit any and all disputes to binding arbitration to be administered by JAMS pursuant to its
20 Streamlined Rules & Procedures." (Doc. No. 13 at 17–18.) Defendant argues that this court must
21 enforce the Arbitration Agreement because it clearly delegated the determination of arbitrability
22 questions to the arbitrator by incorporating JAMS Streamlined Arbitration Rules & Procedures
23 Rule 8(b), which in turn provide that "[t]he Arbitrator has the authority to determine jurisdiction
24 and arbitrability issues as a preliminary matter." (*Id.* at 17) (citing *Brennan v. Opus Bank*, 796
25 F.3d 1125, 1132 (9th Cir. 2015)). Defendant asserts that, here, the arbitrator found defendant's
26 claims to be arbitrable in the October 8, 2020 order, in which the arbitrator simply stated that
27 "[t]he claims are arbitrable." (*Id.* at 19.)

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1 Defendant also argues that plaintiffs are not likely to succeed on the merits of their claim
2 because the Releases lacked consideration and were entered into upon economic duress and
3 fraudulently induced. (*Id.* at 24–28.) Defendant argues that the Release lacked consideration
4 because plaintiffs were required to provide the NOCs under the covenant of good faith and fair
5 dealing to mitigate defendant’s damages upon plaintiffs’ refusal to accept and pay for the shipped
6 containers of almonds. (*Id.* at 24–25.) Defendant also alleges economic duress caused by
7 plaintiffs’ refusal to accept the delivered almonds or to pay for those almonds, pointing to the risk
8 of product loss due to exposure to the elements and the detention and demurrage charges of
9 \$6000 incurred daily as the almonds remained unclaimed at the Mumbai port. (*Id.* at 27.)
10 Defendant additionally argues that the Release was fraudulently induced by plaintiffs’
11 representation of their lack of liquidity to pay for even one load of almonds, such that defendant
12 understood plaintiffs to be indicating that they were judgment proof. (*Id.* at 28–29.) Defendant
13 contends that, in light of plaintiffs’ alleged lack of liquidity, no reasonable business would have
14 sought legal action against plaintiffs in lieu of attempting to mitigate their damages by first
15 reselling the refused almonds to another purchaser, and that defendant could not have released
16 plaintiffs of claims related to the alleged misrepresentation of plaintiffs’ liquidity under these
17 circumstances. (*Id.* at 27–28, 30.) Finally, defendant argues that even if the Release were to be
18 found valid, it would merely cancel the Seller Contract “according to terms laid out in the
19 Declarations,” such that the Release only bars claims seeking monetary damages from breach of
20 the Seller Contract, leaving defendant free to seek a declaratory judgment from the arbitrator that
21 plaintiffs breached the Seller Contract.

22 In their reply, plaintiffs for the most part merely reiterate their arguments regarding their
23 likelihood of success on the merits. (Doc. No. 20.) Plaintiffs do clarify that it is their contention
24 that the arbitrator has not yet ruled on the question of arbitrability, finding instead that plaintiffs’
25 arguments with respect to the validity of the Release are affirmative defenses to be raised at the
26 arbitration hearing. (*Id.* at 6–7.) Plaintiffs argue that the arbitrator lacks the authority to
27 determine the arbitrability of defendant’s contract claims because the Release “clearly and
28 unmistakably” terminated the Seller Contract containing the Arbitration Agreement. (*Id.* at 8–9.)

1 Plaintiffs argue that the court, not an arbitrator, determines arbitrability when parties enter into
2 settlement agreements that do not contain arbitration provisions. (*Id.* at 10–11) (citing *Ingram*
3 *Micro Inc. v. Signeo Int’l, Ltd.*, No. 8:13-cv-01934-DOC-AN, 2014 WL 3721197, at *3 (C.D.
4 Cal. July 22, 2014)).

5 In this case it is undisputed that the Seller Contract existed, was validly formed, and
6 contained a broad Arbitration Agreement. The Arbitration Agreement “requires buyer and seller
7 to submit any and all disputes to binding arbitration to be administered by JAMS pursuant to its
8 Streamlined Rules & Procedures.” (Compl. at ¶ 9; Doc. No. 13 at 18.) JAMS Streamlined
9 Arbitration Rules & Procedures Rule 8(b) specifically provides that the arbitrator “has the
10 authority to determine jurisdiction and arbitrability issues as a preliminary matter.” (Doc. No. 19-
11 1 at 6.) Such incorporation of a delegation provision satisfies the “clearly and unmistakably”
12 standard to be applied in determining the parties’ intent to delegate the question of arbitrability to
13 the arbitrator. *See Brennan*, 796 F.3d at 1131 (finding that “the parties’ incorporation of the AAA
14 rules [which contained a delegation provision] constituted ‘clear and unmistakable’ evidence of
15 their intent to submit the arbitrability dispute to arbitration”). The presence of broad arbitration
16 clauses generally requires that disputes regarding termination of a contract must be submitted to
17 arbitration. *See Optimum Prods.*, 839 F. App’x at 78; *Camping Constr.*, 915 F.2d at 1340. As
18 noted above, the existence of a contract containing an arbitration clause or whether such a
19 contract is void are matters for the court and not the arbitrator. *See Sanford*, 483 F.3d at 962 & n.
20 8 (“Issues regarding the validity or enforcement of a putative contract mandating arbitration
21 should be referred to an arbitrator, but challenges to the existence of a contract as a whole must be
22 determined by the court prior to ordering arbitration.”).

23 The question presented in the motion now pending before this court, however, turns on the
24 parties’ dispute over whether the Release terminated or repudiated the Seller Contract and the
25 Arbitration Agreement, not on whether the Seller Contract is void as a matter of contract
26 formation. In fact, plaintiffs make no allegations challenging the construction of the arbitration
27 clause itself. Accordingly, the issue in dispute here is a matter for the arbitrator. *Cf. Homestake*
28 *Lead Co. of Missouri v. Doe Run Res. Corp.*, 282 F. Supp. 2d 1131, 1139–40 (N.D. Cal. 2003)

1 (finding it a matter for the court when plaintiff challenged the construction of the arbitration
2 clause itself, whereas “[i]f this were at its core a question of the [entire contract] and its
3 cancellation under section 6.03 [of a subsequent agreement], that would be a question for the
4 arbitrator”). Here, plaintiffs have argued that the Release purports to “cancel” the Seller Contract
5 and release plaintiffs of all liability arising from the Seller Contract upon defendant’s receipt of
6 the NOCs. Defendant, on the other hand, has presented arguments calling into question the
7 validity of the Release, and thus its effect on the Seller Contract and the embedded Arbitration
8 Agreement.⁴ Given the broad language of the arbitration clause at issue here, whether the Seller
9 Contract, including its Arbitration Agreement, has terminated due to the Release is a question for
10 the arbitrator and not for this Court. *See McKinney*, 954 F.2d at 593; *Optimum Prods.*, 839 F.
11 App’x at 78; *Camping Constr.*, 915 F.2d at 1340.

12 The Ninth Circuit’s opinion in *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015), is
13 instructive in this regard. In *Brennan*, “three agreements—each nested inside the other—[were]
14 relevant to the analysis”: (1) plaintiff’s employment agreement, (2) the arbitration clause within
15 the agreement, and (3) the delegation provision via the arbitration clause’s incorporation of the
16 AAA rules which delegated enforceability questions to the arbitrator. *Id.* at 1133. “The last two
17 [were] separate agreements to arbitrate different issues.” *Id.* The court found that because “only
18 issue before this Court is who—an arbitrator or a judge—should decide the forum for resolving
19 the validity of the Arbitration Clause as a whole . . . that question is resolved by determining the
20 validity of the Delegation Provision alone.” *Id.* (citing *Rent-A-Center, W., Inc. v. Jackson*, 561
21 U.S. 63, 73–75 (2010)). The court concluded that it “need not consider” the claim that the
22 delegation provision was invalid because the plaintiff had failed to make any argument specific to
23 the delegation provision and instead merely argued that the arbitration clause as a whole was
24 invalid. *Id.* Accordingly, the court in *Brennan* held that the question of whether the

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26 ⁴ It would be inappropriate for the court to express an opinion on the ultimate effect of the
27 Release and it therefore will not do so. *See McKinney*, 954 F.2d at 593 (holding that the
28 questions as to whether a contract containing an arbitration clause has expired, terminated, or
been repudiated are matters for the arbitrator where the arbitration clause is sufficiently broad).

1 arbitration clause as a whole was valid “is for the arbitrator to decide in light of the parties’ ‘clear
2 and unmistakable’ delegation of that question.” *Id.*

3 Here, just as in *Brennan*, the Seller Contract, the Arbitration Agreement, and the
4 delegation provision via the Arbitration Agreement’s incorporation of JAMS Streamlined Rules
5 and Procedures are relevant to the required analysis. *See id.* at 1133. In arguing that the court
6 should enjoin defendant from enforcing the Arbitration Agreement and should itself determine
7 the validity of the Arbitration Agreement, plaintiffs put the delegation provision at issue. *See id.*
8 Plaintiffs argue that the Arbitration Agreement does not “clearly and unmistakably” contain a
9 delegation provision (*see* Doc. No. 3 at 23–24), but the Arbitration Agreement incorporated the
10 JAMS Streamlined Rules & Procedures, which does contain a delegation provision in its Rule
11 8(b). (*See* Compl. at ¶ 9; Doc. Nos. 13 at 18; 19-1 at 6.) Plaintiffs also argue that the Release
12 cancels the Seller Contract and thus cancels the Arbitration Agreement as a whole. (*See* Doc.
13 Nos. 3 at 23–25; 9 at 8–10.) However, plaintiffs do not extend that contention specifically to the
14 delegation provision. (*See* Doc. Nos. 3 at 23–25; 9 at 8–10.) Much like the plaintiff’s arguments
15 in *Brennan* that the arbitration clause was unconscionable as a whole without specifically arguing
16 the delegation provision was unconscionable, plaintiffs’ arguments that the Release “clearly and
17 unmistakably terminated the Seller Contract containing the Arbitration Agreement” do not make
18 an argument specifically challenging the delegation provision. (Doc. No. 9 at 8–9.) *See Brennan*,
19 796 F.3d at 1133 (“[S]ince [the plaintiff] failed to make any arguments specific to the delegation
20 provision, and instead argued that the [Arbitration Clause] as a whole is unconscionable under
21 state law, we need not consider that claim, because it is for the arbitrator to decide in light of the
22 parties’ clear and unmistakable delegation of that question.”) (internal quotations omitted); *Rent-*
23 *A-Center*, 561 U.S. at 73–74 (holding that, where the plaintiff challenged the entire arbitration
24 agreement as unconscionable but “did not make any arguments specific to the delegation
25 provision,” the Court “need not consider [the plaintiff’s unconscionability claim] because none of
26 [the plaintiff’s] substantive unconscionability challenges was specific to the delegation
27 provision.”). Because plaintiffs here argue only that the Arbitration Agreement as a whole is
28 terminated by the Release and do not make a specific argument as to the delegation provision,

1 here, as in *Brennan*, the validity of the Arbitration Agreement and of the Seller Contract is
2 therefore for the arbitrator to decide in light of the parties' delegation of the question. *See*
3 *Brennan*, 796 F.3d at 1133.

4 In arguing that this court should review the jurisdiction of the
5 arbitrator *de novo*, plaintiffs' reliance on the decision in *Orion*
6 *Pictures Corp. v. Writers Guild of Am., W., Inc.*, 946 F.2d 722 (9th
7 Cir. 1991), is misguided. The Ninth Circuit in that case held: A
8 district court may resolve questions about the jurisdiction of an
9 arbitrator *de novo* pursuant to the Declaratory Judgment Act, and
10 may do so even after the arbitrator has asserted jurisdiction over the
11 dispute. A district court may not do so, however, at the behest of a
12 party which has submitted the question of arbitrability to the
13 arbitrator for decision. Once a party has "initially submitted the
14 arbitrability question to the arbitrator, any subsequent judicial review
15 [is] narrowly circumscribed." *George Day Const. Co. v. United*
16 *Brotherhood of Carpenters & Joiners*, 722 F.2d 1471, 1476 (9th
17 Cir.1984). A federal court can no longer decide arbitrability *de novo*,
18 but must await the arbitrator's ruling on arbitrability and enforce that
19 ruling if it represents a "plausible interpretation" of the [contract].
20 *Id.* at 1477; *see also Ralph Andrews Productions, Inc. v. Writers*
21 *Guild of America, West*, 938 F.2d 128, 131 (9th Cir.1991).

22 *Orion Pictures Corp.*, 946 F.2d at 725. Here, plaintiffs have already submitted the question of the
23 validity of the Arbitration Agreement to the arbitrator in light of the Release. (*See* Compl. at
24 ¶¶ 18, 22; Doc. No. 3 at 24.) The arbitrator has determined to hear that issue in conjunction with
25 the merits of defendant's claims during the arbitration hearing scheduled for June 7, 2021.
26 (Compl. at ¶ 27; Doc. No. 3 at 24.) Therefore, this court cannot decide arbitrability *de novo* but
27 must instead wait for the arbitrator's ruling on the effect of the Release on the parties' Arbitration
28 Agreement. *See Orion Pictures Corp.*, 946 F.2d at 725.

29 Plaintiffs' reliance on *Ingram Micro Inc. v. Signeo Int'l, Ltd.*, No. 8:13-cv-01934-DOC-
30 AN, 2014 WL 3721197 (C.D. Cal. July 22, 2014), is similarly misplaced. The parties in *Ingram*
31 *Micro Inc.* entered into a distribution contract containing an arbitration clause, only to enact a
32 new distribution contract the following year that, while incorporating some provisions of the
33 earlier contract, did not contain an arbitration provision and superseded all prior agreements. *Id.*
34 at *1. When disputes arose from the contract, the parties entered into a settlement agreement
35 purporting to release all claims and superseding all prior contracts but not containing an
36 arbitration clause. *Id.* Upon breach of the settlement agreement, the parties entered into an

1 amended settlement agreement, which also did not contain an arbitration provision. *Id.* The
2 demand for arbitration relied on the arbitration provision of the initial distribution contract, but
3 did not seek relief in the form of damages under that agreement. *Id.* at *2. The court found that
4 claims based on solely on the alleged breaches of the later-in-time contracts were not subject to
5 arbitration because none of the agreements under which plaintiff was seeking relief contained an
6 arbitration clause and, in fact, those agreements superseded the only prior contract with the
7 arbitration provision. *Id.* at *2–3.

8 Unlike in *Ingram Micro Inc.*, here the underlying claims at issue arose from the alleged
9 breach of the Seller Contract, not the subsequent Release. In *Ingram Micro Inc.*, plaintiff alleged
10 defendant delivered faulty goods in breach of the later-in-time new distribution contract and
11 subsequent settlement agreements, not in breach of the original distribution contract containing
12 the arbitration provision. Here, in contrast, defendant does not claim that plaintiffs breached the
13 Release. Rather, defendant contends that plaintiffs breached the original Seller Contract by
14 refusing to accept and pay for the contracted-for almonds. *See id.* at *1; (Compl. at ¶ 15).
15 Moreover, unlike *Ingram Micro Inc.*, where the question of termination was focused only on the
16 arbitration provision, plaintiffs in this action argue that the entire Seller Contract, including the
17 Arbitration Agreement, has been terminated due to the subsequent Release and is therefore not
18 arbitrable. As discussed above, the Ninth Circuit has explicitly held that a dispute over whether a
19 contract containing an arbitration clause has been terminated or repudiated is a matter for the
20 arbitrator to determine where, as here, the arbitration clause is sufficiently broad. *See McKinney*,
21 954 F.2d at 593.

22 For all of the reasons explained above, the court concludes that plaintiffs have not
23 demonstrated that they are likely to succeed on the merits of this action, or that they have raised
24 serious questions going to the merits of their claims. Having failed to make that required
25 showing, their motion must be denied.

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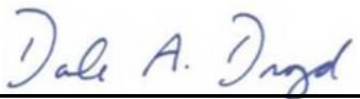
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CONCLUSION

Accordingly, plaintiffs' motion for a temporary restraining order and preliminary injunction (Doc. No. 3) is denied.

IT IS SO ORDERED.

Dated: May 14, 2021



UNITED STATES DISTRICT JUDGE