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PROSKAUER ROSE LLP
ANTHONY J. ONCIDI, SBN 118135
aoncidi@proskauer.com
2029 Century Park East, 24th Floor
Los Angeles, CA 90067-3010
Telephone: (310) 557-2900
Facsimile: (310) 557-2193

ANDREW A. SMITH, SBN 275316
asmith@proskauer.com
Eleven Times Square
New York, New York 10036
Telephone: (212) 969-3000
Facsimile: (212) 969-2900

Attorneys for Defendants,
NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES, INC., MUSICARES FOUNDATION, INC., GRAMMY MUSEUM FOUNDATION, INC., and GRAMMY FOUNDATION, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DANA J. TOMARKEN, an individual,

Plaintiff,

vs.

NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES, INC., a Delaware corporation; MUSICARES FOUNDATION, INC., a Delaware corporation; GRAMMY MUSEUM FOUNDATION, INC., a California nonprofit corporation; GRAMMY FOUNDATION, INC., a California nonprofit corporation; and DOES 1-10, Inclusive,

Defendants.

Case No. 19STCV05402

MEMORANDUM IN SUPPORT OF DEFENDANTS' PETITION TO COMPEL ARBITRATION AND DISMISS OR STAY PROCEEDINGS; REQUEST FOR SANCTIONS

Filed concurrently with:

1. Notice of Petition and Petition to Compel Arbitration;
2. Declaration of Anthony J. Oncidi;
3. Declaration of Gaetano Frizzi; and
4. [Proposed] Order Granting Petition to Compel Arbitration and Dismiss or Stay Proceedings.

Hearing: June 12, 2019
Time: 8:30 a.m.
Dept.: 73 (Hon. Rafael A. Ongkeko)
RES ID: 226343750610

Complaint Filed: February 14, 2019
Trial Date: None Set

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Defendants National Academy of Recording Arts & Sciences, Inc. (the "Academy"), MusiCares Foundation, Inc. ("MusiCares"), GRAMMY Museum Foundation, Inc. (the "Museum"), and Grammy Foundation, Inc. (the "Foundation") (collectively, "Defendants") submit the following Memorandum of Points and Authorities in support of their Petition to Compel Arbitration and Dismiss or Stay Proceedings and Request for Sanctions:

INTRODUCTION

Plaintiff, a former MusiCares employee, agreed to arbitrate all of her claims against Defendants and to participate in mediation before initiating an arbitration. With full knowledge of that agreement, Plaintiff filed this action, alleging purported employment-related claims that are plainly covered by the agreement. Even after Defendants reminded Plaintiff that she had agreed not to file her claims in court, Plaintiff refused to dismiss or stay this action. The Court should therefore compel Plaintiff to arbitrate her claims, require her to participate in mediation before initiating that arbitration, and sanction her and her counsel in an amount equal to the attorney's fees and costs that Defendants were unnecessarily compelled to incur in bringing this Petition.

BACKGROUND

The Academy is an organization of musicians, songwriters, producers, engineers, and music industry professionals that is dedicated to recognizing musical excellence, advocating for the well-being of music makers and ensuring that music remains an indelible part of culture. (Declaration of Gaetano Frizzi ["Frizzi Decl."] ¶ 6.) The Academy's many activities include the GRAMMY Awards, an internationally televised ceremony that has been held both in Los Angeles and New York City. (*Id.*)

MusiCares and the Museum are non-profit organizations established by and affiliated with the Academy. (*Id.* ¶ 4.) The Foundation was a non-profit organization established by and affiliated with the Academy that merged into the Museum in approximately May 2017. (*Id.*) MusiCares provides a safety net of critical assistance for individuals in the music industry in times of need, including by staging an annual Person of the Year Gala, which has been held in Los Angeles and New York City. (*Id.* ¶ 7.) The Museum pursues music education and preservation initiatives throughout the United States, including by selling tickets to its museums and programs.

(*Id.* ¶ 8.) The Academy, MusiCares, and the Museum transact business with organizations in numerous states. (*Id.* ¶¶ 6-8.)

Plaintiff was employed in California by MusiCares until April 2018. (*Id.* ¶ 11.) Plaintiff signed and entered into a Mutual Agreement to Mediate and/or Arbitrate (the "Agreement") on or about May 15, 2006. (Frizzi Decl. Exh. 1.) The parties to the Agreement are Plaintiff, on the one hand, and MusiCares, the Foundation, and their parent, subsidiary and affiliated entities, on the other hand. (*Id.* at 1.)[1] The Agreement applies to "all disputes or controversies, whether or not arising out of, in connection with, or related to [Plaintiff's] employment (or termination of that employment), that [Defendants] may have against [Plaintiff] or that Plaintiff may have against [Defendants]." (*Id.* ¶ A.) It excludes only certain claims for workers' compensation or similar entitlements, claims within the exclusive jurisdiction of the National Labor Relations Board, and claims for which applicable laws do not permit resolution through arbitration. (*Id.*)

The Agreement provides a three-step dispute resolution process that applies reciprocally to any claim Plaintiff might have against Defendants and any claim Defendants might have against Plaintiff. Step one is an informal discussion. (Frizzi Decl. Exh 1, Exh. A, ¶¶ B-C.) If Plaintiff "does not wish" to engage in that process, the Agreement provides that she may proceed to step two and "request a non-binding mediation" in which she and Defendants agreed to participate "in good faith with the goal of resolving the Claim." (*Id.* ¶ D.) The Agreement requires that Defendants "pay the entire cost of the JAMS' and the mediator's fees." (*Id.*) Finally, if mediation "does not result in a settlement of the Claim," the Agreement provides that either party may pursue her or its claims through arbitration by serving "written notice to the other party of its intent to proceed to arbitration." (*Id.*)

The Agreement gives the arbitrator "exclusive authority to resolve any Claim" and exclusive authority to resolve "a dispute relating to the interpretation, applicability, enforceability or formation" of the Agreement or a contention that all or part of the Agreement "is void or voidable." (*Id.* ¶ G.) As to the arbitration proceeding, the Agreement provides that it will be

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[1] The Agreement refers to MusiCares and the Foundation collectively as the "Company," and specifies that the Company includes "parent and all subsidiary and affiliated entities . . . and all successors and assigns of any of them, past and present." (Frizzi Decl. Exh. 1, ¶ A.)

“conducted in accordance with the then current Employment Arbitration Rules and Procedures of JAMS.” (*Id.* ¶ E.) If the parties cannot agree on an arbitrator, the Agreement provides that they will have equal rights to select from among a list of names issued by JAMS. (*Id.* ¶ F(1).)

With regard to discovery, the Agreement provides that the parties will have the “same rights to conduct depositions and written discovery, as provided by California Code of Civil Procedure Section 1283.05.” (*Id.* ¶ F(5).) The arbitrator may “award any form or amount of remedy or damagers that would be available in a court” (*Id.* ¶ G) and will “render a written decision and award . . . set[ting] forth the facts and reasons that support the Award.” (*Id.* ¶ L.) Finally, the Agreement makes Defendants responsible for all “reasonable and necessary fees and expenses” charged by the arbitration agency and the arbitrator, except that if Plaintiff initiates the arbitration, she may be required to pay no more than “the normal filing fee for commencing a court action on the Claim.” (*Id.* ¶ H.)

The Agreement states in explicit terms that by entering into the Agreement, the parties agreed to waive the right to a jury trial. For example, at the top of the second page, in large, bold-faced, underlined text, the Agreement reads:

> **EACH PARTY WAIVES THE RIGHT TO A JURY TRIAL OR COURT TRIAL. THE SOLE AND EXCLUSIVE METHOD TO RESOLVE ANY CLAIM IS MEDIATION AND/OR ARBITRATION AS PROVIDED IN THIS AGREEMENT.**

(Frizzi Decl. Exh. 1, ¶ C.) Likewise, directly above Plaintiff’s signature, the Agreement provides in large, bold-faced, underlined text:

> **NOTICE: BY SIGNING THIS AGREEMENT, YOU ARE AGREEING THAT ALL CLAIMS WILL BE DECIDED BY NEUTRAL MEDIATION AND/OR ARBITRATION, AND YOU ARE GIVING UP YOUR RIGHT TO A JURY TRIAL OR COURT TRIAL. (SEE PARAGRAPH 3).**

(*Id.* ¶ I.) Plaintiff acknowledged that she had “carefully read the Mutual Agreement to Mediate and/or Arbitrate and Exhibit A attached thereto,” that she “underst[ood] it terms, and knowingly waive[d] [her] right to have any claim litigated in a court or jury trial.” (*Id.* at 3.)

Notwithstanding the Agreement, Plaintiff filed this action on February 14, 2019, asserting claims against Defendants based on her employment with MusiCares and the termination of that employment. (*See, e.g.,* Compl. ¶ 18 [alleging that Plaintiff "was improperly fired to cover up wrongdoing"]; ¶¶ 60-139.)[2] Defendants' counsel, on March 20, 2019, sent Plaintiff's counsel a copy of the Agreement and explained that if Plaintiff continued to pursue her claims in court in violation of the Agreement, Defendants would be forced to compel her claims to mediation and/or arbitration. (Oncidi Decl. Exh. 2.) Defendants' counsel further explained that Defendants would "seek appropriate sanctions in connection therewith, including recovery of all attorneys' fees and costs incurred." (*Id.*)

Plaintiff's counsel responded on March 22, 2019, that Plaintiff would "not agree to stipulate to binding arbitration" because "we believe [the Agreement] to be procedurally and substantively unconscionable." (Oncidi Decl. Exh. 3.) Plantiff's counsel promised to forward "further correspondence that sets forth [Plaintiff's] objections to the Agreement" (*id.*) but never did so (Oncidi Decl. ¶ 4.) In subsequent communications, Defendants' counsel sought to clarify whether Plaintiff was also refusing to comply with her obligation under the Agreement to mediate, but Plaintiff's counsel never communicated Plaintiff's position on that issue either. (*Id.* ¶ 5.)

ARGUMENT

I. The Court Should Compel Plaintiff to Arbitrate Her Claims.

A. The Federal Arbitration Act Governs the Agreement.

The Federal Arbitration Act (the "FAA") "compels judicial enforcement of a wide range of written arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). Section 2 of the FAA states:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

[2] The Complaint is attached to the Declaration of Anthony J. Oncidi ("Oncidi Decl.") as Exhibit 1.

1 9 U.S.C. § 2 (emphasis added). The FAA reflects "a liberal federal policy favoring arbitration
2 agreements, notwithstanding any state substantive or procedural policies to the contrary."[3] *AT&T*
3 *Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749 (2011) (quotation omitted); *see also Iskanian*
4 *v. CLS Trans. Los Angeles, LLC*, 59 Cal. 4th 348, 366 (2014) ("[T]he FAA . . . prevent[s] states
5 from mandating or promoting procedures incompatible with arbitration.") Thus, "[s]tate and
6 federal courts must enforce the [FAA] with respect to all arbitration agreements covered by that
7 statute." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 1202 (2012) (citations
8 omitted); *see also Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018) ("Congress
9 require[d] courts to respect and enforce agreements to arbitrate . . . .").
10 "Employment contracts, except for those covering workers engaged in transportation, are
11 covered by the FAA." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Specifically, the
12 FAA's reference to contracts "evidencing a transaction involving commerce," 9 U.S.C. § 2,
13 reflects Congress's intent "to exercise [its] commerce power to the full" and simply requires that
14 "the 'transaction' in fact 'involv[e]' interstate commerce, even if the parties did not contemplate
15 an interstate commerce connection." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S.
16 265, 277, 281 (1995).
17 A very minimal showing is required to demonstrate a "transaction involving commerce"
18 under the FAA. *See EEOC v. Ratliff*, 906 F.2d 1314, 1316 (9th Cir. 1990) ("The 'affects
19 commerce' jurisdictional obstacle is very low indeed."). "Congress' Commerce Clause power
20 'may be exercised in individual cases without showing any specific effect upon interstate
21 commerce' if in the aggregate the economic activity in question would represent 'a general
22 practice . . . subject to federal control.'" *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57
23 (2003) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236
24 (1948)); *see also Allied-Bruce Terminix*, 513 U.S. at 273-274 (concluding that "involving"
25 commerce is the "functional equivalent" of "affecting" commerce).
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[3] "California law, like federal law, favors enforcement of valid arbitration agreements." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 97 (2000). In fact, California courts have held an employee is "bound by the provisions of the [arbitration] agreement regardless of whether [she] read it or [was] aware of the arbitration clause when [she] signed the document." *Brookwood v. Bank of Am.*, 45 Cal. App. 4th 1667, 1674 (1996) (quoting *Macaulay v. Norlander*, 12 Cal.App.4th 1, 6 (1992)).

Here, the Agreement is plainly covered by the FAA. Plaintiff was employed by MusiCares, which transacts business with organizations in numerous states, including as part of its Person of the Year Gala, which Plaintiff was involved in planning and executing. (Frizzi Decl. ¶ 7.) Plaintiff also agreed to arbitrate any claims against each of the other Defendants, who also transact business with organizations in multiple states. (*Id.* ¶¶ 6, 8.) Consequently, Plaintiff's employment and the Agreement "involv[ed] commerce" within the meaning of the FAA. *See Shepard v. Edward Mackay Enter., Inc.*, 148 Cal. App. 4th 1092, 1101 (2007) (recognizing that the "pertinent" question under the FAA "is whether the contract evidences a transaction involving interstate commerce, not whether the dispute arises from the particular part of the transaction involving interstate commerce"). Consequently, the FAA governs this Petition to compel arbitration.[4]

B. The Agreement Delegates Questions of Arbitrability to the Arbitrator.

The parties to an arbitration agreement may delegate threshold questions of arbitrability to an arbitrator. *See Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524, 529 (2018). A "delegation clause requires issues of interpretation and enforceability of an arbitration agreement to be resolved by the arbitrator." *Malone v. Sup.Ct.*, 226 Cal. App. 4th 1551, 1559 (2014). "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." *Henry Schein*, 139 S.Ct. at 529. California courts have recognized only "two prerequisites" for a delegation clause to be effective: (1) "the language of the clause must be clear and unmistakable"; and (ii) the delegation "must not be revocable under state contract defenses such as fraud, duress, or unconscionability." *Tiri v. Lucky Chances, Inc.*, 226 Cal. App. 4th 231, 242 (2014). A delegation clause that reads: "The arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement," is clear and unmistakable. *Malone*, 226 Cal. App. 4th at 1560. A bilateral delegation clause (one that requires both parties to submit disputes over arbitrability to the arbitrator) and provides for an unbiased decisionmaker is not unconscionable. *Id.* at 1570-71.

[4] While the FAA governs enforceability and arbitrability, the Code of Civil Procedure dictates the procedure to be followed in this case insofar as those procedures "further, rather than defeat, full and uniform effectuation of [FAA's] objectives." *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 410 (1996).

Here, the Agreement's delegation clause easily satisfies both prerequisites. First, the delegation provision is clear and unmistakable because it provides: "The Arbitrator shall have exclusive authority to resolve any Claim, including, but not limited to, a dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, or any contention that all or any part of this Agreement is void or voidable." (Frizzi Decl. Exh. 1, Exh. A, ¶ G); *see Malone*, 226 Cal. App. 4th at 1559. Second, the delegation provision is not revocable. It is binding on Plaintiff and Defendants—indeed, "Claim," as used in the delegation clause, is defined, in pertinent part, as "all disputes or controversies . . . that [Defendants] may have against [Plaintiff] or that [Plaintiff] may have against [Defendants]." (Frizzi Decl. Exh. 1, ¶ A.) The Agreement also provides for the selection of a neutral arbitrator by agreement of the parties or through a selection process from a list of names issued by JAMS. (*Id.* ¶ F(1).) As a result, the Court should compel Plaintiff to arbitrate any dispute she may raise over whether her claims are arbitrable.

C. Even if the Delegation Clause Were Not Enforceable, the Agreement is Valid and Covers Plaintiff's Claims.

Arbitration is a matter of contract. *See Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309 (2013). Thus, in the absence of a delegation clause, courts are limited to determining two issues: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008); *accord Mendez v. Mid-Wilshire Health Care Ctr.*, 220 Cal. App. 4th 534, 541 (2013).

Whether a valid arbitration agreement exists depends on state law principles of contract formation. *See Cione v. Foresters Equity Servs., Inc.*, 58 Cal. App. 4th 625, 634 (1997). The essential elements of a contract are (1) capacity to contract; (2) consent; (3) a lawful object; and (4) sufficient cause or consideration. *See* Cal. Civil Code § 1550. A mutual promise to arbitrate constitutes sufficient consideration. *See Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002); *see also Strotz v. Dean Witter Reynolds*, 223 Cal. App. 3d 208, 216 (1990), *overruled on other grounds, Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394 (1996).

Once a court determines that the parties formed a binding agreement under general principles of state contract law, "questions concerning the construction and scope of the arbitration clause are determined by federal law." *Cione*, 58 Cal. App. 4th at 641. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *accord Bunker Hill Park Ltd. v. U.S. Bank Nat'l Ass'n*, 231 Cal. App. 4th 1315, 1325 (2014).

Here, the Agreement is valid and covers Plaintiff's claims. Plaintiff accepted and executed the Agreement on May 15, 2006. *See Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 236 (2012) ("A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement."). She did so when she was over the age of 18 (*see* Compl. ¶ 1) and in exchange for Defendants' promise that they would arbitrate any claims against her, after engaging in the same informal resolution efforts to which she agreed to submit (Frizzi Decl. Exh. 1); *see Najd*, 294 F.3d at 1108 ("Circuit City's promise to be bound by the arbitration process itself serves as adequate consideration.").

The Agreement applies to "all disputes or controversies, whether or not arising out of, in connection with, or related to [Plaintiff's] employment (or termination of that employment), that the Company may have against [Plaintiff] or that Plaintiff may have against the Company." (Frizzi Decl. Exh. A at 1.) It specifically applies to "claims for employment discrimination," to "claims for violation of any . . . state . . . statute," including FEHA, and to "tort claims." (*Id.* ¶ A.) This provision easily encompasses all of the claims in the Complaint, which are for discrimination, retaliation and wrongful termination in violation of state statutes and common law. (Compl. ¶¶ 60-139.) Thus, even if the delegation clause were not enforceable, the Court should still compel Plaintiff to arbitrate her claims.

D. No Grounds Exist for Refusing to Enforce the Agreement.

Under the FAA, a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any

contract." 9 U.S.C. § 2. Section 2's "savings clause" "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S.Ct. at 1746. Consistent with Section 2 of the FAA, California law commands the enforcement of an arbitration agreement, unless "(a) [t]he right to compel arbitration has been waived by the petitioner; or (b) [g]rounds exist for the revocation of the agreement." Cal. Code Civ. Proc. § 1281.2.

1. Defendants Did Not Waive Their Right to Arbitrate.

"Since arbitration is a strongly favored means of resolving disputes, courts must closely scrutinize any claims of waiver." *Sobremonte v. Sup. Ct.*, 61 Cal. App. 4th 980, 991 (1998). Hence, "[a] party claiming that the right to arbitrate has been waived has a heavy burden of proof." *Id.* "[A]ny doubts regarding a waiver allegation should be resolved in favor of arbitration." *Saint Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1195 (2003). "A party seeking to prove waiver of a right to arbitration must demonstrate '(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration.'" *Hoover v. Am. Income Life Ins. Co.*, 206 Cal. App. 4th 1193, 1203 (2012) (quotation omitted).

Defendants' actions have not been inconsistent with their right to seek arbitration and have not prejudiced Plaintiff. To the contrary, shortly after Plaintiff commenced this action, Defendants reminded Plaintiff's counsel that Plaintiff was bound to arbitrate under the Agreement. (Oncidi Decl. ¶ 4-5.) Defendants' counsel continued to communicate with Plaintiff's counsel in an unsuccessful attempt to learn the basis for Plaintiff's refusal to comply with the Agreement. (*Id.*) Defendants filed this Petition before responding to the Complaint or engaging in any other litigation activity. Defendants' actions bear no resemblance to those held to constitute a waiver. *See, e.g., Saint Agnes*, 31 Cal.4th at 1204 (equating prejudice with conduct that "substantially undermined" policies favoring arbitration or "substantially impaired" adversary's ability to take advantage of benefits and efficiencies of arbitration).

2. The Agreement is Not Invalidated by Any Unconscionability.

Under California law, a court may refuse to enforce any contract found to have "been unconscionable at the time it was made . . . , or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Cal. Civ. Code § 1670.5(a); *accord Roman v. Sup. Ct.*, 172 Cal. App. 4th 1462, 1468 (2009). The doctrine of unconscionability has both "procedural" and "substantive" elements. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 114 (2000).

Procedural unconscionability must be coupled with substantively unconscionable terms to invalidate an arbitration agreement. *Roman*, 172 Cal. App. 4th at 1471. Where procedural unconscionability is minimal, *see Serafin v. Balco Properties Ltd., LLC*, 235 Cal. App. 4th 165,179 (2015), only a significant amount of substantive unconscionability will render an agreement unenforceable, *see Armendariz*, 24 Cal.4th at 114 ("[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, *and vice versa*."). Here, unconscionability is plainly not a bar to enforcement of the Agreement.

i. The Agreement is Not Procedurally Unconscionable.

Procedural unconscionability focuses on "oppression" or "surprise" resulting from unequal bargaining power. *Id.* Surprise "involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by a party in a superior bargaining position." *Id.* Oppression, on the other hand, "arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice." *See Serafin*, 235 Cal. App. 4th at 160. In the employment context, even a contract of adhesion, when clearly marked, presents minimal procedural unconscionability. *See Roman*, 172 Cal. App. 4th at 1470-71 ("The arbitration provision was not buried in a lengthy employment agreement. Rather, it was . . . underneath the heading "Please Read Carefully, Initial Each Paragraph and Sign Below" [and] was set forth in a separate, succinct (four-sentence) paragraph . . . .").

Here, the Agreement is not procedurally unconscionable by any measure. The Agreement is clearly labeled—in large, underlined, capitalized print—"MUTUAL AGREEMENT TO

MEDIATE AND/OR ARBITRATE." (Frizzi Decl. Exh. 1 at 1.) In two other places—in large, bold, underlined, and capitalized print—the Agreement informs Plaintiff that she is agreeing to pursue her claims exclusively through mediation and/or arbitration and waiving her right to proceed in court. (*Id.* at ¶¶ C, I.) One of these warnings appears directly above the part of the Agreement where Plaintiff printed the date and signed and printed her name. (*Id.* ¶ I.) It is entirely inconceivable that Plaintiff could have been surprised to learn she had agreed to mediate and/or arbitrate when she entered the Agreement. Likewise, because the Agreement was a standalone agreement to mediate and/or arbitrate and was clearly labeled as such, any complaint that Plaintiff had unequal bargaining power would raise only a negligible level of procedural unconscionability. *See Roman*, 172 Cal. App. 4th at 1470-71; *Lane v. Francis Capital Mgmt. LLC*, 224 Cal. App. 4th 676, 689 (2014) ("[A]ssuming the agreement was one of adhesion, courts have consistently held that that fact alone is insufficient to invalidate an arbitration agreement.").

ii. The Agreement is Not Substantively Unconscionable.

The substantive element of unconscionability is concerned with whether a contract imposes "overly harsh" or "one-sided" results. *Armendariz*, 24 Cal.4th at 114. Both must exist to render a contract unconscionable. *Id.* "[T]he paramount consideration in assessing [substantive] conscionability is mutuality." *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal. App. 4th 74, 85 (2014) (quotation omitted). The California Supreme Court has articulated five basic requirements for an enforceable arbitration agreement in the employment context. *See Armendariz*, 24 Cal.4th at 102–11. Such an agreement is lawful if it "(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." *Id.* at 102.

Here, the Agreement is not substantively unconscionable in the least. It binds Plaintiff and Defendants to the same procedures. *See Roman*, 172 Cal. App. 4th at 1467; *McManus v. CIBC World Markets Corp.*, 109 Cal. App. 4th 76, 100 (2003). Moreover, the Agreement complies with each of *Armendariz's* requirements, including because: (1) it provides that the parties will agree

on an arbitrator or participate in a mutual process to select one from lists furnished by JAMS (Frizzi Decl. Exh. 1, Exh. A, ¶ F(1)); (2) it provides that the parties will have the "same rights to conduct depositions and written discovery, as provided by California Code of Civil Procedure Section 1283.05" (*id.* ¶ F(5)); (3) it requires that the arbitrator "render a written decision and award . . . set[ting] forth the facts and reasons that support the Award" (*id.* ¶ L); (4) it provides that the arbitrator may "award any form or amount of remedy or damages that would be available in a court" (*id.* ¶ G); and (5) it makes Defendants responsible for all "reasonable and necessary fees and expenses" charged by the arbitration agency and the arbitrator, except that if Plaintiff initiates the arbitration, she may be required to pay no more than "the normal filing fee for commencing a court action on the Claim." (*id.* ¶ H).

Because the Agreement lacks either procedural or substantive unconscionability, no basis exists for refusing to enforce it.

E. The Court Should Order Plaintiff to Participate in Mediation as a Condition Precedent to Arbitration.

An informal dispute resolution provision is an enforceable part of an arbitration agreement. *See Serpa v. California Surety Investigations, Inc.*, 215 Cal. App. 4th 695, 710 (2013) ("[A] requirement that internal grievance procedures be exhausted before proceeding to arbitration is both reasonable and laudable in an agreement containing a mutual obligation to arbitrate"); *see also Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1261 (9th Cir. 2017). Here, Plaintiff agreed that before initiating an arbitration she would "request a non-binding mediation," in which she and Defendants agreed to participate "in good faith with the goal of resolving the Claim." (Frizzi Decl. Exh. 1, Exh. A, ¶ D.). Plaintiff has not satisfied that condition precedent to arbitration, and the Court should therefore require her to do so before proceeding to arbitration.

II. The Court Should Stay All Proceedings Pending a Ruling on Defendants' Petition and Dismiss or Stay the Proceeding Upon Granting the Petition.

Upon the motion of any party, a court must stay an action until a petition to compel arbitration is resolved, and, if ordered, until arbitration has been completed. *See* Code Civ. Proc. § 1281.4 ("Section 1281.4"); *see Twentieth Century Fox Film Corp. v. Superior Court*, 79 Cal. App.

1 4th 188, 192 (2000) ("[Section 1281.4] requires that the trial court stay an action pending before it
2 while an application to arbitrate the subject matter of the action is pending in a court of competent
3 jurisdiction."). The Section 1281.4 stay is mandatory because "the continuation of the
4 proceedings in the trial court disrupts the arbitration proceedings and can render them ineffective."
5 *Heritage Provider Network, Inc. v. Sup. Ct.*, 158 Cal. App. 4th 1146, 1152 (2008).

6 Defendants hereby request an order staying all proceedings in this matter pending
7 determination of this Petition. Further, upon granting the Petition, the Court should dismiss this
8 action, or, in the alternative, should stay the action pending resolution through mediation or
9 arbitration. *See Gaines v. Fidelity Nat'l Title Ins. Co.*, 62 Cal.4th 1081, 1096 (2016) ("Once a
10 court grants a petition to compel arbitration and stays the action at law, the action at law sits in the
11 twilight zone of abatement with the trial court retaining merely a vestigial jurisdiction over matters
12 submitted to arbitration to determine, upon conclusion of the arbitration proceedings, whether an
13 award on the merits requires dismissal of the legal action.") (quotations omitted).

14 **III. The Court Should Sanction Plaintiff and Her Counsel in an Amount Equivalent to**
15 **Attorneys' Fees Defendants Incurred in Filing This Petition.**

16 A court may order a party or counsel, or both, to pay the reasonable expenses, including
17 attorneys' fees, incurred by the other party "as a result of actions or tactics, made in bad faith, that
18 are frivolous or solely intended to cause unnecessary delay." Code Civ. Proc. § 128.5(a). Actions
19 or tactics are "frivolous" when they are either "totally and completely without merit" or "for the
20 sole purpose of harassing an opposing party." Moreover, "subjective bad faith may be inferred
21 from the prosecution of a frivolous action." *Childs v, PaineWebber Inc.*, 29 Cal. App. 4th 982,
22 997 (1994); *see also Simonian v. Patterson*, 27 Cal. App. 4th 773, 785 (1994) (awarding sanctions
23 under Section 128.5 for filing frivolous pleading).

24 Plaintiff's refusal to abide by her contractual obligations has forced Defendants to
25 unnecessarily incur attorneys' fees in filing this Petition. Plaintiff's filing of this action in the first
26 instance was "totally and completely without merit" in light of her obligations to mediate and/or
27 arbitrate under the Agreement. Code Civ. Proc. § 128.5(a). Even if that initial step were not
28 frivolous, Plaintiff certainly engaged in frivolous conduct by maintaining this action even after

Defendants' counsel provided her counsel with a copy of the Agreement and indicated that Defendants would seek sanctions. Indeed, Plaintiff's counsel refused to provide any explanation for Plaintiff's refusal to abide by the Agreement, instead citing a "belie[f]" that the Agreement was unconscionable and declining to provide any other detail. (Oncidi Decl. ¶ 4.) When Defendants' counsel attempted to determine whether Plaintiff was also refusing to abide by her obligation to mediate (her counsel's correspondence referred to a refusal to arbitrate only), Plaintiff's counsel never communicated a position on that issue. (*Id.* ¶ 5.)

Accordingly, Plaintiff and her Counsel should be sanctioned in the amount of $15,645, which is equivalent to the attorneys' fees that Defendants were forced to unnecessarily incur in filing and prosecuting this Petition through hearing. (Oncidi Decl. ¶ 6.)

CONCLUSION

For the foregoing reasons, the Court should compel Plaintiff to arbitrate her claims while dismissing or staying this action, require her to participate in mediation before initiating that arbitration, and sanction her and her counsel in an amount equal to the attorney's fees and costs that Defendants were forced to unnecessarily incur in bringing this Petition.

DATED: April 16, 2019 PROSKAUER ROSE LLP

By:
Anthony J. Oncidi

Attorneys for Defendants
NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES, INC., MUSICARES FOUNDATION, INC., GRAMMY MUSEUM FOUNDATION, INC., and GRAMMY FOUNDATION, INC.

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