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3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 JOHN FLEMING,
8 Plaintiff,

9 v.

10 MATCO TOOLS CORPORATION, et al.,
11 Defendants.

Case No. [19-cv-00463-WHO](#)

**ORDER DENYING MOTION TO
DISMISS OR TRANSFER VENUE;
DENYING MOTION TO FILE SUR-
REPLY**

Re: Dkt. Nos. 16, 25

12
13 Plaintiff John Fleming brings suit on behalf of himself and a putative class of other
14 distributors that he asserts were misclassified as independent contractors, rather than employees,
15 by defendants Matco Tools Corporation, NMTC, Inc., d/b/a Matco Tools, and Fortive Corporation
16 (collectively “Matco”). Complaint (“Compl.”) at ¶¶ 1,5 [Dkt. No. 1]. Matco moves to dismiss or
17 transfer this case pursuant to a forum selection clause contained in an agreement between it and
18 Fleming. There is a state statute that would invalidate the forum selection clause contained in the
19 agreement, but Matco argues that I must enforce the forum selection clause because the statute is
20 preempted by the Federal Arbitration Act (“FAA”). Fleming responds that the FAA does not
21 apply because the arbitration agreement is void by its own terms and that I must apply the state
22 statute invalidating the forum selection clause. I agree with Fleming and will deny Matco’s
23 motion to dismiss or transfer.

24 **BACKGROUND**

25 Matco manufactures and distributes mechanic’s tools and service equipment. *Id.* at ¶ 6. It
26 relies on distributors to make sales and service calls to existing and prospective customers through
27 mobile distributorship stores. *Id.* Fleming was a distributor for Matco from July of 2012 through
28 December of 2018. *Id.* at ¶ 9. He claims that, by allegedly misclassifying him and similarly

1 situated distributors as independent contractors, Matco has sought to avoid various duties and
2 obligations owed to employees under California’s Labor Code and Industrial Welfare Commission
3 wage orders, including: the duty to indemnify employees for all expenses and losses necessarily
4 incurred in connection with their employment; the duty to pay overtime compensation for hours
5 worked in excess of eight hours in a day or forty hours a week; the duty to provide off-duty meal
6 periods; the duty to authorize and permit paid rest periods; the duty to furnish accurate wage
7 statements; the duty to pay employees all wages owed upon termination; and unlawful collection
8 and receipt of earned wages. *Id.* at ¶ 6.

9 According to Matco, Fleming entered into two distributorship agreements with it in July
10 2012 and October 2013.¹ Declaration of Mike Swanson at ¶¶ 4, 5 [Dkt. No. 16-1]. The July 2012
11 distributorship agreement was amended in October 2013 and November 2016. *Id.* The October
12 2013 distributorship agreement was terminated in September 2015. *Id.* at ¶ 5. For the purposes of
13 this motion, both the July 2012 agreement and October 2013 are functionally the same and will be
14 collectively referred to as the “Distribution Agreement.” The Distribution Agreement contains a
15 forum selection clause which states:

16 Unless this requirement is prohibited by law, all arbitration hearings
17 must and will take place exclusively in Summit or Cuyahoga County,
18 Ohio. All court actions, mediations or other hearings or proceedings
19 initiated by either party against the other party must and will be
20 venued exclusively in Summit or Cuyahoga County, Ohio. Matco
21 (including its employees, agents, officers or directors and its parent,
22 subsidiary or affiliated companies) and the Distributor (including
23 where applicable the Distributor’s Spouse, immediate family
24 members, owners, heirs, executors, successors, assigns, shareholders,
25 partners, and guarantors) do hereby agree and submit to personal
26 jurisdiction in Summit or Cuyahoga County, Ohio in connection with
27 any Arbitration hearings, court hearings or other hearings, including
28 any lawsuit challenging the arbitration provisions of this Agreement
or the decision of the arbitrator, and do hereby waive any rights to
contest venue and jurisdiction in Summit or Cuyahoga County, Ohio
and any claims that venue and jurisdiction are invalid. In the event
the law of the jurisdictions in which Distributor operates the
Distributorship require that arbitration proceedings be conducted in
that state, the Arbitration hearings under this Agreement shall be
conducted in the state which the principal office of the Distributorship
is located, and in the city closest to the Distributorship in which the

¹ In evaluating a motion to dismiss based on a forum selection clause, I may consider declarations by the parties. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996).

1 American Arbitration Association has an office. Notwithstanding this
2 Article, any actions brought by either party to enforce the decision of
3 the arbitrator may be venued in any court of competent jurisdiction.

4 July 2012 Distributorship Agreement at ¶ 12.10 [Dkt. No. 16-2]; October 2012 Distributorship
5 Agreement at ¶ 12.10 [Dkt. No. 16-4].

6 Matco moves to dismiss the complaint or, in the alternative, to transfer this case to the
7 Northern District of Ohio in light of the above forum selection clause and the arbitration clause
8 contained in the Distribution Agreement. Motion to Dismiss (“Mot.”) [Dkt. No. 16]. If this case
9 is transferred, Matco will move to compel arbitration once the matter is lodged in the Northern
10 District of Ohio. *Id.*

11 **LEGAL STANDARD**

12 Forum selection clauses are “presumptively valid,” and “honored” “absent some
13 compelling and countervailing reason.” *Murphy v. Schneider Nat’l Inc.*, 362 F.3d 1133, 1140 (9th
14 Cir. 2004). “The party challenging the clause bears a heavy burden of proof and must clearly
15 show that enforcement would be unreasonable and unjust, or that the clause was invalid for such
16 reasons as fraud or over-reaching.” *Id.* at 1140 (internal quotation marks and citation omitted). A
17 forum selection clause may be unreasonable if: (1) “the inclusion of the clause in the agreement
18 was the product of fraud or overreaching”; (2) “the party wishing to repudiate the clause would
19 effectively be deprived of his day in court were the clause enforced”; or (3) “enforcement would
20 contravene a strong public policy of the forum in which suit is brought.” *Id.*

21 “[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign
22 forum is through the doctrine of forum non conveniens.” *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*,
23 571 U.S. 49, 60 (2013). When a motion to dismiss is based on a forum selection clause, rather
24 than solely on the doctrine of forum non conveniens, the Supreme Court has held that a district
25 court cannot consider the “private interest” factors, such as the plaintiff’s choice of forum and the
26 convenience of parties and witnesses. *See id.* at 62–64. Instead, the court may only weigh the
27 “public interest” factors, which “may include the administrative difficulties flowing from court
28 congestion; the local interest in having localized controversies decided at home; [and] the interest
in having the trial of a diversity case in a forum that is at home with the law.” *Id.* at 62 n.6.

1 “For the convenience of parties and witnesses, in the interest of justice, a district court may
2 transfer any civil action to any other district or division where it might have been brought or to
3 any district or division to which all parties have consented.” 28 U.S.C. § 1404(a). When a case
4 concerns an enforcement of a forum selection clause, section 1404(a) provides a mechanism for its
5 enforcement and “a proper application of § 1404(a) requires that a forum-selection clause be given
6 controlling weight in all but the most exceptional cases.” *Marine*, 571 U.S. at 59-60 (internal
7 quotation marks omitted). Plaintiff bears the burden of showing these exceptional circumstances
8 that make transfer inappropriate. *Id.* at 64. Plaintiff must show either that the forum selection
9 clause is not valid or that the public interest factors recognized under section 1404(a) make
10 transfer inappropriate. *Id.* at 64; *see also Bayol v. Zipcar, Inc.*, No. 14-cv-02483-TEH, 2014 WL
11 4793935, at *1 (N.D. Cal. Sept. 25, 2014).

12 DISCUSSION

13 I. THE APPLICABILITY OF CALIFORNIA BUSINESS AND PROFESSIONS CODE 14 § 20040.5 AND THE FEDERAL ARBITRATION ACT

15 The success of Matco’s motion to dismiss or transfer this case depends on the applicability
16 of California Business and Professions Code § 20040.5. The statute makes void any “provision in
17 a franchise agreement restricting venue to a forum outside this state . . . with respect to any claim
18 arising under or relating to a franchise agreement involving a franchise business operating within
19 this state.” Cal. Bus. & Prof. Code § 20040.5. The Ninth Circuit has held that it “expresses a
20 strong public policy of the State of California to protect California franchisees from the expense,
21 inconvenience, and possible prejudice of litigating in a non-California venue.” *Jones v. GNC
22 Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). A forum selection clause “that requires a
23 California franchisee to resolve claims related to the franchise agreement in a non-California
24 court[.]” such as the one here, “directly contravenes this strong public policy and is unenforceable
25 under the directives of *Bremen*.” *Id.* (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1
26 (1972)).

27 Matco argues that California Business and Professions Code § 20040.5 does not apply
28 because the Distribution Agreement contains a valid arbitration provision and, as a result, the state

1 statute is preempted by the FAA. Mot. at 10-11 (*citing Bradley v. Harris Research, Inc.*, 275 F.3d
 2 884, 890 (9th Cir. 2001)).² In *Bradley*, the Ninth Circuit analyzed the Supreme Court’s decisions
 3 in *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) and *Perry v. Thomas*, 482 U.S. 483
 4 (1987), as well as the language of 9 U.S.C. § 2, to determine that “a state law that invalidates
 5 arbitration provisions is not preempted by the FAA only if the law is ‘generally applicable,’ or
 6 applies to ‘any contract.’ ” *Id.* at 890 (*quoting Doctor’s Assocs.*, 517 U.S. at 687; 9 U.S.C. § 2).
 7 The court reasoned that Section 20040.5 was preempted by the FAA because it “applies only to
 8 forum selection clauses and only to franchise agreements” and “therefore [Section 20040.5] does
 9 not apply to ‘any contract.’ ” *Id.* This led the Ninth Circuit to reverse the district court’s order
 10 compelling the parties to participate in private arbitration in California, rather than in Utah, as
 11 dictated by the franchise agreement’s forum selection clause. *Id.* Matco contends that I should
 12 follow *Bradley* and find that Section 20040.5 is preempted here by the FAA and that I must
 13 enforce the forum selection clause.

14 Matco is correct in stating that, typically, forum selection clauses are considered prima
 15 facie valid and courts are not to consider other parts of the contract, or the validity of a contract as
 16 a whole, when ruling on a motion to transfer or dismiss. Defendants’ Reply in Support of Motion
 17 to Dismiss, or, in the Alternative, Transfer Venue to the U.S. District Court for the Northern
 18 District of Ohio (“Reply”) at 1-3 [Dkt. No. 22]. But, as Fleming argues, this is not a typical
 19 situation. The only reason that the forum selection clause would not be invalidated by Section
 20 20040.5 is the preemptive effect of the Distribution Agreement’s arbitration provision. Plaintiff’s
 21 Opposition to Defendants’ Motion to Dismiss (“Oppo.”) at 4-6 [Dkt. No. 21]. But because the
 22 arbitration provision is invalid, Fleming contends, *Bradley* is not controlling and the arbitration
 23

24 ² Although *Bradley* has been called into question by the Ninth Circuit’s decision in *Sakkab v.*
 25 *Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 432-33 (9th Cir. 2015) based on the Supreme Court’s
 26 decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), it remains good law. As the
 27 Honorable Jaqueline Scott Corley held in *Bell Prod., Inc. v. Hosp. Bldg. & Equip. Co.*, “[n]either
 28 the Ninth Circuit sitting *en banc* nor the Supreme Court have overruled *Bradley*[,] . . . [n]or did
 the three-judge panel in *Sakkab* expressly overrule *Bradley* in light of *Concepcion*” and that
 “[a]bsent an order overruling the decision, it remains good law in the Ninth Circuit and binding
 precedent on the Court.” No. 16-cv-04515-JSC, 2017 WL 282740, at *4 (N.D. Cal. Jan. 23,
 2017).

1 provision in the Distribution Agreement cannot serve as a predicate to evade the reach of Section
2 20040.5. *Id.* He insists that I must go beyond the terms of the forum selection clause itself and
3 first evaluate the validity of the arbitration provision. *Id.*

4 I agree with Fleming that in order to rule on Matco's motion, I must make a threshold
5 determination on the validity of the arbitration provision to determine if it preempts Section
6 20040.5. The analysis required here is less straightforward than in the typical motion to dismiss or
7 transfer because the only reason that a directly on point state statute does not invalidate the
8 Distribution Agreement's forum selection clause is the preemptive effect of an allegedly invalid
9 arbitration provision. Put differently, but for the existence of the arbitration provision, Section
10 20040.5 would apply and the forum selection clause would be void. This motion hinges on the
11 preemptive effect of the arbitration provision and I cannot turn a blind eye toward questions of its
12 validity.

13 Matco's cited authority to the contrary does not apply because none of the cases involve
14 similar state statutes or the preemptive effects of arbitration agreements under the FAA. Instead,
15 each stands for the uncontroversial proposition that generally it is inappropriate to analyze the
16 validity of the contract as a whole when determining the applicability of a forum selection clause.
17 *Id.* (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (holding that
18 federal courts may consider claim of fraud in the inducement of the arbitration clause itself but not
19 fraud in the inducement of a contract generally); *Washington v. Cashforiphones.com*, No. 15-cv-
20 0627, 2016 WL 6804429, *4 (S.D. Cal. Jun. 1, 2016) (rejecting arguments related to contract
21 validity for failure to identify the contracting parties, fraud, and public policy); *Cream v. N.*
22 *Leasing Sys., Inc.*, No. 15-cv-1208-MEJ, 2015 WL 4606463, *6 (N.D. Cal. Jul. 31, 2015)
23 (rejecting arguments related to concealment, fraudulent inducement, and public policy); *Lizdale v.*
24 *Advanced Planning Servs., Inc.*, No. 10-cv-0834, 2011 WL 1103642, *6, (S.D. Cal. Mar. 25,
25 2011) (rejecting arguments related to fraudulent inducement, lack of consideration, inconvenience
26 of parallel litigation, risk of unfair prejudice, and risk of conflicting judgments); *SeeComm*
27 *Network Servs. Corp. v. Colt Telecomm.*, No. 04-cv-1283-MEJ, 2004 WL 1960174, *4 (N.D. Cal.
28 Sept. 3, 2004) (rejecting arguments related to unilateral mistake, fraudulent inducement, and

1 affordability)).

2 In order to determine if Section 20040.5 applies or is preempted, I must first decide
3 whether the arbitration provision in the Distribution Agreement is enforceable. Fleming gives
4 several reasons that it is not: it is void by its own terms; even if it is not, it would expressly
5 exclude his claims; it is invalid; and it is not severable. Oppo. at 10-19. I review those arguments
6 below.

7 **II. THE ENFORCEABILITY OF THE ARBITRATION PROVISION**

8 Fleming asserts that, by its own terms, the arbitration provision is null and void in light of
9 the Distribution Agreement’s severability provision and the impermissible waiver of his PAGA
10 claim. Oppo. at 10-12. The portion of the Distribution Agreement titled “Severability” states:

11 It is the desire and intent of the parties to this Agreement that the
12 provisions of this Article be enforced to the fullest extent permissible
13 under the laws and public policy applied in each jurisdiction in which
14 enforcement is sought. Accordingly, if any part of this Article is
15 adjudicated to be invalid or unenforceable, then this Article will be
16 deemed amended to delete that portion thus adjudicated to be invalid
17 or unenforceable, such deletion to apply only with respect to the
18 operation of this Article in the particular jurisdiction in which the
19 adjudication is made. Further, to the extent any provision of this
20 Article is deemed unenforceable by virtue of its scope, the parties to
21 this Agreement agree that the same will, nevertheless be enforceable
22 to the fullest extent permissible under the laws and public policies
23 applied in such jurisdiction where enforcement is sought, and the
24 scope in such a case will be determined by Arbitration as provided
25 herein, **provided, however that if the provision prohibiting
26 classwide or private attorney general arbitration is deemed
27 invalid, then the provision requiring arbitration of breaches
28 between the parties shall be null and void and there shall be no
obligation to arbitrate such breaches.**

21 Distribution Agreement at ¶ 12.12 (emphasis added). The portion of the Distribution Agreement
22 titled “No Class Actions” states in relevant part:

23 No matter how styled by the party bringing the claim, any claim or
24 dispute is to be arbitrated on an individual basis and not as a class
25 action. **THE DISTRIBUTOR EXPRESSLY WAIVES ANY
26 RIGHT TO ARBITRATE OR LITIGATE AS A CLASS
27 ACTION OR IN A PRIVATE ATTORNEY GENERAL
28 CAPACITY.**

Distribution Agreement at ¶ 12.7 (emphasis in original). Read together, Fleming contends that if
the PAGA waiver in ¶ 12.7 is found to be invalid, the arbitration provision is similarly invalid

1 under ¶12.12. Oppo. at 10-12.

2 PAGA “authorizes an employee to bring an action for civil penalties on behalf of the state
3 against his or her employer for Labor Code violations committed against the employee and fellow
4 employees, with most of the proceeds of that litigation going to the state.” *Sakkab*, 803 F.3d at
5 429 (citing *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (Cal. 2014)). It was
6 enacted to (i) provide civil penalties for violations of parts of the labor code that had previously
7 only carried criminal penalties, and (ii) to make up for the shortage of government enforcement
8 resources to combat violations of the labor code. *Id.* at 429-30 (internal citations omitted). To
9 compensate for the shortage of resources, PAGA permitted aggrieved employees to act as private
10 attorneys general to collect civil penalties for labor code violations, with seventy five percent of
11 recovered penalties distributed to the California Labor and Workforce Development Agency. *Id.*
12 (internal citations omitted).

13 In *Sakkab*, the Ninth Circuit held that pre-dispute agreements to waive PAGA claims are
14 unenforceable for two reasons. *Id.* at 430-31 (citing *Iskanian*, 59 Cal.4th at 382–83). First,
15 California Civil Code § 1668 states that agreements exculpating a party for violations of the law
16 are unenforceable. *Id.* (internal citations omitted). Second, under California Civil Code § 3513, a
17 law established for a public reason may not be contravened by private agreement. *Id.* (internal
18 citations omitted). Describing the California Supreme Court’s reasoning in *Iskanian*, the Ninth
19 Circuit stated that “agreements requiring the waiver of PAGA rights would harm the state’s
20 interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter
21 violations.” *Id.* (internal citations omitted). This applies to agreements waiving the right to bring
22 “representative” PAGA claims—claims seeking penalties for Labor Code violations affecting
23 other employees—as well. *Id.* (internal citations omitted).

24 Applying the rule in *Sakkab* and *Iskanian* here, the Distribution Agreement’s PAGA
25 waiver contained in ¶12.7 constitutes an impermissible pre-dispute agreement to waive Fleming’s
26 PAGA claims. Combined with the severability provision contained in ¶ 12.12, the provision
27 requiring arbitration of breaches between Fleming and Matco is null and void and neither party
28 has an obligation to arbitrate. Similar non-severability clauses have been found to void arbitration

1 agreements in other cases as well. *See McArdle v. AT&T Mobility LLC*, No. 09-cv-01117-CW,
2 2017 WL 4354998, at *5 (N.D. Cal. Oct. 2, 2017) (denying motion to compel arbitration based on
3 non-severability provision); *Securitas Sec. Servs. USA, Inc. v. Superior Court*, 234 Cal. App. 4th
4 1109, 1125 (Cal. App. Ct. 2015). Accordingly, I need not consider Fleming’s arguments related to
5 the unconscionability of the arbitration provision. *Oppo*. at 12-19.

6 In its briefing, Matco’s only counterarguments were that (1) I should not consider the text
7 of the arbitration provision because it is the forum selection clause that is at issue and (2) the
8 governing law has yet to be determined. Reply at 1-4. At the hearing held on April 24, 2019,
9 Matco also argued (3) that because the severability provision refers to “such breaches” it only
10 contemplates PAGA claims. I have already disposed of Matco’s first argument above. Matco’s
11 second argument is not persuasive because the terms of the arbitration provision encapsulated in
12 ¶¶ 12.1, 12.7, and 12.12 are clear and there is no indication that my interpretation of their plain
13 terms would differ under either California or Ohio law. As to the third argument, the term
14 “breaches” in the Distribution Agreement is defined to include “all breaches, claims, causes of
15 action, demands, disputes and controversies” between Fleming and Matco. Distribution
16 Agreement ¶ 12.1. Matco’s argument that “such breaches” would mean only PAGA claims need
17 not be arbitrated does not make sense given how the Distribution Agreement defines “breaches.”
18 Because the arbitration provision is void, the FAA does not preempt Cal. Bus. & Prof. Code §
19 20040.5 and the forum selection clause has no effect.³

20 **III. IS CALIFORNIA BUSINESS & PROFESSIONS CODE § 20040.5**
21 **ENFORCEABLE?**

22 **A. The Dormant Commerce Clause**

23 Matco claims that the Dormant Commerce Clause of the United States Constitution
24

25 ³ Fleming argues that in addition to Section 20040.5, the forum selection clause is also governed
26 by California Labor Code § 925. Mot. at 6-10. Like Section 20040.5, California Labor Code §
27 925 invalidates forum selection clauses in employment agreements that require employees to
28 arbitrate claims that arise in California outside of the state. Because Section 20040.5 is dispositive
of this motion, I need not address the parties’ arguments related to California Labor Code § 925.
Additionally, because Fleming’s proposed sur-reply is dedicated to argument related to California
Labor Code § 925, it is not needed and Fleming’s Objection to Reply Evidence and
Administrative Motion for Leave to File Sur-Reply [Dkt. No. 25] is denied.

1 invalidates Cal. Bus. & Prof. Code § 20040.5 because it places a substantial burden on interstate
2 commerce. Mot. at 11-13. It argues that although the legislative history of the statute states that it
3 is to protect franchisees who cannot typically afford to litigate out of state, it is actually designed
4 to deprive out-of-state franchisors, which are more likely to litigate in federal court with
5 franchisees than in-state franchisors, from the protections of federal law in diversity cases. *Id.* It
6 contends that the statute has the potential to wreak havoc on out-of-state franchisors’ “interest of
7 uniformity in franchise operations” because there is no assurance that the same laws, court rules,
8 and regulations will apply to their franchise agreements. *Id.* Instead, California franchisors,
9 whose contracts would typically be governed by California law and interpreted by California
10 courts, will derive a competitive advantage over out-of-state franchisors because they may rely on
11 consistent judicial interpretations of their obligations as franchisors. *Id.* It argues that the
12 legislature could have achieved its stated purpose by non-discriminatory means, such as requiring
13 franchisors to cover expenses incurred by California franchisees that are unique to litigating in the
14 designated out of state forum. *Id.*

15 Matco’s argument fails. To the extent that Matco is concerned about having the same
16 laws, court rules, and regulations applied to its franchise agreements, it may always remove a case
17 filed in state court to federal court. As the Ninth Circuit has stated, “[t]he purpose of diversity
18 jurisdiction is to provide a federal forum for out-of-state litigants where they are free from
19 prejudice in favor of a local litigant.” *Tosco Corp. v. Communities for a Better Env’t*, 236 F.3d
20 495, 502 (9th Cir. 2001), *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77
21 (2010) (internal citation and quotation marks omitted). For this reason also, Matco’s claim that
22 enforcement of Cal. Bus. & Prof. Code § 20040.5 would lead to “economic balkanization” is also
23 unpersuasive. Reply at 4-5.

24 Matco also cites *1-800-Got-Junk? LLC v. Superior Court*, 189 Cal. App. 4th 500, 515 (Cal.
25 Ct. App. 2010) for the proposition that it has “interest of uniformity in franchise operations” that
26 would be harmed by application of Cal. Bus. & Prof. Code § 20040.5. Mot. at 11-13. That case
27 does not help Matco. There, the court needed to determine whether the franchise agreement’s
28 choice of law provision requiring application of Washington law violated the anti-waiver

1 provision contained in California Franchise Relations Act (“CFRA”). 189 Cal. App. 4th at 515.
2 The court had to resolve two issues. First, was there was a reasonable basis for a choice of law
3 provision in a franchise agreement? *Id.* at 511-12. Second, was the provision contrary to a
4 fundamental public policy of California? *Id.* at 511-12.

5 Answering the first question, the court found that there was a reasonable basis because “a
6 multi-state franchisor has an interest in having its franchise agreements governed by one body of
7 law[.]” *Id.* at 515. Here, the choice of law provision is not challenged; any federal court is
8 equally well equipped to interpret California or Ohio law.

9 On the second question, the court reasoned that because the purpose of the CFRA was to
10 protect franchisees, the franchisee in its case would be better protected by Washington law than
11 California law and so the application of Washington law was not contrary to the goals of the
12 CFRA. *Id.* at 514-19. By way of example, the court actually identified Section 20040.5 as a
13 model for how the legislature could have drafted the antiwaiver provision to have the preclusive
14 effect suggested by the franchisor. *Id.* at 518. Here, the franchisee is better protected by
15 California laws.

16 *1-800-Got-Junk?* is of no help to Matco. The dormant commerce clause does not preclude
17 application of Section 20040.5 here because there is no reason to believe that a federal court
18 sitting in California cannot apply California or Ohio law, in this case, without prejudicing Matco.
19 The statute is enforceable.

20 **B. Equitable Estoppel**

21 Matco also argues that Fleming is equitably estopped from repudiating the forum selection
22 clause because his claims are inherently intertwined with the Distribution Agreement and his
23 purported employment relationship with Matco arises from the Agreement. Mot. at 13-14. This
24 argument fails because the forum selection clause is inoperative as a matter of law under Section
25 20040.5.

26 **IV. PUBLIC AND PRIVATE FACTORS UNDER 28 U.S.C. § 1404(a)**

27 Because the forum selection clause is void pursuant to Section 20040.5, I must decide
28 whether to transfer the action under 28 U.S.C. 1404(a) “[f]or the convenience of parties and

1 witnesses [or] in the interest of justice.” In assessing a motion to transfer for convenience, the
2 court considers public factors, which go to the interests of justice, and private factors, which go to
3 the convenience of the parties and witnesses. *Brackett v. Hilton Hotels Corp.*, 619 F. Supp. 2d
4 810, 820 (N.D. Cal. 2008) (Alsup, J.) (internal citation omitted).

5 **A. Private Interest Factors**

6 “Factors relating to the parties’ private interests include ‘relative ease of access to sources
7 of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining
8 attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to
9 the action; and all other practical problems that make trial of a case easy, expeditious and
10 inexpensive.’ ” *Atl. Marine Constr. Co.*, 571 U.S. at 63 n.6 (quoting *Piper Aircraft Co. v. Reyno*,
11 454 U.S. 235, 241, n.6 (1981)). Here, the private interest factors strongly favor Fleming.

12 Matco does not dispute the following: the Distribution Agreement was presented to
13 Fleming in California; his claims are brought pursuant to California law; courts in California are
14 more familiar with California law than Ohio courts; the action arose based on conduct in
15 California; Fleming has only worked for Matco in California and only seeks to represent
16 California distributors; the majority of witnesses are located in California; and it would be
17 significantly more expensive for Fleming to represent the interest of California-based Matco
18 distributors in Ohio.⁴ *Oppo.* at 23-24. Matco makes no counterarguments, seeking to stand on the
19 forum selection clause. *Reply* at 14.

20 Although Matco’s corporate headquarters are in Ohio, it has hired numerous citizens of
21 California as distributors and implemented policies that allegedly violate California labor laws.
22 That it is headquartered in Ohio “does not negate the local impact of [their] decisions when they
23 are implemented elsewhere.” *Karl v. Zimmer Biomet Holdings, Inc.*, No. 18-cv-04176-WHA,
24 2018 WL 5809428, at *5 (N.D. Cal. Nov. 6, 2018) (citing *Schultz v. Hyatt Vacation Marketing*
25 *Corp.*, 10-cv-04568-LHK, 2011 WL 768735, at *5 (N.D. Cal. Feb. 28, 2011)). As I have found

26
27
28 ⁴ Fleming also contends that California Labor Code § 925 requires that California law apply to the instant action. *Id.* at 24. As noted above, because Section 20040.5 is dispositive, I decline to address the applicability of California Labor Code § 925 at this point.

1 that the forum selection clause is invalidated by Section 20040.5 and Matco makes no other
2 arguments in relation to its private interests here, the private interest factors identified by Fleming
3 favor denial of Matco’s motion to transfer.

4 **B. Public Interest Factors**

5 “Public factors include the administrative difficulties flowing from court congestion; the
6 local interest in having localized controversies decided at home; the interest in having the trial of a
7 diversity case in a forum that is at home with the law that must govern the action; the avoidance of
8 unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness
9 of burdening citizens in an unrelated forum with jury duty.” *Decker Coal Co. v. Commonwealth*
10 *Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (quoting *Piper Aircraft Co.*, 454 U.S. at 241 n.6).
11 The public interest factors slightly favor Fleming.

12 The parties disagree if the relative court congestion between here and the Northern District
13 of Ohio weighs for or against transfer. Mot. at 16; Oppo. at 25. Matco points out that as of March
14 31, 2018, there were 4,700 civil cases pending in the Northern District of Ohio and 8,502 civil
15 cases pending in this district. Mot. at 16. It also notes that in its 2018 Annual Assessment, the
16 Northern District of Ohio reported that total civil case filings decreased by 13.8% from 2016 to
17 2017. *Id.* Fleming counters that under Ninth Circuit caselaw, “[t]he real issue is not whether a
18 dismissal [or transfer] will reduce a court’s congestion but whether a trial may be speedier in
19 another court because of its less crowded docket” and the median time from filing to disposition in
20 civil cases is 7 months in this district compared to 10.3 months in the Northern District of Ohio.
21 Oppo. at 24 (citing *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1337 (9th Cir. 1984)). Matco
22 counters that the median time from filing to trial is more than eight months longer in this district
23 than the Northern District of Ohio. Reply at 13. This factor, which is seldom informative, is
24 neutral.

25 Fleming argues that the public interest in adjudicating local controversies lies here because
26 Matco presented Fleming the Distribution Agreement in California; Fleming worked for Matco
27 solely in California; and Matco employs over a hundred of other drivers in California. Oppo. at
28 25. In contrast, he and other putative plaintiffs have no connection to Ohio. *Id.* Matco responds

1 that Ohio has an equivalent interest given that Matco is headquartered there and negotiated
2 contracts containing choice of law and forum selection clauses that point to Ohio law and Ohio as
3 a forum respectively. Mot. at 16. At most, this factor is neutral as well, if not slightly favoring
4 Fleming and California as the forum because the purpose of Section 20040.5 is to protect
5 franchisees from being forced to litigate claims based on a franchise agreement out of state.

6 The final factor is familiarity with the underlying law. Fleming contends that Ohio law has
7 no corollary to most of Fleming's claims, no statute similar to PAGA, no statute similar to
8 California Labor Code § 2802, no daily overtime, and no meal and rest breaks. Oppo. at 25.
9 Matco replies that because the governing law remains an open question this factor is neutral.
10 Reply at 13-14. Further, federal judges routinely apply the law of other states than the one in
11 which they sit. *Id.* (citing *Rowen v. Soundview Commc'ns, Inc.*, No. 14-cv-05530-WHO, 2015 WL
12 899294, at *7 (N.D. Cal. Mar. 2, 2015)). I agree with Matco, and this factor is neutral.

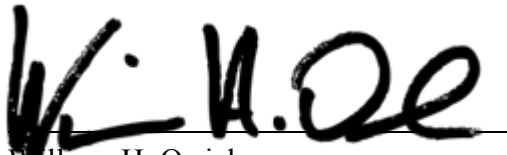
13 Here the private factors, to a great degree, and the public factors, to a much lesser extent,
14 favor Fleming. Matco has failed to meet the factors outlined in 28 U.S.C. 1404(a). I deny its
15 alternative motion to transfer.

16 **CONCLUSION**

17 Matco's motion to dismiss is denied because by the Distribution Agreement's own terms,
18 the arbitration provision is invalid and Section 20040.5's prohibition of forum selection clauses in
19 franchise agreements restricting venue to a forum outside California is not preempted by the FAA.
20 I deny the motion to transfer. Matco shall answer the complaint within 15 days.

21 **IT IS SO ORDERED.**

22 Dated: May 3, 2019

23 
24 William H. Orrick
25 United States District Judge
26
27
28