IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39563

MARLENE SANCHEZ,

Plaintiff-Petitioner,

v.

UNITED DEBT COUNSELORS, LLC and LORRAINE S. ALIRES,

Defendants-Respondents.

ANSWER BRIEF OF DEFENDANTS-RESPONDENTS UNITED DEBT COUNSELORS, LLC AND LORRAINE ALIRES

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INTRODUCTION

Marlene Sanchez failed to show the district court and the New Mexico Court of Appeals that the delegation clause in an arbitration agreement with United Debt Counselors, LLC ("UDC") is unenforceable. Ms. Sanchez argued, without explanation or supporting authority, that the delegation clause is unconscionable "for exactly the same reason as the arbitration agreement as a whole: it strips consumers of the right to [recover] attorney's fees and costs." **[RP 112]** However, Ms. Sanchez never identified any law that confers this right for proceedings that merely address questions about the interpretation of an arbitration agreement, but which do not resolve any substantive claims. Although Ms. Sanchez referred to the New Mexico Unfair Trade Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019) ("UPA"), which confers the right to recover attorney fees and costs to a consumer who ultimately "prevails" on her claims under the UPA, she failed to show any provision that confers the right to such recovery for preliminary proceedings in which neither party "prevails" on the underlying claims. Without this showing, Ms. Sanchez's contention that the fee-stripping provision in the arbitration agreement that purportedly renders it unconscionable "applies equally" to the delegation clause is wrong. **[RP 112]** Ms. Sanchez fails to show how the Court of Appeals erred in applying established New Mexico precedent to this case. Thus, the Court should affirm the Court of Appeals.

SUMMARY OF FACTS AND PROCEEDINGS

On May 14, 2019, Ms. Sanchez met in person with Lorraine S. Alires, a representative for UDC, to discuss UDC's services. **[RP 76, 90]** In their meeting, Ms. Alires provided Ms. Sanchez an opportunity to ask any questions or raise any issues with the Customer Enrollment Package and Customer Service Agreement ("Contract"), which includes an arbitration agreement, prior to signing and she explained that Ms. Sanchez had a right to cancel the Contract even after signing it. **[RP 76, 90-91]** After meeting with Ms. Alires, Ms. Sanchez signed the Contract. **[RP 77, 91]** The arbitration agreement contains a clause delegating to the arbitrator disputes concerning the interpretation, applicability, enforceability or formation of the agreement. **[RP 77, 87]** After Ms. Sanchez signed the Contract, Ms. Alires explained that Ms. Sanchez could cancel the Contract without any obligation for any reason within three business days and she provided Ms. Sanchez with a form NOTICE OF RIGHT TO CANCEL to easily cancel the Contract. **[RP 77, 91, 93]** Ms. Sanchez did not cancel the Contract. **[RP 77]**

While Ms. Sanchez contends that UDC did not properly perform the services she contracted for, she did not dispute below or on appeal that she fully reviewed, understood, and signed the Contract. Ms. Sanchez's contentions in this lawsuit, including her contention that the Contract is void, form the basis of a dispute that is plainly within the scope of the arbitration agreement in the Contract.

The district court found that the arbitration agreement contains a valid delegation clause reserving for the arbitrator threshold questions regarding the arbitrability of Ms. Sanchez's claims. **[RP 162-64]** While Ms. Sanchez purportedly challenged the validity of the delegation clause, she argued that it was unenforceable "for precisely the same reasons as the entire arbitration agreement[.]" **[RP 112]** Thus, the district court concluded that Ms. Sanchez's challenge to the delegation clause is not specific to the delegation clause alone, and it ordered the parties to arbitration consistent with their agreement. **[RP 164]** The Court of Appeals affirmed the district court in an unpublished memorandum opinion. *Sanchez v. United Debt Counselors, LLC et al.*, No. A-1-CA-40164, mem. op. (N.M. Ct. App. Aug. 17, 2022) (non-precedential).

ARGUMENT

I. STANDARD OF REVIEW.

The New Mexico Supreme Court applies a de novo standard of review to a district court's decision on a motion to compel arbitration. *See Peavy by Peavy v. Skilled Healthcare Grp., Inc.*, 2020-NMSC-010, ¶ 9, 470 P.3d 218. Unconscionability is a legal question; therefore, the Court also applies a de novo standard of review to an unconscionability determination by a lower court. *See Dalton v. Santander Consumer USA, Inc.*, 2016-NMSC-035, ¶ 6, 385 P.3d 619.

II. THE NEW MEXICO COURT OF APPEALS CORRECTLY HELD THAT MS. SANCHEZ FAILED TO SPECIFICALLY CHALLENGE THE ENFORCEABILITY OF THE DELEGATION CLAUSE.

The New Mexico Court of Appeals held that Ms. Sanchez failed to raise a specific challenge to the delegation clause by arguing that it is unenforceable "for exactly the same reason as the arbitration agreement as a whole." Case No. A-1-CA-40164, ¶ 2. This ruling is consistent with established ***New Mexico*** precedent. *See Juarez v. THI of N.M. at Sunset Villa*, 2022-NMCA-056, ¶¶ 29-40, 517 P.3d 918 (discussing more than a decade of New Mexico law addressing the requirements for making a specific challenge to a delegation clause in an arbitration agreement). Ms. Sanchez largely overlooks established New Mexico law, instead focusing on law from outside New Mexico[1] to argue that our Court of

[1] One of the cases Ms. Sanchez relies on, *Lim v. TForce Logistics, LLC*, 8 F.4th 992 (9th Cir. 2021), does not address the narrow issue on appeal here: whether a particular argument constitutes a specific challenge to a delegation clause in an arbitration agreement. Thus, the case is irrelevant. Other cases that Ms. Sanchez relies on are distinguishable from the facts at issue here. In each case, unlike here, it is evident that the plaintiff's challenge to a delegation clause is specifically tailored to the enforceability of the delegation clause alone. *See Gingras v. Think Fin., Inc.*, 922 F.3d 112, 119, 127 (2d Cir. 2019) (delegation provision challenged as unenforceable because that provision was "designed to avoid federal and state consumer protection laws" and it assigned an illusory arbitral forum); *MacDonald v. CashCall, Inc*, 883 F.3d 220, 227 (3d Cir. 2018) (delegation provision challenged as unenforceable because it assigned an illusory arbitral forum); *Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 455 (4th Cir. 2017) (delegation provision challenged as unenforceable because Virginia law renders all arbitration provisions in insurance contracts void); *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 338 (4th Cir. 2020) (delegation provisions challenged as unenforceable because they waived the application of state and federal law); *Shockley v. PrimeLending*, 929 F.3d 1012, 1018, 1019 (8th Cir. 2019) (delegation provision challenged as unenforceable because no valid contract was formed); *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331, 1335 (11th Cir. 2016) (delegation provision challenged as unenforceable because it assigned an illusory arbitral forum); *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.*, 232 Cal. Rptr. 3d 282, 290 (2018) (delegation provision challenged as unenforceable because it was not filed with the Insurance Department as California law

Appeals "confused the requirement that a challenge to a delegation clause be "*specific*" with a (non-existent) mandate that the challenge be *unique*." **[BIC 10]** The New Mexico Court of Appeals did not misapply applicable law, nor did it issue any new mandates in its unpublished memorandum opinion. It merely determined that Ms. Sanchez failed to specifically challenge the delegation clause at issue here. This determination is consistent with established New Mexico precedent because (a) Ms. Sanchez's argument against arbitration was not clearly directed at the validity of the delegation clause alone, and (b) she did not explain how the delegation clause in this case is unenforceable under New Mexico law.

A. Ms. Sanchez's Argument Against Arbitration Was Not Clearly Directed Against the Validity of the Delegation Clause Alone.

To dispute the validity of a delegation clause in an arbitration agreement, the New Mexico Court of Appeals has consistently required a challenging party to direct her argument against the validity of the delegation clause alone. The Court of Appeals has never required, as Ms. Sanchez contends, that a challenge to a delegation clause must be *unique*. **[BIC 10]** It must be *specific*. A party can challenge a delegation clause and an arbitration agreement as a whole for the same

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requires); *Luxor Cabs, Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 242 Cal. Rptr. 3d 87, 95 (2018) (delegation provision challenged as unenforceable because it was neither filed with nor approved by the Insurance Commissioner as California law requires). By contrast, it is not evident that Ms. Sanchez's argument here is specifically tailored to the enforceability of the delegation provision alone. *See infra* at 9.

reasons, but the challenging party must show how her argument distinctly applies to the delegation clause alone. Ms. Sanchez failed to do so.

In *Felts v. CLK Management., Inc.*, the New Mexico Court of Appeals held that a borrower specifically challenged a delegation clause in an arbitration agreement with a lender where the borrower made two distinct arguments regarding the validity of a delegation clause. 2011-NMCA-062, ¶ 30, 149 N.M. 681, 254 P.3d 124, *aff'd on other grounds*, No. 33,011, dec. ¶ 8 (N.M. Sup. Ct. Aug. 23, 2012) (non-precedential). First, the borrower argued that an arbitration agreement's prohibition on class actions rendered the agreement unconscionable and was also distinctly directed at the delegation clause. *Id.* Second, the borrower argued that performance of the delegation clause was impossible under New Mexico law because the designated arbitrator specified in the agreement had ceased its consumer arbitration business. *Id.* The New Mexico Court of Appeals held that these arguments both specifically applied to the delegation clause because the delegation clause contained a parenthetical prohibiting class arbitrations and the arbitration agreement delegated a specific arbitrator "for any and all disputes" between the parties, including threshold disputes about arbitrability. *Id.* Thus, the Court of Appeals held, "[t]hese arguments were both clearly directed against the validity of the delegation clause alone, and were distinct" from the borrower's claims against the loan agreements on other grounds. *Id.*

Then, in *Clay v. New Mexico Title Loans, Inc.*, the New Mexico Court of Appeals held that a borrower specifically challenged a delegation clause in an arbitration agreement with a lender where there borrower argued that the lender fraudulently induced the contract with the borrower by allegedly misrepresenting the neutrality of the two organizations identified to administer arbitration proceedings and the fact that both organizations had stopped arbitrating collection cases. 2012-NMCA-102, ¶ 13, 288 P.3d 888. The Court of Appeals compared this argument to the argument in *Felts* because the delegation clauses in both cases were rendered impossible because the designated arbitrators had ceased their consumer arbitration businesses. *See id.* (citing *Felts*, 2011-NMCA-062, ¶ 30). Thus, like in *Felts*, the Court of Appeals held that the borrower's argument was a specific challenge to the delegation clause because it went directly to the delegation clause itself. *See Clay*, 2012-NMCA-102, ¶ 13.

Most recently, in *Juarez*, the New Mexico Court of Appeals explained that a challenge to a delegation clause "under the same grounds" as a challenge to an arbitration agreement as a whole, without more, is not specific unless it is "'clearly directed against the validity of the delegation clause alone.'" 2022-NMCA-056, ¶¶ 37-38 (quoting *Felts*, 2011-NMCA-062, ¶ 30, and citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70, 130 S.Ct. 2772, 2778 (2010)).

There, a plaintiff argued that the circumstances of signing an admission agreement containing an arbitration provision at a care facility made the contract procedurally unconscionable because the plaintiff did not read the agreement, was not asked to review it thoroughly, felt as if she had no choice but to sign it, and was on medication at the time. *Juarez*, 2022-NMCA-056. ¶ 7. The plaintiff also argued that the arbitration provision was substantively unconscionable because it contained terms that were unfair and against public policy—(1) the arbitration agreement was facially one-sided; (2) the designated arbitrator's rules unreasonably favored defendants; and (3) the arbitration agreement contained an unfair small claims exception to arbitration. *Id.* ¶¶ 7, 39.

As to the procedural unconsionability argument, the Court of Appeals observed, "[p]laintiff's statements attacked the validity of the delegation clause only so far as the delegation clause is included in the [arbitration agreement] because [p]laintiff's procedural unconscionability argument both in the district court and on appeal is directed at the validity of the [arbitration agreement] in its entirety." *Id.* ¶ 38. The Court of Appeals concluded that "this argument is challenging the contract as a whole, and is not clearly directed against the validity of the delegation clause alone." *Id.* (internal quotation marks and citations omitted). As to the substantive unconsionability arguments, the Court of Appeals concluded that none of the arguments "discuss the language or the application and

enforcement of the delegation clause, which is required to make a specific challenge." *Id.* ¶ 39 (citing *Clay*, 2012-NMCA-102, ¶ 13; *Felts*, 2011-NMCA-062, ¶ 30). Therefore, the Court of Appeals held that the plaintiff had not specifically challenged the delegation clause.

Ms. Sanchez's argument is akin to the argument by the plaintiff in *Juarez* who challenged a delegation clause "under the same grounds" as her challenge to an arbitration agreement as a whole. 2022-NMCA-056, ¶¶ 37-38. Ms. Sanchez asserts that the delegation clause and the entire arbitration agreement "are unconscionable for the same reason" because they "both prohibit Ms. Sanchez from exercising her statutory right to recover attorneys' fees and costs." **[BIC 1]** However, Ms. Sanchez fails to point to any law establishing a statutory right to recover attorney fees and costs for threshold proceedings that merely concern the interpretation of an arbitration agreement, but which do not resolve substantive claims under the UPA or any other statute. **[RP 112-13]**

Ms. Sanchez contends that the delegation clause here strips away a right that does not exist. This argument is not clearly directed against the validity of the delegation clause alone; rather, it is indistinguishable from Ms. Sanchez's argument against the validity of the arbitration agreement as a whole. Under established New Mexico precedent, such an argument, without more, is not specific to a delegation clause.

B. Ms. Sanchez Failed to Explain How the Delegation Clause Is Unenforceable Under New Mexico Law.

The New Mexico Court of Appeals has explained that a party challenging a delegation clause must "discuss the language or the application and enforcement of the delegation clause" in order make a specific challenge to it. *Juarez*, 2022-NMCA-056, ¶ 39 (citing *Clay*, 2012-NMCA-102, ¶ 13 and *Felts*, 2011-NMCA-062, ¶ 30). This requirement is not new, but is consistent with prior New Mexico precedent and U.S. Supreme Court precedent.

In *Felts*, the New Mexico Court of Appeals discussed U.S. Supreme Court precedent, including *Rent-A-Center*, 561 U.S. 63, 130 S.Ct. 2772, to analyze the mechanism for determining whether a party has challenged a delegation provision in an arbitration agreement in a manner such that a court can decide the challenge in the first place. *See* 2011-NMCA-062, ¶¶ 13-20. The Court of Appeals observed that "*Rent-A-Center* appears to establish that in cases where a delegation provision granting an arbitrator the authority to determine the validity of an arbitration agreement exists, a district court is precluded from deciding a party's claim of unconscionability unless that claim is based on the alleged unconscionability of the delegation provision itself." 2011-NMCA-062, ¶ 20.

To effectively challenge a delegation clause in an arbitration agreement, the U.S. Supreme Court said in *Rent-A-Center* that a challenging party had to explain how the objectionable procedures "*as applied* to the delegation provision rendered

that provision unconscionable." 561 U.S. at 74, 130 S. Ct. at 2780 (emphasis in original).[2] Ms. Sanchez acknowledged the requirement "that a party explain why the delegation clause itself is unenforceable—rather than relying solely on unenforceability of the merits arbitration clause or the contract as a whole." **[BIC 2]** However, she failed to explain to the district court, and in this appeal, how the delegation clause is distinctly unenforceable under New Mexico law.

Ms. Sanchez argued in conclusory fashion to the district court that the arbitration agreement "strips consumers of the right to attorney's fees and costs pursuant to the Unfair Practices Act ("UPA") and other statutes" and this argument "applies equally to the delegation provision and the threshold issues it purports to send to the arbitrator." **[RP 112]** On appeal, Ms. Sanchez argues "that the contract's prohibition on recovering attorneys' fees and costs rendered the delegation clause itself unconscionable." **[BIC 16]** While Ms. Sanchez points to Section 57-12-10(C) of the UPA in her Brief in Chief, she never cited any

[2] The Court in *Rent-A-Center* acknowledged that some unconscionability arguments may be harder to sustain when directed at a delegation provision than when directed at the arbitration agreement as a whole. For example, in that case the plaintiff argued that an arbitration agreement's limitations on discovery were unconscionable. 561 U.S. at 74. The Court said that, in order to challenge the delegation provision, the plaintiff would have had to argue that the limitations on discovery, including the limitation upon the number of depositions, specifically made arbitration under the delegation provision unconscionable. *Id.* The Court noted that this would be "a much more difficult argument to sustain than the argument that the same limitation render[ed] arbitration of his factbound employment-discrimination claim unconscionable." *Id.* The Court pointed out that the same was true of the fee-splitting procedure: "the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination." *Id.* Ms. Sanchez's argument against the validity of the delegation provision here does not come close to providing the type of explanation the U.S. Supreme Court indicated would be required to successfully challenge a delegation clause.

provision purporting to create an entitlement to recover attorney fees and costs for proceedings that merely address threshold questions about the interpretation of an arbitration agreement, but which do not resolve or address any substantive claims under the UPA or any other statute.

It is unclear how Section 57-12-10(C) of the UPA supports Ms. Sanchez's contention that the delegation clause strips any statutory rights from her. Ms. Sanchez did not explain the argument. **[RP 112-113]** This provision says that a "court shall award attorney fees and costs to the party complaining of an unfair or deceptive trade practice or unreasonable trade practice ***if the party prevails***." Section 57-12-10(C) (emphasis added). No party prevails on any UPA claims, however, in a proceeding to address threshold questions about the interpretation of an arbitration agreement. It would be a misreading of the UPA to conclude that it provides for the recovery of attorney fees and costs for proceedings to resolve disputes about the interpretation of an arbitration agreement, but which do not resolve underlying statutory claims. *See Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 226 P.3d 611 ("We will not read into a statute language which is not there, especially when it makes sense as it is written.") (internal quotation marks and citation omitted); *see also Faber v. King*, 2015-NMSC-015, ¶ 15, 348 P.3d 173 (reading a statute that embeds language from an inapplicable section into another section "violates our long-established rule of construction

prohibiting courts from reading language into a statute which is not there, particularly when it makes sense as it is written").

Ms. Sanchez does not point to any law that confers the right to recover attorney fees and costs for proceedings to determine preliminary contract interpretation issues. Thus, her contention that the fee-stripping provision that renders the arbitration agreement unconscionable "applies equally" to the delegation clause is without support. **[RP 112]** The Court can assume that no supporting authority exists. *See State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 ("We remind counsel that we are not required to do their research . . . and that this Court will not review issues raised in appellate briefs that are unsupported by cited authority."); *Roselli v. Rio Communities Serv. Station, Inc.*, 1990-NMSC-018, ¶ 10, 109 N.M. 509, 787 P.2d 428 (refusing to consider a party's claim for entitlement to reimbursement where the party failed to cite supporting authority for the argument); *In re Adoption of Doe,* 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."); *see also Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 71, 309 P.3d 53 (refusing to consider an argument as inadequately briefed where, although the appellant cited case law, it failed to provide sufficient

analysis or explanation of how or why the Court should apply those precedents to the facts of the case).

Ms. Sanchez has never offered anything more than a conclusory argument that the delegation clause in this case is unenforceable because it strips her of a statutory right. Because she has never identified any statute that guarantees her the right to recover attorney fees and costs for proceedings that do not actually resolve any substantive claims under the UPA or any other statute, it is unclear how Ms. Sanchez's argument applies specifically to the delegation clause. Ms. Sanchez's argument against arbitration does not specifically address the language of the delegation clause or the application and enforcement of the delegation clause. Such an explanation is required to make a specific challenge to the delegation clause under established New Mexico precedent. *See Juarez*, 2022-NMCA-056, ¶ 39; *Clay*, 2012-NMCA-102, ¶ 13; *Felts*, 2011-NMCA-062, ¶ 30.

CONCLUSION

The Court of Appeals correctly held that Ms. Sanchez did not make a specific challenge to the delegation clause. Her argument against arbitration was not clearly directed against the validity of the delegation clause alone and she did not explain how the delegation clause is distinctly unenforceable under New Mexico law. Ms. Sanchez's contention that she will be precluded from recovering attorney fees and costs for litigating threshold issues before the arbitrator does not

render the delegation clause unenforceable because the merits of Ms. Sanchez's unconscionability challenge have not yet been decided and she can raise this matter before the arbitrator. Ms. Sanchez fails to identify any support for her contention that she is entitled to recover attorney fees and costs for all phases of arbitration, including proceedings that only address gateway arbitrability issues, but which do not resolve any substantive UPA claims. In announcing its conclusion in an unpublished memorandum opinion, the New Mexico Court of Appeals did not create new law or establish new requirements; rather, it merely applied longstanding New Mexico precedent in a predictable fashion.

RELIEF REQUESTED

This Court should affirm the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was submitted for e-filing and service through "Odyssey File & Serve" and e-mailed to the following counsel of record this 20th day of July, 2023:

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