Rachel W. Dempsey (SBN 310424)
rachel@towardsjustice.org
David H. Seligman (admitted *pro hac vice*)
david@towardsjustice.org
TOWARDS JUSTICE
2840 Fairfax Street, Suite 220
Denver, CO 80207
Tel: (720) 441-2236

Sparky Abraham (SBN 299193)
sparky@jubilee.legal
JUBILEE LEGAL
300 E Esplanade Dr, Ste 900
Oxnard, CA 93036-1275
Tel: (805) 946-0386

Attorneys for Plaintiff and the Putative Classes

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BREANN SCALLY,

Plaintiff, on behalf of herself and all others similarly situated,

vs.

PETSMART, LLC,

Defendant.

Case No.: 22-cv-06210-YGR

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: July 25, 2023
Hearing Time: 2:00 p.m.
Hearing Place: Courtroom 1, 4th Floor
Judge: Hon. Yvonne Gonzalez Rogers

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on July 25, 2023, at 2:00 p.m., or as soon thereafter as the matter may be heard before the Honorable Yvonne Gonzalez Rogers in Courtroom 1 of the United States District Court for the Northern District of California in the Oakland Courthouse, 1301 Clay Street, Oakland, CA 94612, Plaintiff BreAnn Scally ("Plaintiff") will and hereby does move this Court for an order certifying for appeal certain issues raised in the Order Compelling Arbitration at ECF No. 34. Plaintiff seeks an immediate appeal of the following questions:

(1) What constitutes a request for "public injunctive relief" under California law, including California's False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq*.; and

(2) Whether, and how, a party's bad-faith inclusion of unconscionable contract terms affects the court's discretion to sever those terms or invalidate the contract entirely under Cal. Civil Code § 1670.5(a) and California law.

Pursuant to 28 U.S.C. § 1292(b), district courts may certify interlocutory appeals where "appellate review of a particular ruling will materially advance disposition of the claims before the trial court." *Morrison-Knudsen Co., Inc. v. Archer*, 655 F.2d 962, 966 (9th Cir. 1981). An issue may be certified under § 1292(b) if: (1) it involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. *Google Inc. v. Rockstar Consortium U.S. LP*, 2014 WL 4145506, at *1 (N.D. Cal. Aug. 20, 2014).

Both of the issues for which Plaintiff seeks leave to appeal involve controlling questions of law that could materially affect the outcome of the litigation and are purely legal. There is a substantial ground for difference of opinion on both issues, as evidenced by the lack of clarity in the controlling law and the contradictory conclusions courts have reached on them. And an immediate appeal would avoid needless delay and advance the interests of justice.

Plaintiff's motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, any other matters of which the Court may take judicial notice, other documents on file in this action, and any oral argument of counsel.

DATED: June 13, 2023

By: */s/ Rachel W. Dempsey*

Rachel W. Dempsey (SBN 310424)
David H. Seligman (admitted *pro hac vice*)
rachel@towardsjustice.org
david@towardsjustice.org
TOWARDS JUSTICE
2840 Fairfax Street, Suite 220
Denver, CO 80207
Tel: (720) 441-2236

Sparky Abraham (SBN 299193)
sparky@jubilee.legal
JUBILEE LEGAL
300 E Esplanade Dr, Ste 900
Oxnard, CA 93036-1275
Tel: (805) 946-0386

Attorneys for Plaintiff and the Putative Classes

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I. INTRODUCTION

In July of last year, Plaintiff brought this action against PetSmart on behalf of herself and her fellow low-wage PetSmart groomers. The complaint alleges that Ms. Scally took a job at PetSmart because she hoped that the free grooming training the company advertised would help her reach her goal of one day opening a pet rescue—only to find after she started working that the training was not free. *See* Complaint, ECF No. 1-2 ¶¶ 46-48. Instead, the company required Ms. Scally to sign a Training Repayment Agreement Provision ("TRAP") that indebted her to PetSmart in the amount of $5,000, promising to forgive the debt only if she worked for the company for two years. *Id*. ¶ 48. Unable to support herself on her salary, and after receiving assurances from her manager that the debt would be forgiven, Ms. Scally left PetSmart before the two years were up. *Id*. ¶¶ 55-59. Several months later, she checked her credit report and learned that PetSmart had sent the TRAP debt to collections. *Id*. ¶¶ 60-61.

Ms. Scally filed the Complaint in this action seeking relief from the TRAP based on allegations that PetSmart had unlawfully charged her for its business expenses, or in the alternative that PetSmart was running an unapproved school. *Id*. ¶¶ 1-7. She brought these claims on her own behalf and on behalf of her fellow PetSmart groomers who were subject to the same TRAP she was. *Id*. ¶¶ 65-71. Ms. Scally also sought to enjoin PetSmart from publicly advertising its training to prospective employees as free. *Id*. ¶¶ 137-46. PetSmart responded to the Complaint with yet another adhesive contract—one that Ms. Scally did not even remember signing—and has sought to compel her claims into arbitration on an individual basis, effectively blocking the broader class from the possibility of relief. Motion to Compel, ECF No. 14.

In the order granting PetSmart's Motion to Compel, this Court acknowledged that PetSmart's arbitration agreement was procedurally and substantively unconscionable, and that it included terms that reflected a "bald attempt" to chill employees' exercise of their rights. Order, ECF No. 34 at 6. Nevertheless, the Court granted PetSmart's motion, effectively ending the case. This decision was based in part on the conclusion that Ms. Scally's request for public injunctive

relief, including as to her false advertising claims, was not "true" public injunctive relief under California law. *Id*. at 7-8.

But there is an increasing rift over what constitutes public injunctive relief in California state and federal courts. And recent case law suggests that severing unconscionable terms that were included in a contract in bad faith, rather than invalidating the entire contract, may be beyond a district court's discretion. These issues are high stakes not only for Plaintiff and the class in this case, but for parties throughout California. Accordingly, Plaintiff petitions the Court for permission to appeal these issues now pursuant to 28 U.S.C. § 1292(b).

II. BACKGROUND

Plaintiff filed this action on July 28, 2022 in San Mateo County Superior Court, alleging that the "FREE paid training" that PetSmart advertises to aspiring groomers and promises in job postings is not free. *See, e.g.*, Complaint, ¶¶ 24-25. Instead, the company presents its workers with a "Training Repayment Agreement Provision" ("TRAP") upon the commencement of training that provides workers with a $5,000 loan for the purported cost of the training, which PetSmart only forgives if the groomers work for PetSmart for at least two years after training. *See, e.g., id.* ¶¶ 1, 25-28, 140-44. As relevant to this motion, Plaintiff brought claims that these practices violate the California Unfair Competition Law ("UCL"), Consumer Legal Remedies Act ("CLRA"), and False Advertising Law ("FAL"). *See, e.g.*, *id*. ¶¶ 131-46; 155-58. On October 19, 2022, PetSmart removed the action to this court. ECF No. 1.

On November 23, 2022, PetSmart filed a Motion to Compel Arbitration. ECF No. 14. Plaintiff opposed, arguing in relevant part that PetSmart's arbitration agreement contained an unenforceable waiver of public injunctive relief, along with a poison pill that required the entire arbitration agreement to be invalidated if a court found the public injunctive relief waiver invalid. Opposition to Motion to Compel, ECF No. 24 at 5-9. Plaintiff also argued that the provision in the arbitration agreement that required the parties to split the costs of arbitration was unconscionable and unenforceable under California law, and had been drafted in bad faith. *Id*. at

16-17; 20. She further argued that when contract terms are drafted in bad faith, courts must invalidate the contracts that contain them rather than severing the offending terms. *Id*. at 19-20.

On May 25, 2023, the Court issued an order granting PetSmart's motion to compel but severing the fee-splitting provision from the arbitration agreement. The Court acknowledged that the Complaint seeks, *inter alia*, "to require PetSmart to stop falsely advertising its training as free to prospective employees." Opinion at 8. However, the Court held that Plaintiff had not stated a claim for true public injunctive relief, because "the primary beneficiaries of the injunctive relief plaintiff seeks [is] a sub-set of current PetSmart employees rather than the general public." *Id*. The Court also found that the fee-splitting provision constituted a "bald attempt to chill employees' efforts to hold their employer accountable." *Id*. at 6. Despite this finding of bad faith, the Court severed the fee-splitting provision and did not invalidate the remainder of the arbitration agreement.

III. ISSUES FOR CERTIFICATION

Plaintiff identifies the following issues for interlocutory review:

(1) What constitutes a request for "public injunctive relief" under California law, including California's False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq*.; and

(2) Whether, and how, a party's bad-faith inclusion of unconscionable contract terms affects the court's discretion to sever those terms or invalidate the contract entirely under Cal. Civil Code § 1670.5(a) and California law.

IV. LEGAL STANDARD

Although in general, district court rulings cannot be appealed until final judgment is entered, 28 U.S.C. § 1292(b) allows for district courts to certify interlocutory appeals where "appellate review of a particular ruling will materially advance disposition of the claims before the trial court." *Morrison-Knudsen Co., Inc. v. Archer*, 655 F.2d 962, 966 (9th Cir. 1981). An issue may be certified under § 1292(b) if: (1) it involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. *Google Inc. v. Rockstar Consortium*

U.S. LP, No. C 13-5933 CW, 2014 WL 4145506, at *1 (N.D. Cal. Aug. 20, 2014). The party seeking interlocutory review bears the burden of showing that all of these factors are met. *Id.* (citing *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010)).

V. LEGAL ARGUMENT

Plaintiff seeks the certification of an interlocutory appeal as to two of the issues raised in her Opposition to PetSmart's Motion to Compel Arbitration. First, Plaintiff seeks appellate review of the question of whether she pleaded a "true" claim for public injunctive relief under California law. And second, she seeks appellate review of the question of whether severance is an appropriate remedy for unconscionable contract terms that were drafted in bad faith.

Both of these issues meet the requirements for certification of an interlocutory appeal under § 1292(b). They are contested questions of law as to significant and important issues that would benefit from a clear decision of the Court of Appeals. Addressing them now instead of waiting for the conclusion of any potential arbitration would advance the ultimate termination of litigation and thereby preserve the resources of the parties, the arbitrator, and the courts.

A. The Issues Plaintiff Seeks to Certify Involve Controlling Questions of Law.

The issues that Plaintiff seeks to certify involve a controlling issue of law. The Ninth Circuit has held a controlling issue of law is one that could "materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981); *see also Dalie v. Pulte Home Corp.*, 636 F. Supp. 2d 1025, 1028 (E.D. Cal. 2009) (holding that certification is appropriate where the certified question "will affect the course of the litigation"). An issue need not be dispositive to be considered controlling, *In re Cement*, 673 F.2d at 1026, and even "'issues collateral to the merits' may be the proper subject of an interlocutory appeal," *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (quoting *In re Cement*, 673 F.2d at 1027 n.5). In addition, "[a] controlling question of law must be one of law—not fact." *ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1130 (9th Cir. 2022).

Federal courts in California routinely hold that issues that determine whether claims are heard in court or arbitration constitute a controlling issue of law. *See, e.g.*, *Youssofi v. Credit One Fin.*, 15-CV-1764-AJB-RBB, 2016 WL 6395086, at *2 (S.D. Cal. Oct. 28, 2016) (finding that determining whether there exists a "valid agreement to arbitrate" was controlling question of law); *Andrade v. P.F. Chang's China Bistro, Inc.*, No. 12-cv-2724 JLS, 2013 WL 12315517, at *7 (S.D. Cal. Nov 26, 2013) (finding enforceability of arbitration provisions barring representative PAGA claims was a controlling question of law because it "could affect in what forum Plaintiffs' PAGA claims are heard"); *cf. Silicon Valley Self Direct, LLC v. Paychex, Inc.*, No. 5:15-cv-01055-EJD, 2015 WL 5012820, at *3 (N.D. Cal. Aug. 24, 2015) (finding no controlling question of law where "[a]n arbitration will occur" regardless of the resolution of the issue requested to be certified).

Further, the questions for which Plaintiff seeks certification here are questions of law, not fact. First, she seeks review of whether the Court accurately defined public injunctive relief. This is a legal question that does not require revisiting any of the relevant facts. And second, she seeks review of whether severance is an appropriate remedy for a contract term that a court has found was unconscionable and drafted in bad faith. The appellate court can answer these questions without any knowledge of the facts or pleadings in this case.

B. There Is a Substantial Ground for Difference of Opinion on the Questions Plaintiff Seeks to Certify.

"Courts traditionally will find that a substantial ground for difference of opinion exists where 'the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.'" *Lee v. Postmates Inc.*, No. 18-CV-03421-JCS, 2019 WL 1864442, at *2 (N.D. Cal. Apr. 25, 2019) (quoting *Couch*, 611 F.3d at 633); *see also Certain Underwriters at Lloyd's, London v. Belmont Commons L.L.C.*, No. 2:22-CV-3874, 2023 WL 2617387, at *1 (E.D. La. Mar. 23, 2023) (certifying 1292(b) appeal on an issue that had not been "squarely or definitively addressed" by the circuit court). Certification under § 1292(b) is appropriate both where there is a lack of "controlling authority," *see Oracle USA, Inc. v. SAP*

AG, No. C 07–1658 PJH, 2012 WL 29095, at *1 (N.D. Cal. Jan. 6, 2012), and where "the controlling law is unclear," *Couch*, 611 F.3d at 633. The development of "contradictory precedent" is not necessary for § 1292(b) certification "when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011).

1. California Law Is Increasingly Clear That the Type of Injunctive Relief Plaintiff Requests Is a Public Injunction.

Plaintiff first seeks § 1292(b) certification on the question of what constitutes unwaivable public injunctive relief under *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017). In *McGill*, the California Supreme Court held that arbitration provisions that waive the right to seek public injunctive relief in any forum are invalid and unenforceable. *Id*. at 953-54.

However, *McGill* did not articulate a clear definition of public injunctive relief, which has led to an increasing rift between California and federal courts. In *Clifford v. Quest Software Inc.*, 38 Cal. App. 5th 745 (2019), a California appeals court held that a claim for an injunction under the UCL to remedy wage-and-hour violations was not a public injunction because the relief sought was of primary benefit to employees of the defendant, rather than the general public. In *Mejia v. DACM Inc.*, 54 Cal. App. 5th 691 (2020), another appeals court held that an injunction under the UCL and CLRA to force a motorcycle dealership to make certain disclosures to purchasers qualified as a public injunction, because it "'generally benefit[s]' the public 'directly by the elimination of deceptive practices' and 'will . . . not benefit' the plaintiff 'directly,' because the plaintiff has 'already been injured, allegedly, by such practices and [is] aware of them.'" *Id*. at 703 (quoting *McGill*, 2 Cal. 5th at 955). And in *Maldonado v. Fast Auto Loans, Inc.*, 60 Cal. App. 5th 710 (2021), an appeals court adopted the reasoning of *Mejia* to hold that a request under the UCL and CLRA to enjoin a lender from providing usurious interest rates was a request for a public injunction. *Id*. at 717-21.

The Ninth Circuit waded into the fray in *Hodges v. Comcast Cable Commc'ns, LLC*, 21 F.4th 535 (9th Cir. 2021), where it held that an injunction against unlawful data-collection practices was not a public injunction. *Id*. at 538. The *Hodges* court contrasted the injunction in

that case with an injunction against "the use of false advertising to promote a credit protection plan," which the *McGill* plaintiffs sought and which the Ninth Circuit described as "[t]he paradigmatic example" of public injunctive relief. *Id*. at 542. In reaching its holding, *Hodges* explicitly declined to follow *Maldonado* and *Mejia*, which it described as "a patent misreading of California law." *Id*. at 544.

Since the *Hodges* decision, however, California courts have only reaffirmed that the standard *Maldonado* and *Mejia* set forth for public injunctive relief is the correct one under California law. Thus, for example, an appeals court found that a request for an injunction against a racially hostile work environment under California's Fair Employment and Housing Act was a public injunction in light of the statute's express findings that unlawful discrimination constitutes a harm to the public and not just the individuals involved. *Vaughn v. Tesla, Inc.*, 87 Cal. App. 5th 208, 231 n.16 (2023) (noting *Hodges* and concluding that "the analysis of the dissent is more consistent with *McGill*"). Although the *Hodges* court speculated that the California Supreme Court would decline to follow the rule established by the appellate courts, the California Supreme Court has consistently denied petitions to review these cases, leaving the rule in place as binding on California trial courts. *See, e.g.*, *Mejia*, 54 Cal. App. 5th 691, *review denied* Dec. 23, 2020; *Maldonado*, 60 Cal. App. 5th 710, *review denied* Apr., 28, 2021; *Vaughn*, 87 Cal. App. 5th 208, *review denied* Apr. 12, 2023; *see also Fast Auto Loans, Inc. v. Maldonado*, 142 S. Ct. 708 (2021) (certiorari denied by United States Supreme Court). The more well-established this rule becomes, the less appropriate it is for federal courts to disregard it. *See, e.g.*, *Harper v. Charter Commc'ns, LLC*, No. 219CV00902WBSDMC, 2022 WL 1204706, at *2 (E.D. Cal. Apr. 22, 2022) ("[T]he Ninth Circuit has cautioned that courts should 'not disregard a well-reasoned decision from a state's intermediate appellate court' when that decision is highly relevant." (quoting *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1278 (9th Cir. 2013)).

The result is an increasing fracture in interpretations of California law, which could lead to a different conclusion on the enforceability of a single contract based solely on where a

plaintiff happened to file her case. This action provides a stark example: Plaintiff here filed in California court before PetSmart removed. If PetSmart had not done so, there is little doubt that her arbitration agreement would have been invalidated pursuant to the rule articulated in and applied by the *Maldonado*, *Mejia*, and *Vaughn* courts. Even in a court bound by *Hodges*, there is room for a substantial difference of opinion: Is it the case that a claim for false advertising, which Plaintiff brought here, is the "paradigmatic" claim for public injunctive relief that cannot be compelled to arbitration under California law? *See Hodges*, 21 F.4th at 542. Or is it the case that, as this court held, injunctive relief on such a claim would primarily benefit only "a sub-set of current PetSmart employees rather than the general public" and therefore did not constitute public injunctive relief? *See* Opinion at 8.

Under these circumstances, there is a "substantial ground for difference of opinion" on the question of what constitutes a proper request for public injunctive relief, making certification under § 1292(b) appropriate for the appeals court to resolve the matter.

2. District Courts Differ in Their Interpretations of How *Lim* Impacts Their Discretion to Sever Unconscionable Contract Terms.

As the Court acknowledged, it is long-settled in California federal and state courts that fee-splitting arrangements in arbitration are unconscionable and unenforceable. *See* Opinion at 5-6 ("California has a long-standing public policy against the imposition of fee-based barriers to employees vindicating their rights through arbitration." (quoting *Armendariz v. Foundation Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 110-11 (2000)). The Court found that PetSmart's contract contains a fee-splitting provision, along with a delegation clause that would require Plaintiff to "accept that she could be saddled with immense fees in order to then argue to the arbitrator that assessing such fees would be unjust." *Id*. at 6. The Court held that "[t]his is a bald attempt to chill PetSmart employees' efforts to hold their employer accountable and cannot stand." *Id*. Plaintiff does not contest any of these findings.

However, after reaching these conclusions, the Court elected to sever the fee-splitting provision and enforce the rest of the contract, citing Cal. Civil Code § 1670.5(a) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the

time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause . . . .") and *Armendariz*, 24 Cal. 4th at 124 ("[W]here an unconscionable 'provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.'"). Opinion at 6. Even so, the Court also noted that the Ninth Circuit has held that, "[i]n the arbitration context, an unconscionable term should generally not be severed . . . if the provision was drafted in bad faith." *Id*. (citing *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1002 (9th Cir. 2021)).

Lim and the underlying cases cited provide that where a "deliberately illegal" term is inserted into a contract, courts cannot sever that term and enforce the remainder of the contract, because doing so "would allow an employer to draft one-sided agreements and then whittle down to the least-offensive agreement if faced with litigation, rather than drafting fair agreements in the first instance." *Lim*, 8 F.4th at 1005-06 (citing *Armendariz* 24 Cal. 4th at 124 n.13; *Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 421 (N.D. Cal. 2015); *Parada v. Superior Ct.*, 176 Cal. App. 4th 1554, 1586 (2009)). The Court's factual finding here that the fee-splitting provision was a "bald attempt to chill" PetSmart employees' rights amounts to a finding of bad faith. *See, e.g.*, *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910 (9th Cir. 2001) (quoting the Restatement (Second) of Contracts to conclude that bad faith in employment contracting may include "[s]ubterfuges and evasions" and "evasion of the spirit of the bargain"); *Armendariz*, 24 Cal. 4th at 124 n.13 (defining "bad faith" contract terms as those that were drafted "with a knowledge of their illegality").

Lim suggests, but does not state clearly, that a finding of bad faith eliminates or limits a court's discretion to sever the offending contract terms, and compels invalidation of the contract. *See, e.g.*, *Lim*, 8 F.4th at 1005 (unconscionable arbitration terms "*should*" not be severed if drafted in bad faith (emphasis added)). Several district courts—and a non-precedential decision of a Ninth Circuit panel—have adopted this interpretation, particularly where the drafting party includes a fee-splitting term. *See, e.g.*, *Fraser v. OMV Med., Inc.*, No. 22CV713-L-MSB, 2023 WL 2293346, at *4 (S.D. Cal. Feb. 28, 2023) ("[S]everance is not appropriate 'given

[Defendant's] inclusion of a fee-splitting provision that has been impermissible under *Armendariz* for more than two decades.'" (*quoting Reyes v. Hearst Commc'ns, Inc.*, No. 21-16542, 2022 WL 2235793, at *2 (9th Cir. June 22, 2022)); *Storms v. Paychex, Inc.*, No. LACV2101534JAKJEM, 2022 WL 2160414, at *18 (C.D. Cal. Jan. 14, 2022) ("Severance is improper when the invalid term was 'drafted in bad faith' (quoting *Lim*, 8 F.4th at 1006)); *Hale v. Brinker Int'l, Inc.*, No. 21-CV-09978-VC, 2022 WL 2187397, at *1 (N.D. Cal. June 17, 2022) ("Even absent other unconscionable terms, . . . the cost-shifting provision at issue is reason enough to decline to enforce the agreement.") A minority of courts, however, including this one, have continued to sever such terms and enforce the remainder of the agreement. *See, e.g.*, *Alvitre v. Colonial Life & Accident Ins. Co.*, No. CV 22-6289-DMG (SKX), 2023 WL 3549743, at *6 (C.D. Cal. Mar. 2, 2023).

The contract here illustrates why this issue would benefit from clarification. Although the fee-splitting term has been ordered severed as to Plaintiff, the next employee with a claim against PetSmart, and the one after that, and so on, will again be faced with a series of unviable options. She can hire a lawyer and pay them to go to court to challenge the fee-splitting term as unconscionable before accessing arbitration, proceed in court pro se, or pay an arbitrator to determine whether she can afford to pay an arbitrator. This would result in precisely the rights-chilling effect that the Court has observed PetSmart seeks. Accordingly, this issue would benefit from prompt review.

C. Immediate Appeal Will Materially Advance the Termination of Litigation.

It is well-established that interlocutory appeals from orders compelling arbitration and staying litigation materially advance the termination of litigation. *See, e.g.*, *Kuehner*, 84 F.3d at 319 (holding that certification under § 1292(b) can avoid "the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter."); *Islam v. Lyft, Inc.*, No. 20-CV-3004 (RA), 2021 WL 2651653, at *5 (S.D.N.Y. June 28, 2021) (noting that a § 1292(b) challenge to an order compelling arbitration could "save[] the parties the expense and burden of arbitration"); *Lee*, 2019 WL 1864442, at *4 (noting that, while appeals can be time-

consuming, "[a]n appeal before arbitration will still conclude more quickly than requiring arbitration to run its course before the appeal begins," and that "resolving . . . potential plaintiffs' claims through a class action could be far more efficient than piecemeal litigation and arbitration of individual claims"); *Youssofi*, 2016 WL 6395086, at *5 (finding "the possibility of avoiding [arbitration] proceedings" sufficient to grant certification (quoting *Mann v. Cty. of San Diego*, No. 3:11-CV-0708-GPC-BGS, 2016 WL 245480, at *3 (S.D. Cal. Jan. 21, 2016)). This principle holds here. Plaintiff intends to appeal the district court's order after the conclusion of arbitration, and if she wins the parties will have to return to the beginning in court in several years. Permitting her to appeal now would cut out these unnecessary additional steps.

VI. CONCLUSION

For the reasons stated above, all of the conditions for certifying an issue for immediate appeal under 28 U.S.C. § 1292(b) are met for the issues identified herein, and an immediate appeal would serve the interests of justice. The Court should grant Plaintiff's motion.

DATED: June 13, 2023

By: */s/ Rachel W. Dempsey*

Rachel W. Dempsey (SBN 310424)
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rachel@towardsjustice.org
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Attorneys for Plaintiff and the Putative Classes