No. S224086

IN THE SUPREME COURT OF CALIFORNIA

SHARON MCGILL,

Plaintiff and Petitioner,

v.

CITIBANK, N.A.,

Defendant and Respondent.

After an Order by the Court of Appeal, Fourth Appellate District, Division Three (Case No. G049838), Reversing and Remanding Order of the Superior Court of Riverside (Case No. RIC1109398), Denying In Part Motion to Compel Arbitration, Commissioner John W. Vineyard Presiding

---

ANSWER TO PETITION OF SHARON MCGILL FOR REVIEW OR, IN THE ALTERNATIVE, FOR A GRANT AND TRANSFER ORDER

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I. INTRODUCTION

The Court should deny the Petition for Review (the "Petition") filed by plaintiff/petitioner Sharon McGill ("McGill"). There is no review worthy issue here at all. In McGill v. Citibank, N.A., 232 Cal. App. 4th 753 (2014), reh'g denied (Jan. 7, 2015), the California Court of Appeal, Fourth Appellate District (the "Court of Appeal") correctly held that California's state-law rule against arbitrating claims for public injunctive relief under California's Unfair Competition Law, Bus. & Prof. Code § 17200, et seq. ("UCL"), False Advertising Act, Bus. & Prof. Code § 17500, et seq. ("FAL"), and Consumer Legal Remedies Act, Civ. Code § 1750, et seq. ("CLRA") is preempted by the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA") and the United States Supreme Court's decision in AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011) ("AT&T Mobility"). In so holding, the Court of Appeal rejected the pre-AT&T Mobility rule in Broughton v. Cigna Healthplans, 21 Cal. 4th 1066 (1999), and Cruz v. PacifiCare Health Sys., Inc., 30 Cal. 4th 303 (2003), which held that, although claims for monetary relief under the UCL and CLRA are subject to arbitration, claims for public injunctive relief under those statutes are not.

Importantly, the Court of Appeal's opinion is consistent with settled U.S. Supreme Court precedent, including AT&T Mobility, 131 S. Ct. 1740, and its progeny. The rule stated in AT&T Mobility is clear and simple: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." AT&T Mobility, 131 S. Ct. at 1747. The Broughton/Cruz rule simply does not survive AT&T Mobility. The Court of Appeal's opinion is also consistent with this Court's recent decision in Iskanian v. CLS Transp.

Los Angeles, LLC, 59 Cal. 4th 348 (2014), cert. denied, No. 14-341, 2015 WL 231976 (U.S. Jan. 20, 2015). In Iskanian, this Court confirmed the expansive scope of the FAA's preemption and overturned another state-law rule invalidating class action waivers on claims for arbitration of unpaid wages.

Similarly, McGill's argument that arbitration is not a proper forum for public injunctive relief claims under the UCL, FAL and CLRA based on either public policy or practical reasons is irrelevant here. Again, AT&T Mobility is clear: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." AT&T Mobility, 131 S. Ct. at 1753 (emphasis added). Regardless of how McGill attempts to reformulate the now-irrelevant Broughton/Cruz rule reasoning, McGill's argument is categorically foreclosed by AT&T Mobility and there is no important question of law to be settled. For these same reasons, McGill's request for the Court to grant review and transfer the case back to the Court of Appeal with instructions to apply the Broughton/Cruz rule should be denied.

Accordingly, the Petition should be summarily denied.

II. STATEMENT OF THE FACTS AND CASE

A. McGill's Complaint

On March 27, 2011, McGill filed this putative class action against Citibank purportedly on behalf of all California residents holding Citibank credit cards and who enrolled in Citibank's Credit Protector program. Vol. 1, CT, pp 1-23. The Credit Protector program is an optional debt deferral/cancellation benefit program provided by Citibank. Vol. 1, CT, pp. 98-99. The Complaint alleges that when McGill enrolled in Credit Protector, all of the conditions regarding coverage and claims were not

disclosed to her, no evaluation of her eligibility was performed and that she was improperly denied benefits. Vol. 1, CT, pp. 4-5, 7-8, 10-23. McGill alleges violations of: (1) the UCL; (2) the FAL; (3) the CLRA; and (4) California Insurance Code Section 1758.9, et seq. Vol. 1, CT, pp. 10-23. On behalf of herself and a putative California class of similarly-situated persons, McGill seeks restitution, compensatory, monetary and punitive damages, injunctive relief, and attorneys' fees, among other things. Vol. 1, CT, pp. 23-24.

B. Citibank's Motion And The Arbitration Agreement

On August 26, 2011, Citibank filed the Motion. Vol. 1, CT, pp. 31-57. In support of the Motion, Citibank submitted the Declaration of Cathleen A. Walters, attaching the written Card Agreement, as amended, that contains the terms and conditions of McGill's Citibank credit card account. Vol. 1, CT, pp. 94-160. The Card Agreement contains the Arbitration Agreement, which provides that either party can elect mandatory binding arbitration. Id.

On December 1, 2011, the trial court issued its order granting in part and denying in part the Motion:

> The Court has considered the supplemental briefing submitted by both parties. Based on AT&T Mobility v. Concepcion (2011) 131 S. Ct. 1740 and KPMG LLP v. Cocchi (2011) [132 S. Ct. 23], the Court finds that the arbitration [agreement] at issue in this action is enforceable, and that certain of the claims asserted are subject to arbitration, the motion is granted in part.
>
> The claims for injunctive relief pursuant to B&P Code section 17200 and Civil Code section 1750 are not subject to arbitration, and the motion is denied as to those claims, which

are hereby stayed pending completion of arbitration of the remaining claims.

Vol. 6, CT, p. 1406. The Order did not reference McGill's FAL claim. Id.

On January 10, 2012, McGill filed an ex parte application to clarify that McGill's claim for public injunctive relief under the FAL should have been referenced in the trail court's order. Vol. 6, CT, pp. 1422-58. On January 11, 2012, the trial court held a hearing on the ex parte application; at the hearing, the trial court clarified that its order should have referenced McGill's claim for public injunctive relief under the FAL and that such claim is not subject to arbitration. RT, pp. 19:23-20:9. On February 2, 2012, the trial court issued a formal order reflecting the clarification ruling. Vol. 6, CT, pp. 1463-66.

C. Citibank's Appeal And The Court of Appeal's Order

On January 27, 2012, Citibank filed its Notice of Appeal. Following briefing, the Court of Appeal reversed the trial court's order and remanded the action to the trial court to order all of McGill's claims to arbitration. McGill, 232 Cal. App. 4th at 757. On January 2, 2015, McGill filed a Petition for Rehearing on the grounds that the Court of Appeal did not address McGill's argument that the Arbitration Agreement improperly prohibits arbitration of claims for injunctive relief. On January 7, 2015, the Court of Appeal denied McGill's Petition for Rehearing. (See Ex. A, Order Denying Petition for Rehearing.) McGill filed the instant Petition for Review on January 27, 2015.

III. ARGUMENT

A. Review Is Not Warranted Because There Is No Lack Of Uniformity Of Decision Or Need To Settle An Important Question Of Law.

Review of a Court of Appeal decision may be ordered when, among other reasons, it is "necessary to secure uniformity of decision or to settle an important question of law." Cal. R. Ct. 8.500(b)(1). Here, McGill contends that review is necessary to address whether the FAA preempts the Broughton/Cruz rule, i.e., whether McGill is required to arbitrate her claims for public injunctive relief pursuant to the parties' Arbitration Agreement. However, review is not necessary because this question is foreclosed by the U.S. Supreme Court's decision in AT&T Mobility.

Broughton and Cruz held that, although claims for monetary relief under the UCL and CLRA are subject to arbitration, claims for public injunctive relief under those statutes are not. See Broughton, 21 Cal. 4th at 1079-80; Cruz, 30 Cal. 4th at 315-16. Ignoring AT&T Mobility, McGill claims that there is no precedential authority supporting the conclusion that the Broughton/Cruz rule has been abrogated. Contrary to McGill's assertion, the Supreme Court's decision unquestionably is precedential authority. See Phillips v. Sprint PCS, 209 Cal. App. 4th 758, 768-69 (2012) ("Concepcion has resulted in a significant clarification of the Federal Arbitration Act -- and a major change in California law. Whatever views the trial court or this court may hold regarding the relative wisdom of Discover Bank and Concepcion, we are all bound to follow the law as it has been interpreted by our highest court.") (internal quotation and citation omitted) rev. denied, Dec. 19, 2012; Mullaney v. Woods, 97 Cal. App. 3d

710, 718-19 (1979) ("as a state court we are bound by the federal Supreme Court's interpretation of a federal statute").

The Supreme Court clearly stated that "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." AT&T Mobility, 131 S. Ct. 1745-46 (citation omitted). Thus, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." Id. at 1747. Similarly, "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" are preempted by the FAA. Id. at 1746. A state law doctrine "normally thought to be generally applicable," such as "unconscionability," that is "applied in a fashion that disfavors arbitration" or has a "disproportionate impact on arbitration agreements" is preempted. Id. at 1747; see also Coneff v. AT&T Corp., 673 F.3d 1155, 1160 (9th Cir. 2012) (courts may not leverage "'the uniqueness of an agreement to arbitrate' to achieve a result that the state legislature cannot") (quoting AT&T Mobility, 131 S. Ct. at 1747). Abrogating the Discover Bank rule, which exempted from arbitration a particular type of claim, i.e., small-dollar consumer claims, by holding such claims to more stringent standards than contracts generally, the Supreme Court held that because the rule was an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms, it was preempted. AT&T Mobility, 131 S. Ct. at 1750, 1753.

There is no sound legal basis to distinguish between the Broughton/Cruz rule and the Discover Bank rule. Both are state-law rules that prevent enforcing arbitration agreements according to their terms by "prohibit[ing] outright the arbitration of a particular type of claim." AT&T

Mobility, 131 S. Ct. at 1747 (emphasis added). Both rules provide special protection to a particular category of claims solely because they arise in the context of arbitration. In this context, "the analysis is *straightforward*: The conflicting rule is *displaced* by the FAA." AT&T Mobility, 131 S. Ct. at 1747 (emphasis added).

The Supreme Court's decision in Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012), reaffirmed the FAA's preemption of state public policy justifications. There, the Supreme Court held that under the FAA, an arbitration agreement between a nursing home and a patient's family member was enforceable in a suit against the nursing home for personal injury or wrongful death -- despite the West Virginia Supreme Court of Appeals' conclusion that arbitration of such claims was against that state's public policy. Marmet, 132 S. Ct. at 1203-04. Because the public policy of West Virginia prohibited "'outright the arbitration of a particular type of claim" -- personal injury and wrongful death claims -- that policy was "displaced by the FAA.'" Id. at 1203 (quoting AT&T Mobility, 131 S. Ct. at 1747).

Indeed, this Court's decision in Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal. 4th 348 (2014), reaffirms the broad impact of AT&T Mobility and its progeny. See, e.g., Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Marmet, 132 S. Ct. 1201, 1203; CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012); KPMG LLP v. Cocchi, 132 S. Ct. 23, 25 (2011) (per curiam). In Iskanian, this Court held that a challenge based on California law to a class action waiver contained in an employment arbitration agreement is preempted by the FAA and AT&T Mobility. Iskanian, 59 Cal. 4th at 364. In doing so, the Court found plaintiff's proffered distinction between Gentry v. Super.

Court, 42 Cal. 4th 443 (2007) (which required a plaintiff to make an evidentiary showing as to why a class-action ban results in a waiver of substantive rights) and AT&T Mobility (which held consumer class-action bans "generally unconscionable") to be irrelevant since "[AT&T Mobility] holds that even if a class waiver is exculpatory in a particular case, it is nonetheless preempted by the FAA." Iskanian, 59 Cal. 4th at 364 (emphasis in original). Thus, this Court reasoned, Gentry's rule against employment class-action bans "runs afoul" of AT&T Mobility by mandating procedures incompatible with arbitration. Id. at 366.[1] The Court's reasoning is equally applicable outside the employment context.

In the instant case, McGill argues that California law prohibits outright arbitration of a particular type of claim – claims for public injunctive relief. Under existing law, including Iskanian, the FAA preempts California's Broughton/Cruz rule. Indeed, the courts that have addressed this issue agree. For example, in Ferguson v. Corinthian Colls., Inc., 733 F.3d 928 (9th Cir. 2013), the Ninth Circuit unequivocally held that the Broughton/Cruz rule is preempted by the FAA and AT&T Mobility: "By exempting from arbitration claims for public injunctive relief under the CLRA, UCL, and FAL, the Broughton–Cruz rule similarly

[1] The Court also held that a ban on the right to bring a representative action under California's Private Attorneys General Act of 2004, Lab. Code § 2698, et seq. ("PAGA"), was not preempted under the FAA. This Court made clear: "Our FAA holding applies specifically to a state law rule barring predispute waiver of an employee's right to bring an action that can only be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers." Iskanian, 59 Cal. 4th at 388. The portion of Iskanian regarding PAGA does not apply here as McGill does not invoke PAGA.

prohibits outright arbitration of a particular type of claim." Ferguson, 733 F.3d at 934; see also McArdle v. AT & T Mobility LLC, No. C 09-1117 CW, 2013 WL 5372338, *3 (N.D. Cal. Sept. 25, 2013), appeal dismissed, Nov. 6, 2013 ("The Broughton–Cruz doctrine applies only to arbitration agreements and only to certain claims brought pursuant to the CLRA and UCL. . . . Because the Broughton–Cruz rule is not a generally applicable contract defense, it does not survive [AT&T Mobility]."); Bernal v. Cash Am. Int'l, Inc., No. C 12-05792 JSW, 2013 WL 5313965, *2 (N.D. Cal. Sept. 23, 2013) ("The Court agrees with the majority that, however strong the state public policy reasons are in favor of having judicial review of public injunctive claims, [AT&T Mobility] compels preemption of the Broughton–Cruz rule."); Laster v. T-Mobile USA, Inc., No. 05CV1167 DMS WVG, 2013 WL 4082682, *7 (S.D. Cal. July 19, 2013) (holding that Broughton/Cruz rule is preempted by the FAA and AT&T Mobility); Brown v. DIRECTV, LLC, No. CV 12-08382 DMG EX, 2013 WL 3273811, *11 (C.D. Cal. June 26, 2013) (same); Cunningham v. Leslie's Poolmart, Inc., No. CV 13-2122 CAS CWX, 2013 WL 3233211, *5 (C.D. Cal. June 25, 2013) (same).

In addition, California's Courts of Appeal have adhered to the Supreme Court's reasoning in AT&T Mobility, as they must. In Nelsen v. Legacy Partners Residential, Inc., 207 Cal. App. 4th 1115, 1135-36 (2012), rev. denied, Oct. 31, 2012, the First District Court of Appeal expressly noted that "the FAA preempts any rule or policy rooted in state law that subjects agreements to arbitrate particular kinds of claims to more stringent standards of enforceability than contracts generally." Id. Critically here, the court concluded that "[a]bsolute prohibitions on the arbitration of particular kinds of claims such as that reflected in Broughton-Cruz are the

clearest example of such policies[.]" Id. (emphasis added); see also Miguel v. JPMorgan Chase Bank, N.A., No. CV 12-3308 PSG, 2013 WL 452418, *5 (C.D. Cal. Feb. 2, 2013) (endorsing, even though no longer "binding precedent," reasoning of Kilgore v. Keybank, Nat'l Ass'n, 673 F.3d 947, 959-63 (2012), reh'g en banc ordered, 697 F.3d 1191 (9th Cir. Sept. 21, 2012) that Broughton/Cruz rule is preempted by the FAA after AT&T Mobility because "the Broughton–Cruz rule prohibits the arbitration of a particular type of claim, claims for injunctive relief[.]").[2]

Under existing law, the Court of Appeal properly re-evaluated the Broughton/Cruz rule in the present action and, in conformity with other courts, held that the under AT&T Mobility, the FAA preempts the Broughton/Cruz rule. Accordingly, review is not warranted and the Petition should be summarily denied.

B. McGill Waived Her Argument That The Arbitration Agreement Prohibits The Arbitrator From Awarding A Public Injunction.

McGill argues that this Court should grant review for the additional reason that the Arbitration Agreement is purportedly against public policy because it "expressly prohibits" an arbitrator from awarding a public injunction. The Court of Appeal denied McGill's Petition for Rehearing on this ground and held that McGill waived this argument by failing to raise it in her briefs. (Ex. A, Order Denying Petition for Rehearing, at 1-2 (Jan. 7, 2015) ("Appellate courts will not consider arguments raised for the first time at oral argument or in a petition for rehearing.")(citing Reynolds v.

[2] The Ninth Circuit reached the same conclusion in Kilgore v. Keybank, Nat'l Ass'n, 673 F.3d 947, 959-63 (2012). In the *en banc* opinion in Kilgore v. Keybank, N.A., 718 F.3d 1052 (9th Cir. 2013), the Ninth Circuit held that, based on the record, the case did not fall within the purview of the Broughton/Cruz rule.

Bement, 36 Cal. 4th 1075, 1092 (2005) ("It is well settled that arguments ... cannot be raised for the first time in a petition for rehearing'"); Acquire II, Ltd. v. Colton Real Estate Group, 213 Cal. App. 4th 959, 978, fn. 12 (2013) ("We do not consider arguments that are raised for the first time at oral argument.")).) The Court of Appeal further held that McGill's own letter briefs disavowed her contentions. (Ex. A, Order Denying Petition for Rehearing, at 2.)

Notwithstanding McGill's waiver, McGill's argument does not present a review worthy issue. That the CLRA, UCL and FAL purportedly were enacted for the "public benefit" of protecting consumers, does not change the conclusion that prior California decisions restricting the ability to arbitrate based on state-specific public policy grounds simply are no longer good law following AT&T Mobility. Accordingly, based on the foregoing, review is not warranted.

C. McGill's Request, In The Alternative, That The Court Grant Review And Transfer The Case To The Court Of Appeal Should Also Be Denied.

McGill's request, in the alternative, that the Court review and transfer the case to the Court of Appeal with directions to apply the Boughton/Cruz rule or, in the alternative, Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109 (2013), cert. denied, 134 S. Ct. 2724 (2014) ("Sonic-Calabasas II"), should be denied. (Petition at 27-28.) Pursuant to California Rule of Court 8.500(b)(4), this Court may order review of a Court of Appeal decision "[f]or the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order." See also Cal. R. Ct. 8.528(d) ("After ordering review, the Supreme Court may transfer the cause to a Court of Appeal without decision but with

instructions to conduct such proceedings as the Supreme Court orders."). The Advisory Committee Comments to Rule 8.528(d) explain:

> Subdivision (d) is intended to apply primarily to two types of cases: (1) those in which the court granted review 'for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order' (rule 8.500(b)(4)) and (2) those in which the court, after deciding a 'lead case,' determines that a companion 'grant and hold' case (rule 8.512(c)) should be reconsidered by the Court of Appeal in light of the lead case or presents an additional issue or issues that require resolution by the Court of Appeal.

Cal. R. Ct. 8.528(d), Advisory Comm. Notes.

The latter circumstance addressed by the Advisory Committee Notes, in which the Court issues a "grant and hold" until it decides a lead case pending before it, is not applicable here. Indeed, McGill has not cited any case currently being considered by this Court that would justify the issuance of a "grant and hold." Instead, McGill requests that the Court grant review but, rather than consider the merits of the case, summarily order the Court of Appeal to apply the Broughton/Cruz rule or, in the alternative, Sonic-Calabasas II. McGill's request ignores AT&T Mobility, which, as discussed above, requires a re-evaluation of Broughton/Cruz rule.

Similarly, McGill's request that the Court issue a grant and transfer order based on the unconscionability analysis in Sonic-Calabasas II is unavailing. In issuing its opinion, the Court of Appeal considered Sonic-Calabasas II:

> In [Sonic-Calabasas II], this Court reconsidered its earlier decision in Sonic-Calabasas A, Inc. v. Moreno, 51 Cal.4th 659 (2011) (Sonic I), where it examined the enforceability of an employer's arbitration agreement that required employees to waive the right to participate in a nonbinding

> administrative hearing process the California Legislature created to protect employees and assist them in recovering unpaid wages. The Sonic I court established a categorical rule declaring it against public policy and unconscionable for an employer to require its employees to waive the right to a so-called "Berman hearing." The court, however, did not invalidate the entire arbitration agreement, but rather held the employer and employee must first engage in the Berman hearing process, and then arbitrate their dispute according to their arbitration agreement if they are not satisfied with the outcome. [Sonic-Calabasas II], 57 Cal.4th at p. 1124.
>
> In [Sonic-Calabasas II], the California Supreme Court overturned Sonic's categorical prohibition against Berman hearing waivers based on AT&T Mobility's "precept that 'efficient streamlined procedures' is a fundamental attribute of arbitration with which state law may not interfere." [Sonic-Calabasas II], 57 Cal.4th at p. 1140. The [Sonic-Calabasas II] court explained, "Because a Berman hearing causes arbitration to be substantially delayed, the unwaivability of such a hearing, even if desirable as a matter of contractual fairness or public policy, interferes with a fundamental attribute of arbitration—namely, its objective "'to achieve 'streamlined proceedings and expeditious results,,"". . . [and therefore the FAA preempts] Sonic I's rule." (Id. at p. 1141.)

McGill, 232 Cal. App. 4th at 762-63. Consistent with Sonic-Calabasas II, the Court of Appeal held that the Broughton/Cruz rule is preempted and McGill must arbitrate all of her claims. There simply is no reason to waste further judicial time and resources by transferring the action back to the Court of Appeal to consider Sonic-Calabasas II once again.

Accordingly, McGill's request for a grant of review and transfer is improper and should be denied.

IV. CONCLUSION

Based on the foregoing, the Petition should be denied in its entirety. As discussed, the Broughton/Cruz rule relied upon by McGill simply did not survive AT&T Mobility and review by this Court is not necessary to secure uniformity of decision or to settle an important question of law.

February 27, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. R. Ct. 8.504(d)(1))

The text of this Answer to Petition for Review consists of 3,956 words as counted by Microsoft Word 2007, the computer program used to generate the Answer to Petition for Review, excluding the parts of the Answer exempted by Cal. R. Ct. 8.504(d)(3).

February 27, 2015

Respectfully submitted,

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SHARON McGILL,

Plaintiff and Respondent,

v.

CITIBANK, N.A.,

Defendant and Appellant.

G049838

(Super. Ct. No. RIC1109398)

ORDER DENYING PETITION FOR REHEARING

Plaintiff and respondent Sharon McGill's petition for rehearing is DENIED.

McGill contends we should grant rehearing because our opinion failed to address one of her "primary arguments," namely that defendant and appellant Citibank, N.A.'s arbitration agreement is against public policy and unenforceable because it "*expressly prohibits*" the arbitrator from granting public injunctive relief. (Original italics.) According to McGill, this argument required us to affirm the trial court's decision even if the Federal Arbitration Act (9 U.S.C. § 1 et seq.) preempts California's "*Broughton-Cruz* rule."

McGill not only failed to make this argument in any brief she filed, but one of her briefs disavowed the contention Citibank's arbitration agreement expressly barred McGill from seeking public injunctive relief. Indeed, the supplemental letter brief

McGill filed on July 23, 2014, states, "Although Citibank's arbitration agreement does not expressly bar Plaintiff from seeking public injunctive relief in arbitration, due to limitations inherent in arbitration (recognized in *Broughton*), an arbitrator simply cannot award such relief." Appellate courts will not consider arguments raised for the first time at oral argument or in a petition for rehearing. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1092 ["'It is well settled that arguments . . . cannot be raised for the first time in a petition for rehearing'"], disapproved on other grounds in *Martinez v. Combs* (2010) 49 Cal.4th 35, 62-66; *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 978, fn. 12 [""'We do not consider arguments that are raised for the first time at oral argument'""].)

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.

G049838
McGill v. Citibank, N.A.

Superior Court of Riverside County

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Cal. R. Ct. 8.1115(c) Attachments

Exh. No.	Case
1.	Bernal v. Cash Am. Int'l, Inc., No. C 12-05792 JSW, 2013 WL 5313965 (N.D. Cal. Sept. 23, 2013)
2.	Brown v. DirecTV, LLC, No. CV 12-08382 DMG EX, 2013 WL 3273811 (C.D. Cal. June 26, 2013)
3.	Cunningham v. Leslie's Poolmart, Inc., No. CV 13-2122 CAS CWX, 2013 WL 3233211 (C.D. Cal. June 25, 2013)
4.	Laster v. T-Mobile USA, Inc., No. 05CV1167 DMS WVG, 2013 WL 4082682 (S.D. Cal. July 19, 2013)
5.	McCardle v. AT&T Mobility LLC, No. C 09-1117 CW, 2013 WL 5372338 (N.D. Cal. Sept. 25, 2013)
6.	Miguel v. JPMorgan Chase Bank, N.A., No. CV 12-3308 PSG, 2013 WL 452418 PSG (C.D. Cal. Feb. 2, 2013)

2013 WL 5313965
Only the Westlaw citation is currently available.
United States District Court, N.D. California

Paula Bernal, et al., Plaintiffs,
v.
Cash America International, Inc., et al., Defendants.

No. C 12–05792 JSW | September 23, 2013

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ORDER GRANTING MOTION TO COMPEL ARBITRATION

JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE

*1 Now before the Court is Defendants' motion to compel arbitration. With respect to all of Plaintiffs' claim except their request for injunctive relief, the parties agree that Plaintiffs' claims should be arbitrated.

Plaintiffs contend, citing the rule established by *Broughton v. Cigna Healthplans of California,* 21 Cal.4th 1066 (1999) and *Cruz v. PacifiCare Health Sys., Inc.,* 30 Cal.4th 303 (2003) (the *Broughton–Cruz* rule), that claims for public injunctive relief are not arbitrable. In *Kilgore v. Key Bank,* 673 F.3d 947 (9th Cir.2012) ("*Kilgore I* "), the Ninth Circuit held that the *Broughton–Cruz* rule is preempted by the Federal Arbitration Act ("FAA") as construed by the Supreme Court in *AT & T Mobility LLC v. Concepcion,* 131 S.Ct. 1740 (2011). However, the Ninth Circuit reheard the decision issued in *Kilgore en banc.* In that opinion, the Ninth Circuit determined that it did not need to decide the preemption issue because the requested relief did not actually constitute a claim for public injunctive relief. *Kilgore v. Keybank,* 718 F.3d 1052, 1060–61 (9th Cir.2013) ("*Kilgore II* ").

In *Kilgore II,* the Ninth Circuit held that "[a] claim for public injunctive relief ... does not seek 'to resolve a private dispute but to remedy a public wrong.' " *Id.* at 1060 (quoting *Broughton,* 988 P.2d at 76). In the claims at issue in that case, the court found that the plaintiffs were seeking relief which would only benefit the 120 purported class members and that the "relief sought ... relates only to past harms suffered by the members of the limited putative class." *Id.* at 1061 Moreover, the plaintiffs admitted that the alleged statutory violations had already ceased and thus there was "no real prospective benefit to the public at large from the relief sought." *Id.*

Defendants argue that Plaintiffs' claims similarly fall outside the scope of the *Broughton–Cruz* rule because Plaintiffs' requested relief would not provide a prospective public benefit. However, unlike in *Kilgore II,* Plaintiffs have not conceded that the alleged unlawful practices have ceased. Plaintiffs allege that the loan agreements used by Defendants continue to use the Cash America Net name, even after the name change in 2011. Moreover, Plaintiffs allege that Defendants have not posted a copy of a valid license at their place of business. Because Plaintiffs allege ongoing violations that would affect the public, the Court must address the preemption issue the *Broughton–Cruz* rule.

In *AT & T Mobility LLC v. Concepcion,* U.S. 131 S.Ct. 1740, 1746 (2011), the Supreme Court held that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." Most courts that have examined this issue have concluded that the *Broughton–Cruz* rule prohibits outright the arbitration of a particular type of claim—claims for public injunctive relief—and, thus, is clearly preempted by the FAA. *See Meyer v. T–Mobile USA Inc.,* 836 F.Supp.2d 994, 1005–06 (N.D.Cal.2011); *Hendricks v. AT & T Mobility, LLC,* 823 F.Supp.2d 1015, 1024 (N.D.Cal.2011); *Kaltwasser v. AT & T Mobility LLC,* 812 F.Supp.2d 1042, 1050–51 (N.D.Cal.2011); *Rosendahl v. Bridgepoint Educ., Inc.,* 2012 WL 667049, * 12 (S.D.Cal.2012); *Nelson v. AT & T Mobility LLC,* 2011 WL 3651153, *2 (N.D.Cal. Aug. 18, 2011); *In re Apple and AT & T iPad Unlimited Data Plan Litig.,* 2011 WL 2886407, *4 (N.D.Cal. July 19, 2011); *Arellano v. T–Mobile USA, Inc.,* 2011 WL 1842712, *1 (N.D.Cal. May 16, 2011). While there are strong policy arguments

in favor of the *Broughton–Cruz* rule, as other courts have noted, state policy arguments were rejected by *Concepcion,* "perhaps regrettably." *See Arellano,* 2011 WL 1842712, at *2 (holding that "*Concepcion* ... compels preemption" of the *Broughton–Cruz* rule, despite "public policy arguments thought to be persuasive in California."); *see also Nelson,* 2011 WL 3651153, at *2 (same).

***2** Although a couple of courts have concluded that the *Broughton–Cruz* rule is still viable after *Concepcion,* the Court finds that the reasoning of these cases is not persuasive. *See Ferguson v. Corinthian Colleges,* 823 F.Supp.2d 1025, 1035 (C.D.Cal.2011); *In re DirecTV Early Cancellation Fee Marketing and Sales Practices Litig.,* 810 F.Supp.2d 1060, 1073 (C.D.Cal.2011). The Court agrees with the majority that, however strong the state public policy reasons are in favor of having judicial review of public injunctive claims, *Concepcion* compels preemption of the *Broughton–Cruz* rule.

Accordingly, the Court grants the motion to compel arbitration and to stay proceedings pending arbitration. The Clerk is directed to close the file for administrative purposes. The case may be reopened for such additional proceedings as may be appropriate and necessary upon conclusion of arbitration. If the matter is resolved by settlement, the parties shall promptly file a dismissal of this action.

IT IS SO ORDERED.

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2013 WL 3273811
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Joshua D. BROWN, on behalf of himself and all others similarly situated, Plaintiff,
v.
DIRECTV, LLC, the CM Group, Inc., the CMI Group GP, LLC, and Credit Management, LLP, Defendants.

No. CV 12–08382 DMG (Ex). | June 26, 2013.

Attorneys and Law Firms

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ORDER RE DIRECTV'S MOTIONS TO COMPEL ARBITRATION

DOLLY M. GEE, District Judge.

***1** This matter is before the Court on Defendant DIRECTV, LLC's motions to compel arbitration. [Doc.27, 68.] The Court held a hearing on June 21, 2013. After careful consideration of the parties' moving papers, exhibits, and arguments at the hearing, and for the reasons set forth below, the Court concludes that Plaintiff agreed to the arbitration provisions, the claims at issue fall within the scope of the arbitration provisions, and all the claims against DIRECTV are arbitrable. Accordingly, DIRECTV's motions are **GRANTED.**

I.

PROCEDURAL BACKGROUND

On November 19, 2013, Plaintiff Joshua D. Brown, on behalf of himself and all others similarly situated, filed a First Amended Complaint ("FAC") against Defendants DIRECTV LLC ("DIRECTV"), The CMI Group, Inc., The CMI Group GP, LLC, and Credit Management, LLP, raising claims for violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.* [Doc. # 17.] On December 18, 2012, DIRECTV filed its first motion to compel arbitration ("TCPA Mot."). [Doc. # 27.] On January 16, 2013, Brown filed his opposition [Doc. # 45], and on January 30, 2013, DIRECTV filed a reply.

On December 31, 2012, Brown filed a motion for leave to amend his FAC, which the Court granted on March 13, 2013 [Doc. # 65.] On March 18, 2013, Brown filed the operative Second Amended Complaint ("SAC"), retaining the prior TCPA claim and adding a claim under the Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code § 17200 *et seq.* [Doc. # 67.] On February 11, 2013, Brown filed a motion to take arbitration-related discovery and subsequently to file a surreply to DIRECTV's motion to compel. [Doc. # 56.] The Court granted this motion on March 13, 2013, permitting both a surreply and a response from DIRECTV. Brown filed a surreply on May 13, 2013 [Doc. # 70], and DIRECTV filed a response on May 20, 2013 [Doc. # 72].

On April 10, 2013, DIRECTV filed a second motion to compel arbitration, in response to the UCL claim raised in the SAC ("UCL Mot."). [Doc. # 68.] On May 10, 2013, Brown filed an opposition [Doc. # 69], and on May 17, 2013, DIRECTV filed a reply [Doc. # 71].

II.

FACTUAL BACKGROUND

On August 3, 2008, Brown completed an online order for DIRECTV's satellite television service. (Decl. of Joshua D. Brown ("Brown Decl.") ¶ 4 [Doc. # 45–1]; Decl. of Shoshana B. Riss ("Riss Decl.") ¶ 2 [Doc. # 47–1].) Before finalizing orders on the DIRECTV website, all new subscribers are directed to a "Checkout: Payment" page, where they must confirm their payment. (DIRECTV Resp. to Interrogatory No. 1 at 5 (Decl. of Daniel M. Hutchison ("Hutchison Decl."),

Ex. C) [Doc. # 70–1]. At the payment page, under the phrase "DIRECTV Terms and Conditions," appears a text box with three bullet points. The text box also contains a scroll bar, indicating that there is more information not present on the screen. (*Id.;* Riss Decl. ¶¶ 3, 5, Ex. A.) [1] The terms include, *inter alia,* the following bullet point:

> *2 You and DIRECTV® agree that any dispute arising under or relating to your agreements or service with DIRECTV®, which cannot be resolved informally, will be resolved through binding arbitration as fully set forth in the DIRECTV® Customer Agreement (a copy is sent with your first bill but may also be viewed atDIRECTV.com). Arbitration means you waive your right to a jury trial.

(Riss Decl., Ex. A, at 5.) Before completing the payment process, a customer must check a box affirming that he "ha[s] read and accept[s] all of the terms and conditions above, including the DIRECTV® Customer Agreement" ("the Agreement"). (Riss Decl., Ex. A.) During checkout, the title of the Agreement appears as a hyperlink, which directs the customer to the text of the Agreement itself. (Hutchison Decl., Ex. C at 6). The customer cannot complete the process without checking the box. (*Id.*) Brown does not recall reading the Customer Agreement or seeing the arbitration clause during checkout. (Brown Decl. ¶ 6; Opp'n at 3 (arguing that the Agreement was only sent with the first bill and did not appear online).)

On August 5, 2008, DIRECTV technicians installed equipment at Brown's residence. On the same date, Brown signed a form entitled "DIRECTV Equipment Lease Addendum" ("Equipment Lease"). (Hutchison Decl, Ex. E.) The Equipment Lease includes the following clause:

> **ARBITRATION.** You and DIRECTV agree that both parties will resolve any dispute arising under this Equipment Lease Addendum, the DIRECTV Customer Agreement or any other addendum thereto, or regarding your DIRECTV programming service, through binding arbitration as fully set forth in the DIRECTV Customer Agreement.

(*Id.*) On August 6, 2008, DIRECTV mailed Brown his first bill, which included a copy of the Agreement. (Decl. of Valerie W. McCarthy ("McCarthy Decl.") ¶ 3, 11 [Doc. # 27–2].)

The arbitration clause of the Customer Agreement [2] provides, in relevant part, as follows:

> **9. RESOLVING DISPUTES**
>
> In order to expedite and control the cost of disputes, you and we agree that any legal or equitable claim relating to this Agreement, any addendum, or your Service (referred to as a "Claim") will be resolved as follows:
>
> * * *
>
> (b) *Formal Resolution.* Except as provided in Section 9(d), if we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated (referred to as the "JAMS Rules") and under the rules set forth in this Agreement. If there is a conflict between JAMS Rules and the rules set forth in this Agreement, the rules set forth in this Agreement will govern. ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL.... If you decide to initiate arbitration, ... [u]nless we agree to pay your fee for you, you only need to pay an arbitration initiation fee equal to [the filing fee required to initiate a lawsuit in the appropriate court of law in your state], not to exceed $125; we agree to pay any additional fee or deposit required by JAMS to initiate your arbitration. We also agree to pay the costs of the arbitration proceeding. Other fees, such as attorney's fees and expenses of travel to the arbitration will be paid in accordance with JAMS Rules. The arbitration will be held at a location in your hometown area unless you and we both agree to another location or telephonic arbitration....
>
> * * *
>
> *3 (d) *Exceptions.* Notwithstanding the foregoing ... any dispute involving a violation of the Communications Act of 1934, 47 U.S.C. § 605, the Digital Millennium Copyright Act, 17 U.S.C. § 1201, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510–2521 or any other statement or law governing theft of service, may be decided only by a court of competent jurisdiction.

(McCarthy Decl., Ex. A, at 8–9.)

Brown attests that he cancelled his DIRECTV service in July 2009. (Brown Decl. ¶ 9.) DIRECTV attests that Brown stopped paying for service in July 2009, but continued

to receive service until October 2009. (McCarthy Decl. ¶ 14.) Some time after October 2009, DIRECTV transferred Brown's account to Defendant CMI Group for collection action. (*Id.* ¶ 15.) Brown attests that between January 18, 2013 and March 3, 2013, he received automated phone calls from Defendant Credit Management, L.P. (Brown Decl. ¶ 14.) Those phone calls form the underlying factual basis for Plaintiff's claims.

III.

LEGAL STANDARD

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16, provides that written provisions to arbitrate disputes are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *AT & T Mobility LLC v. Concepcion,* ——U.S. ——, 131 S.Ct. 1740, 1744, 179 L.Ed.2d 742 (2011) (quoting 9 U.S.C. § 2) (internal quotation marks omitted). This provision reflects "both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract.' " *Id.* at 1745 (quoting *Rent–A–Center, West, Inc. v. Jackson,* —— U.S. ——, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)) (internal quotation marks omitted).

As long as an arbitration clause is not itself invalid under "generally applicable contract defenses, such as fraud, duress, or unconscionability," *id.* at 1746 (quoting *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)) (internal quotation marks omitted) (citing *Perry v. Thomas,* 482 U.S. 483, 492–93 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)), it must be enforced according to its terms, *id.* at 1745 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). *See also Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) ("By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." (citing 9 U.S.C. §§ 3, 4)). Thus, this Court's role under the FAA is limited to determining "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. Keybank, Nat. Ass'n,* ——F.3d ——, No. 09–16703, 2013 WL 1458876 (9th Cir.2013) (*en banc*) (*"Kilgore II"*) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.,* 207 F.3d 1126, 1130 (9th Cir.2000)).

IV.

DISCUSSION

A. *Brown Assented to the Arbitration Clause*

*4 Brown argues that he did not assent to the Customer Agreement in general and the arbitration clause specifically. DIRECTV contends that Brown agreed to the Customer Agreement, and thus the arbitration clause, by (1) affirming that he read and agreed to its provisions while ordering DIRECTV's service online; (2) signing the Equipment Lease Agreement; and (3) not canceling service after he received the Customer Agreement with his first bill. Because the Court agrees with DIRECTV's first two contentions, it need not address the third.

On two separate occasions—while purchasing service and in the Equipment Lease—Brown expressly assented to the terms of the Agreement. While Brown asserts that he does not recall seeing an arbitration provision during his online order, DIRECTV's evidence demonstrates that he must have encountered language alerting him both to the existence of the Agreement and the arbitration clause specifically, as well as a hyperlink that would have brought him directly to the Agreement. On the Equipment Lease, the provision was even more obvious, present as it was, immediately above the signature line.

Brown cannot claim lack of knowledge under these circumstances. It is a well-established principle of California contract law that "the law imputes to a person the intention corresponding to the reasonable meaning of his words and acts" based on "his outward expression" and not "his unexpressed intent." *See Edwards v. Comstock Insurance Co.* 205 Cal.App.3d 1164, 1169, 252 Cal.Rptr. 807 (1988). Moreover, as this Court observed in *Lima v. Gateway, Inc.,* 886 F.Supp.2d 1170 (C.D.Cal.2012), "when one purchases a product and is aware that other terms and conditions govern that purchase, he or she is bound by those terms as soon as the purchase is complete even [if] the purchaser does not receive a copy of those additional terms until a later date." 886 F.Supp.2d at 1177 (internal quotation marks omitted) (citing *Hill v. Gateway 2000, Inc.,* 105 F.3d 1147 (7th Cir.1997) and *ProCD, Inc. v. Zeidenberg,* 86 F.3d 1447 (7th Cir.1997)).

Based upon the evidence in the record, the Court finds that Brown assented to the Agreement in general and the arbitration clause specifically.

B. *The Arbitration Provision Encompasses The Dispute At Issue*

Brown next argues that the arbitration clause does not encompass his TPCA or UCL claims, because they do not arise under or relate to the Agreement.

1. Collection Calls for Missed Payments Relate to the Contract

A party to an arbitration clause may only be compelled to arbitrate claims that fall within the scope of the clause. Given the strong federal policy favoring arbitration, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone,* 460 U.S. at 24–25. Brown saw or could have seen three different versions of the arbitration requirements. The arbitration provision in the online checkout page summarized the scope to include "any dispute arising under or relating to your agreements or service with DIRECTV." The arbitration provision of the Equipment Lease includes "any dispute arising under this Equipment Lease Addendum, the DIRECTV Customer Agreement or any other addendum thereto, or regarding your DIRECTV programming service." Both of these provisions were clear, however, that they were summaries of the terms set forth fully in the Agreement. Therefore, the relevant arbitration provision was that of the Agreement, which extends to "any legal or equitable claim relating to this Agreement, any addendum, or [a customer's] Service."

***5** The Ninth Circuit has indicated that arbitration clauses that use only "arising under" language should be narrowly construed, while "relating to" language is much broader in scope. *Cape Flattery Ltd. v. Titan Mar., LLC,* 647 F.3d 914, 922 (9th Cir.2011), *cert. denied,* —— U.S. ——, 132 S.Ct. 1862, 182 L.Ed.2d 658 (2012) ("Because of the absence of the 'relating to' language in the arbitration provision, we had 'no difficulty finding that 'arising hereunder' is intended to cover a much narrower scope of disputes, i.e., only those relating to the interpretation and performance of the contract itself.' ") (quoting *Mediterranean Enterprises, Inc. v. Ssangyong Construction Co.,* 708 F.2d 1458, 1464 (9th Cir.1983)). Accordingly, the "relating to" language in the arbitration clause at issue in this case is relatively broad.

Brown argues, citing *Williston on Contracts,* that tort-based TCPA claims are not related to a contract unless they are "in essence a breach of contract claim or based on a breach of contract." (Opp'n to TCPA Mot. at 12 (citing 21 *Williston on Contracts* § 57:31 (4th ed.2010).) Yet, the same section in *Williston on Contracts* begins by stating that "[c]laims *arising out of* torts and nuisances may be submitted to arbitration." *Id.* (emphasis added). The section also states that "the law is clear that tort claims and claims other than breach of contract are not automatically excluded from a contractual arbitration clause .... Whether a claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than the legal causes of action asserted...." *Id. Williston* merely sketches the contours of arbitration clauses, and does not address the distinction the Ninth Circuit has made between "arising under" and "related to." Brown also cites *Cape Flattery* for the same proposition, but it too interprets only the narrower "arising under" language. 647 F.3d at 924 ("The present dispute does not turn on an interpretation of any clause in the contract.... We therefore conclude that under the narrow interpretation of "arising under" in *Mediterranean* and *Tracer,* the present dispute is not arbitrable.") Brown's argument that TCPA claims are not arbitrable blurs the distinction between "arising under" language and "relating to" language and, for that reason, the Court rejects it.

Brown relies on *In re Jiffy Lube Int'l, Inc., Text Spam Litig.,* 847 F.Supp.2d 1253, 1262–63 (S.D.Cal.2012), for the further contention that TCPA violations are not "related to" the Agreement. The *Jiffy Lube* court, however, was faced with a "Pledge of Satisfaction" designed to ensure satisfaction with a one-time transaction, which included an arbitration clause that purported to cover "any and all disputes" arising between the parties, not merely disputes relating to the contract. *Id.* at 1262. The court observed that if it were to take the wildly broad scope of the arbitration clause at its word, the contract "would clearly be unconscionable." *Id.* at 1263. The court noted that it was being asked to read the clause narrowly enough to avoid invalidation, but broadly enough to encompass a TCPA claim based on a marketing text message that did not in any way relate to the customer's completed oil change. *Id.* The court declined to do so, without illuminating whether it was reading an implicit limitation into the clause or finding it invalid. *Id.*

***6** The facts of *Jiffy Lube* are not analogous to the situation at hand. The arbitration clause at issue in this case is not as broad as that in *Jiffy Lube.* Instead of a reference to "any

and all disputes," it contains the more limited "relating to" language that was absent from the arbitration clause in *Jiffy Lube.*[3] *Smith v. Steinkamp,* 318 F.3d 775 (7th Cir.2003), also cited by Brown, raises a point similar to that in *Jiffy Lube,* when it suggests that there must be natural limits to the arbitral scope. Facing a comparably broad arbitration clause, the court wrote that it would be an "absurd result[ ]" to compel arbitration in the hypothetical situation where a plaintiff brings a wrongful death suit based on a defendant lender's murder of a borrower in order to encourage defaults. *Id.* at 777. Once again, the court took issue with the sheer breadth of the arbitration provision. Here, unlike in *Jiffy Lube,* the provision in question is simply not broad enough to compel arbitration in *Steinkamp's* extreme hypothetical, and thus the decision tells us nothing more about whether the TCPA claim relates to the contract.

This action is about whether collection calls were legal under TCPA. Other district courts have compelled arbitration of TCPA claims in similar circumstances. *See, e.g., Cayanan v. Citi Holdings, Inc.,* ——F.Supp.2d ——, 12–CV–1476–MMA JMA, 2013 WL 784662, at *20 (S.D.Cal. Mar.1, 2013) (calls made to plaintiffs "because Plaintiffs had failed to make timely payments on their accounts," "for the limited purpose of collecting money owed them," and "not ... for advertising, marketing, or other purposes unrelated to the accounts," were " 'related to' the delinquent credit accounts" and thus TCPA claims based on those calls were covered by Citi arbitration clause); *Coppock v. Citigroup, Inc.,* C11–1984–JCC, 2013 WL 1192632, at (W.D.Wash. Mar. 22, 2013) (same); *McNamara v. Royal Bank of Scotland Grp., PLC,* 11–CV–2137–L WVG, 2012 WL 5392181, at *7 (S.D.Cal. Nov.5, 2012) (same). *Canayan, Coppock,* and *McNamara* found that collection calls were "related to" unpaid credit card contracts, to which collection is undoubtedly more central, but the principle remains the same. Indeed, the Agreement expressly contemplates collection in paragraph 2(g): *"Collection Costs.* To the extent permitted by law, you will pay us any costs and fees we reasonably incur to collect amounts you owe us." (McCarthy Decl, Ex. A, at 7.) Brown's TCPA claim alleges that the attempts to collect were illegal. The ability to collect on an unpaid contract is "related to" that contract and, here, that is all that is required for the claims against DIRECTV to fall within the scope of the arbitration clause. Similarly, because the UCL claim relies on and is derivative of the TCPA claim, it too "relates to" the Agreement.

2. The TCPA Claims Are Not Excluded

Brown also argues that the TCPA claims are explicitly excluded from arbitration in paragraph 9(d) of the Agreement. That paragraph excludes "any dispute involving a violation of the Communications Act of 1934, 47 U.S.C. § 605, the Digital Millennium Copyright Act, 17 U.S.C. § 1201, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510–2521 or any other statement or law governing theft of service." (McCarthy Decl., Ex. A, at 9.) Brown urges the Court to read this language to exclude six different items, each separated by a comma: "The Communications Act of 1934," as well as "47 U.S.C. § 605," and so forth. Brown argues that because the TCPA's provisions are contained within the modified Communications Act of 1934, TCPA claims must be excluded.

*7 To construe the plain language of the contract, a court must take into account the context of a sentence as a whole. *Am. Small Bus. League v. U.S. Small Bus. Admin.,* 623 F.3d 1052, 1054 (9th Cir.2010) ("[A] purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 454, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993))). Paragraph 9(d) excludes three specific provisions of the three laws named in the clause pertaining to theft of service. To read it otherwise would imply that the clause repeatedly alternates between a highly broad exclusion and a single section contained within the previous broad exclusion. Such a construction would be nonsensical. Moreover, it would render each statement of the particular section superfluous and, where possible, a court must give effect to every word of phrase within a contract. *United States v. 1.377 Acres of Land, More or Less, situated in City of San Diego, Cnty. of San Diego, State of Cal.,* 352 F.3d 1259, 1265 (9th Cir.2003) ("Courts interpreting the language of contracts 'should give effect to every provision,' and 'an interpretation which renders part of the instrument to be surplusage should be avoided.' " (quoting *Appalachian Ins. Co. v. McDonnell Douglas Corp.,* 214 Cal.App.3d 1, 12, 262 Cal.Rptr. 716, 721 (1989))). Finally, the phrase "any *other* statement or law governing theft of service" implies that the first three are also laws governing theft of service. The TCPA is not about theft of service and thus it is not excluded.

C. The Arbitration Clause Is Enforceable

Brown next argues that the arbitration clause is unenforceable because it is unconscionable and the disputes at issue are not

arbitrable. The Court finds neither argument convincing in this case.

1. The Arbitration Clause is Not Unconscionable

"Under California law, a contractual provision is unenforceable if it is both procedurally and substantively unconscionable. *Kilgore II,* 2013 WL 1458876, at *7 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.,* 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, 690 (2000)). In analyzing these two elements, courts utilize a sliding scale: "[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." *Id.* (quoting *Armendariz,* 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669). "Procedural unconscionability focuses on the factors of surprise and oppression...." *Id.* (quoting *Harper v. Ultimo,* 113 Cal.App.4th 1402, 1406, 7 Cal.Rptr.3d 418 (2003)). "Substantive unconscionability focuses on the one-sidedness or overly harsh effect of the contract term or clause." *Id.* (quoting *Harper,* 113 Cal.App.4th at 1407, 7 Cal.Rptr.3d 418). Regardless of how heavily the scale tips in favor of one element, both must be present to some degree for an agreement to be unconscionable. *Id.* (citing *Armendariz,* 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669).

a. Procedural Unconscionability

***8** "Procedural unconscionability pertains to the making of the agreement; it focuses on the oppression that arises from unequal bargaining power and the surprise to the weaker party that results from hidden terms or the lack of informed choice." *Ajamian v. CantorCO2e, LP,* 203 Cal.App.4th 771, 795, 137 Cal.Rptr.3d 773 (2012) (citing *Dotson v. Amgen, Inc.,* 181 Cal.App.4th 975, 980, 104 Cal.Rptr.3d 341 (2010)). Any contract of adhesion is minimally procedurally unconscionable, but absent other indicia of oppression or surprise, a contract of adhesion has only a low degree of procedural unconscionability. *Id.* at 796, 137 Cal.Rptr.3d 773 (citing *Dotson,* 181 Cal.App.4th at 981–82, 104 Cal.Rptr.3d 341).

No other such indicia appear here. DIRECTV does not contest that the contract was adhesive, and thus minimally procedurally unconscionable, but that is the extent of the oppression or surprise. Brown had at least two opportunities —the initial order and equipment installation—to review the Agreement and reject it with no penalty. Both times Brown assented to the terms of the Agreement. During the online order, Brown was presented with a hyperlink, in underlined blue text, which led to the Agreement's terms. This hyperlink appeared in a small box which he could not help but look at in order to complete the order. In the Equipment Lease, the arbitration provision appears immediately above the signature line. Once again, Brown would have had to make an effort to *avoid* seeing it.

Moreover, even if Brown could meaningfully object that he was not given the Agreement's full terms to read directly, both the online form and the Equipment Lease contained separate arbitration provisions alerting Brown that he would be bound by arbitration generally and that the rules are set out in the Agreement. Brown cannot at this point suggest that he was surprised by the arbitration clause.

b. Substantive Unconscionability

"Substantive unconscionability addresses the fairness of the term in dispute." *Pokorny v. Quixtar, Inc.,* 601 F.3d 987, 997 (9th Cir.2010) (quoting *Szetela v. Discover Bank,* 97 Cal.App.4th 1094, 1100, 118 Cal.Rptr.2d 862 (2002)) (internal quotation marks omitted). It arises when an agreement "imposes unduly harsh, oppressive, or onesided terms," *Ajamian,* 203 Cal.App.4th at 797, 137 Cal.Rptr.3d 773, or "reallocates risks in an objectively unreasonable or unexpected manner," *Morris v. Redwood Empire Bancorp,* 128 Cal.App.4th 1305, 1317, 27 Cal.Rptr.3d 797 (2005) (quoting *Jones v. Wells Fargo Bank,* 112 Cal.App.4th 1527, 1539, 5 Cal.Rptr.3d 835 (2003)) (internal quotation mark omitted). The paramount consideration in assessing substantive unconscionability is mutuality. *Pokorny,* 601 F.3d at 998 (quoting *Abramson v. Juniper Networks, Inc.,* 115 Cal.App.4th 638, 657, 9 Cal.Rptr.3d 422 (2004)) (internal quotation marks omitted). Agreements to arbitrate will be substantively unconscionable if they do not contain at least "a modicum of bilaterality." *Id.* (quoting *Abramson,* 115 Cal.App.4th at 657, 9 Cal.Rptr.3d 422) (internal quotation marks omitted).

***9** In addition, a provision in an adhesion contract that does not fall within the reasonable expectations of the weaker or "adhering" party is substantively unconscionable and will not be enforced against him. *Thompson v. Toll Dublin, LLC,* 165 Cal.App.4th 1360, 1372–73, 81 Cal.Rptr.3d 736 (2008) (citing *Armendariz,* 24 Cal.4th at 113, 99 Cal.Rptr.2d 745, 6 P.3d 669); *see also Parada v. Superior Court,* 176 Cal.App.4th 1554, 1573, 98 Cal.Rptr.3d 743 (2009) ("Substantive unconscionability may be shown if the disputed contract provision falls outside the nondrafting party's

reasonable expectations." (citing *Gutierrez v. Autowest, Inc.*, 114 Cal.App.4th 77, 88, 7 Cal.Rptr.3d 267 (2003))).

Given the arbitration provision's low degree of procedural unconscionability, Brown must make a substantial showing of its substantive unconscionability to render it unenforceable. *Dotson,* 181 Cal.App.4th at 981, 104 Cal.Rptr.3d 341. Several courts have already examined DIRECTV's arbitration provision and found that it is not substantively unconscionable. *See, e.g., In re DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig.,* 810 F.Supp.2d 1060, 1069 (C.D.Cal.2011)[4]; *Stachurski v. DirecTV, Inc.,* 642 F.Supp.2d 758, 773 (N.D.Ohio 2009); *Bischoff v. DirecTV, Inc.,* 180 F.Supp.2d 1097, 1112 (C.D.Cal.2002); *Hodsdon v. DirecTV, LLC,* C 12–02827 JSW, 2012 WL 5464615, at *6 (N.D.Cal. Nov.8, 2012). Brown argues that these earlier decisions did not consider the three[5] factors he puts forth, and that together these factors amount to substantive unconscionability. The Court addresses each of these factors *seriatim.*

i. Mutuality of the Arbitration Provision

Brown claims that the provision lacks mutuality because DIRECTV may engage in "self-help" by recouping early termination fees via his credit card on file. This "self-help" component of the Agreement, however, has nothing to do with the arbitration clause. The text is clear that neither party may initiate a formal dispute without first attempting informal resolution, and both parties must arbitrate all claims relating to the contract, except those explicitly excluded. The arbitration provision contains perfect symmetry. The purported "self-help" remedy applies only to one conceivable claim—whether a customer is entitled to early cancellation —but that claim is settled by the Agreement itself, which stipulates the cancellation fee. (McCarthy Decl., Ex. A, at 7–8.) Brown thus agreed to the cancellation fee as part of the Agreement, so it is debatable whether it is "self-help" at all. For example, nothing prevents the consumer from cancelling the credit card on file to foil DIRECTV's easy access to recovery of the cancellation fee. "Further, substantive unconscionability requires more than a contract that sometimes favors the drafter. Even if the Customer Agreement skews in favor of Defendant in some respects, the terms of the Arbitration Clause regarding litigating certain claims cannot be categorized as 'overly harsh.' " *In re DirecTV* 810 F.Supp.2d at 1069 (quoting *Pokorny,* 601 F.3d at 997).

ii. Exceeding a Reasonable Consumer's Expectations

***10** Brown next argues, citing this Court's order in *Lima,* that if the "sweeping scope of the ... arbitration provision exceeds a consumer's reasonable expectations, it is substantively unconscionable. *Lima,* 886 F.Supp.2d at 1183 (citing *Bruni v. Didion,* 160 Cal.App.4th 1272, 1295, 73 Cal.Rptr.3d 395 (2008)). The provision here, however, has a narrower reach than the provision in *Lima,* for which the Court observed that it would be "difficult to imagine any dispute ... that would lie outside its bounds." The "relating to" language in this provision, on the other hand, is quite standard. *See Cape Flattery,* 647 F.3d at 922 (discussing the "absence" of "relating to" language, implying that it appears with regularity). Brown suggests that including the TCPA claims within the scope of the arbitration clause defies a consumer's reasonable expectations, but as discussed above in connection with *Jiffy Lube,* such a contention is incorrect.

iii. Confidentiality

Next, Brown points out that the requirement of confidentiality is a basis to find unconscionability. He quotes *Lima* again, wherein this Court stated that "[a]lthough facially neutral, confidentiality provisions usually favor companies over individuals." *Lima,* 886 F.Supp.2d at 1185 (citing *Ting v. AT & T,* 319 F.3d 1126, 1151 (9th Cir.2003)). Full confidentiality which is unilaterally imposed can be problematic because "[a] company requiring arbitration under a confidentiality agreement 'place[s] itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, [it] accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract.' " *Id.* (quoting *Ting,* 319 F.3d at 1152). The confidentiality required by this provision, however, is different from that in *Lima.* JAMS Rule 26, to which Brown cites, only requires confidentiality on the part of the arbitrator and JAMS, not the parties themselves. JAMS Rule 26, *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/# Rule_26. The concern over confidentiality is mitigated where the parties to arbitrations are free to speak or to mutually negotiate for confidentiality as a term of a settlement.

2. Brown's Claims Are Arbitrable

a. TCPA Claim

Brown contends that TCPA is a statute that codifies privacy torts and, as such,, TCPA claims are not arbitrable.

Brown cites little authority for this proposition beyond the observation that "a tort claim is not arbitrable just because it would not have arisen 'but for' the parties' agreement." *Cape Flattery,* 647 F.3d at 924 (quoting *Tracer Research Corp. v. Nat'l Envtl. Servs. Co.,* 42 F.3d 1292, 1295 (9th Cir.1994)). While this is undoubtedly true, it does not explain much about this case. Brown cites *Jiffy Lube* as the example in the TCPA context—although the marketing text messages in that case would not have occurred and thus the claim would not have arisen, "but for" the plaintiff's oil change, that does not make it subject to arbitration. *Jiffy Lube,* 847 F.Supp.2d at 1262–63. As discussed above, however, *Jiffy Lube* found that the particular claim in question was far too attenuated from and unrelated to the oil change arbitration clause, not that TCPA claims are somehow excluded from arbitration as a whole. Indeed, as discussed above, many courts have compelled the arbitration of TCPA claims involving collection calls. *See, e.g., Cayanan,* 2013 WL 784662; *Coppock,* 2013 WL 1192632; *McNamara,* 2012 WL 5392181. Unlike the situation in *Jiffy Lube,* the TCPA claim here is actually "related to" the Agreement. Thus, the TCPA claim is subject to arbitration.

b. UCL Claim

***11** Brown also argues that the UCL claim, as an action for a "public injunction," is not arbitrable under California law. Prior to *Concepcion,* the California Supreme Court held that suits for public injunctions, such as UCL claims, were not subject to arbitration. *Cruz v. PacifiCare Health Sys., Inc.,* 30 Cal.4th 303, 307, 133 Cal.Rptr.2d 58, 66 P.3d 1157 (2003); *Broughton v. Cigna Healthplans of Cal.,* 21 Cal.4th 1066, 1080, 90 Cal.Rptr.2d 334, 988 P.2d 67 (1999). Last year, the Ninth Circuit considered the *Broughton–Cruz* rule in light of *Concepcion. Kilgore I,* 673 F.3d 947. In *Kilgore I,* the Ninth Circuit held that *Concepcion* had overruled the *Broughton–Cruz* doctrine. The Ninth Circuit then accepted the case for rehearing *en banc.* In *Kilgore II,* the court vacated its earlier decision, instead ruling that the suit at issue did not qualify as a suit for public injunction because it sought to resolve a private dispute rather than a public wrong. *Kilgore II,* 2013 WL 1458876, at *5. The court declined to reach the question of whether *Concepcion* ruled that the FAA preempts the *Broughton–Cruz* rule. *Id.*

Although *Kilgore I* is no longer binding law, *Concepcion* is. *Concepcion* held that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion,* 131 S.Ct. at 1747. It is of no moment that *Broughton–Cruz* was a judicially created doctrine arising out of equitable principles; *Concepcion* itself invalidated a similar judicially created policy in California barring arbitration clauses that did not allow for class actions. *Id.* (abrogating *Discover Bank v. Superior Court,* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100(2005)). "Thus, because the *Broughton–Cruz* rule prohibits the arbitration of a particular type of claim, claims for injunctive relief, the *Broughton–Cruz* rule is preempted by the FAA." *See Miguel v. JPMorgan Chase Bank, N.A.,* CV 12–3308 PSG (PLAx), 2013 WL 452418 at *10 (C.D.Cal. Feb. 5, 2013) (agreeing with *Kilgore I*). Applying the reasoning in *Concepcion,* as this Court must, the UCL claim is arbitrable.

V.

CONCLUSION

In light of the foregoing, DIRECTV's motions to compel arbitration are **GRANTED.** Brown and DIRECTV are hereby **ORDERED** to proceed to arbitration in accordance with the terms of the Agreement. All claims against DIRECTV are dismissed without prejudice. *See Sparling v. Hoffman Constr. Co.,* 864 F.2d 635, 638 (9th Cir.1988). Plaintiff's claims against all other Defendants shall proceed in accordance with the Court's Scheduling and Case Management Order issued concurrently herewith.

IT IS SO ORDERED.

Footnotes

1 DIRECTV does not keep a record of the screen that each individual customer sees. DIRECTV provides evidence of the online ordering process for every customer as of June 3, 2008, and further attests that the process did not change between June 3, 2008 and August 3, 2008. (Riss Decl. ¶¶ 3–4.)

2 DIRECTV asserts that it can change the Customer Agreement at any time, and that a customer assents to the agreement by not cancelling service. Generally, though, "mere silence or inaction in the face of the offer of a contract cannot amount to an acceptance." *Wold v. League of Cross of Archdiocese of San Francisco,* 114 Cal.App. 474, 479, 300 P. 57 (1931). Silence or inactivity will

constitute assent only "where circumstances or the previous course of dealing between the parties places the offeree under a duty to act or be bound." *Beatty Safway Scaffold, Inc. v. Skrable,* 180 Cal.App.2d 650, 655, 4 Cal.Rptr. 543 (1960) (citing *Wold,* 114 Cal.App. at 479, 300 P. 57). DIRECTV changed the Customer Agreement once during the time Brown was a customer, and has provided copies of both versions. (McCarthy Decl., Exs. A, B.) Because the relevant portions of the arbitration clause are identical in the two versions, the Court need not address whether Brown is bound by the later version of the Customer Agreement.

3 In *dicta,* the *Jiffy Lube* court observed:

> Even if the court were willing to read the agreement so as to contain a typical limitation, such as that the dispute at issue must "arise out of or relate to" the contract, it is doubtful whether that language would encompass the claims here. Though it seems likely that Cushnie provided his telephone number when signing the contract, it is unclear that later use of that number to commit a tort can be said to relate to the contract.

847 F.Supp.2d at 1263. Because it was merely posing a hypothetical, the court did not have occasion to address the Ninth Circuit precedent regarding the difference between "arising under" and "related to." This off the cuff remark in *Jiffy Lube* is therefore not persuasive.

4 *In re DirecTV* was abrogated by *Kilgore v. KeyBank, Nat. Ass'n ("Kilgore I")*, 673 F.3d 947, 960, (9th Cir.2012), which was in turn vacated by *Kilgore II,* 2013 WL 1458876 at *5.

5 Brown raises six factors, but the third, fifth, and sixth are not unconscionability arguments. (Opp'n to TCPA Mot. to Compel at 23–25.) The third argument is based on an inadvertent error by DIRECTV, claiming the American Arbitration Association is the proper forum, rather than JAMS. DIRECTV corrected this error in its Reply. (Reply to TCPA Mot at 2 n. 3, 15.) The fifth is an argument that after the contract expires, Brown should be released from its terms, but the ability to collect on payments owed is certainly not something that vanishes upon cancellation of a contract and, similarly, the arbitration clause does not vanish. The sixth argument raises California Code of Civil Procedure § 1281.2, which allows a state court to refuse to compel arbitrartion if there is a third party involved in the suit, who will not have its claims arbitrated. As Brown concedes, however, the California procedural rules do not apply to this federal action.

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United States District Court,
C.D. California.

Keith CUNNINGHAM
v.
LESLIE'S POOLMART, INC. et al.

No. CV 13–2122 CAS (CWx). | June 25, 2013.

Attorneys and Law Firms

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Proceedings: (IN CHAMBERS): DEFENDANT'S MOTION TO COMPEL ARBITRATION (Docket # 6, filed April 1, 2013)

CHRISTINA A. SNYDER, Judge.

*1 Catherine Jeang, Deputy Clerk.

I. INTRODUCTION

Plaintiff filed this putative class action in Los Angeles County Superior Court on February 13, 2013. Defendant Leslie's Poolmart, Inc. ("Leslie's) removed the case to this Court on March 25, 2013. Plaintiff's complaint asserts claims under California and federal employment laws, and claims under California's Unfair Competition Law ("UCL"), California Business and Professions Code § 17200, *et seq.*

On April 1, 2013, defendant filed a motion to compel arbitration of plaintiff's claims. Plaintiff filed an opposition on April 22, 2013, and defendant filed a reply on April 29, 2013. After considering the parties' arguments, the Court finds and concludes as follows.

II. BACKGROUND

This case arises out of plaintiff's employment with Leslie's. Plaintiff worked at Leslie's as a retail employee from September 2011 through September 2012, and was compensated through an hourly wage and a monthly non-discretionary performance bonus. In his complaint, plaintiff alleges that Leslie's compensation policy is unlawful because it calculates overtime payments only using an employee's hourly rate, and disregards the employee's performance bonus.

Plaintiff alleges that although it is clear as both a matter of fact and law that defendant's compensation practice is unlawful, defendant has been able to avoid liability for its unlawful policy because its employment contracts contain a mandatory arbitration clause that thwarts effective enforcement. This clause provides that:

> The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future, whether or not arising out of my employment (or its termination), that the Company may have against me or that I may have against any of the following (1) the Company, (2) its officers, directors, employees or agents in their capacity as such or otherwise, (3) the Company's parent, subsidiary and affiliated entities, (4) the Company's benefit plans or the plans' sponsors, fiduciaries, administrators, affiliates and agents, and/or (5) all successors and assigns of any of them.
>
> The only claims that are arbitrable are those that, in the absence of this Agreement, would have been justiciable under applicable state or federal law. The claims covered by this Agreement include, but are not limited to: claims for wages or other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination (including, but not limited to, race, sex, sexual orientation, religion, national origin, age, marital status, physical or mental disability or handicap, or medical condition); claims for benefits (except claims under an employee benefit or pension plan that either (1) specifies that its claims procedure shall culminate in an arbitration procedure different from this one, or (2) is underwritten by a commercial insurer which decides claims); and claims for violation of any federal, state, or other governmental law, statue, regulation or ordinance, except claims excluded in the section of this Agreement entitled "Claims Not Covered By The Agreement."

*2 Except as otherwise provided in this Agreement, both the Company and I agree that neither of us shall initiate or prosecute any lawsuit or administrative action (other than an administrative charge of discrimination to the Equal Employment Opportunity Commission, California Department of Fair Employment and Housing or similar fair employment practices agency, or an administrative charge within the jurisdiction of the National Labor Relations Board), in any way related to any claim covered by this Agreement.

Dkt. # 6, Ex. A ("arbitration agreement"). Plaintiff does not dispute whether he signed the arbitration agreement, but denies that he understood its significance. He claims that no one at Leslie's explained that he was giving up his right bring claims against Leslie's in court.

III. LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising ... 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. The FAA reflects a "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (quoting *Moses H. Cone Mem. Hosp. v. Mecury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

The "first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate the dispute." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.* ., 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). The court must determine (1) whether there exists a valid agreement to arbitrate; and (2) if there is a valid agreement, whether the dispute falls within its terms. *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir.2000). When determining whether a valid and enforceable contract to arbitrate has been established for the purposes of the FAA, federal courts should apply "ordinary state-law principles that govern the formation of contracts to decide whether the parties agreed to arbitrate a certain matter." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Circuit City Stores v. Adams*, 279 F.3d 889, 892 (2002). "[A]greements to arbitrate [may] 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." *AT & T Mobility LLC v. Concepcion*, 563 U.S. ——, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011).

IV. ANALYSIS

Defendant argues that because plaintiff's claims concern "claims for wages or other compensation due," they are squarely within the scope of the parties' arbitration agreement. Additionally, defendant contends that because the agreement only encompasses claims that "the Company may have against me or that I may have against [the Company]," it only allows plaintiff to pursue individual claims in arbitration, not class claims or representative claims pursuant to California's Private Attorney General Act ("PAGA"), California Labor Code § 2698 *et seq.* In response, plaintiff does not contest whether the arbitration agreement, as written, encompasses his claims. Instead, plaintiff argues that, to the extent the arbitration agreement requires plaintiff to give up his right to pursue a class claim or a representative PAGA claim, the agreement is unenforceable. Additionally, plaintiff argues that under the California Supreme Court's decision in *Broughton v. Cigna Healthplans of Cal.*, 21 Cal.4th 1066, 90 Cal.Rptr.2d 334, 988 P.2d 67 (1999), and *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal.4th 303, 133 Cal.Rptr.2d 58, 66 P.3d 1157 (2003), plaintiff's claims for injunctive relief are not arbitrable. The Court considers each of plaintiff's arguments in turn.

A. Labor and Employment Class Actions Claims

*3 Plaintiff first argues that to the extent the arbitration agreement requires him to arbitrate his claims under state and federal employment law on an individual basis, and not a class basis, the agreement is unenforceable under *Gentry v. Superior Court*, 42 Cal.4th 443, 453, 64 Cal.Rptr.3d 773, 165 P.3d 556 (2007). In *Gentry*, the California Supreme Court held that a class action waiver in an employer-employee arbitration agreement is unenforceable as a matter of public policy if a court finds that "a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations." *Id.* at 463, 64 Cal.Rptr.3d 773, 165 P.3d 556. The California Supreme Court explained that when determining whether to void a class action waiver under this

standard, courts should consider several factors, including "the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration." *Id.* Plaintiff asserts that each of these factors weigh in his favor, leading to the conclusion that the arbitration agreement cannot be enforced.

In opposition, defendant argues that *Gentry* is no longer good law in light of the Supreme Court's decision in *AT & T Mobility v. Concepcion,* ——U.S. ——, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). In *Concepcion,* the Court considered whether the FAA preempted a rule of California law announced in *Discover Bank v. Superior Court,* 36 Cal.4th 148, 162–163, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005). The *Discover Bank* rule applied in the context of litigation over consumer contracts, and provided that a class action waiver contained in a contract of adhesion is not enforceable where any individual recovery is small and the plaintiff alleges that the defendant has "carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Id.* at 163, 30 Cal.Rptr.3d 76, 113 P.3d 1100. If those conditions are satisfied, the California Supreme Court held that the class action waiver is unconscionable because "the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another." *Id.* (citing Cal. Civ.Code § 1668).

The United States Supreme Court held that the *Discover Bank* rule is preempted by the FAA. The Court began its analysis by reviewing 9 U.S.C. § 2, which only allows state law to invalidate an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." *Concepcion,* 131 S.Ct. at 1746. The Court explained that this provision of the FAA not only preempts state rules that explicitly prohibit arbitration, but also prevents generally applicable doctrines such as unconscionability from being applied in a way that disfavors arbitration. *Id.* at 1747. The Court held that the *Discover Bank* rule fell into the latter category, as an instance of a state applying unconscionability in a way that disfavors arbitration. Specifically, the Court reasoned that because class arbitration is more complex, costly, and lengthy than individual arbitration, it "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Id.* at 1753. In other words, because class arbitration is not truly "arbitration as envisioned by the FAA," state rules that mandate the availability of classwide proceedings disfavor arbitration and are therefore preempted by the FAA.

***4** In dissent, Justice Breyer observed that the *Discover Bank* rule was motivated by the practical reality that if class proceedings are not available in consumer fraud cases, many claims will not be litigated. *Id.* at 1761. The Court noted this concern, but explained that it was not relevant to the analysis because "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753.

Several courts have concluded that the rule in *Gentry* is analogous to the *Discover Bank* rule, and therefore is preempted under *Concepcion. See,* e.g., *Lewis v. UBS Financial Services,* 818 F.Supp.2d 1161, 1167 (N.D.Cal.2011); *Sanders v. Swift Transp. Co. of Arizona, LLC,* 843 F.Supp.2d 1033, 1037 (N.D.Cal.2012). The Court agrees. Like the *Discover Bank* rule, *Gentry* mandates the availability of class proceedings due to a California public policy favoring class actions for claims which would not otherwise be adjudicated due to social and economic obstacles that discourage individual claims. As other decisions have recognized, *Concepcion* is clear that such rules are preempted because they disfavor arbitration by mandating the use of class action procedures inconsistent with the nature of arbitration "envisioned by the FAA." Foreclosing access to class proceedings may be contrary to California public policy, but state public policy cannot be invoked as a justification for mandating the use of procedures inconsistent with the FAA. *Concepcion,* 131 S.Ct. at 1753.

Plaintiff resists this conclusion on two grounds, both of which are legally unavailing. First, plaintiff argues that the rule in *Gentry* is distinct from the *Discover Bank* rule because it requires courts to make factual findings prior to invalidating a class action waiver, whereas the *Discover Bank* rule only required a plaintiff to make certain allegations. *Nelsen v. Legacy Partners Residential, Inc.,* 207 Cal.App.4th 1115, 1132, 144 Cal.Rptr.3d 198 (2012) (declining to apply *Gentry* to invalidate a class action waiver because the plaintiff did not submit evidence that the relevant factors were satisfied); *Discover Bank,* 36 Cal.4th at 163, 30 Cal.Rptr.3d 76, 113 P.3d 1100. This difference is not significant. At best, plaintiff's argument shows that *Gentry* mandates the availability of class proceedings in a narrower class of cases than *Discover Bank.* While it is true that one aspect of the *Discover Bank* rule that the Court found improper was its broad scope, *Concepcion,*

131 S.Ct. at 1750, the holding in *Concepcion* does not ultimately turn on the breadth of state law rules mandating the availability of class action procedures. Accordingly, the Court finds that *Concepcion* is applicable to the rule in *Gentry* even though it is narrower in scope than the *Discover Bank* rule.

Second, plaintiff argues that *Gentry* remains good law because its holding rests on the California Supreme Court's conclusion that, due to fear of retaliation, employment class actions are necessary to vindicate employees' statutory rights under California labor and employment law. *Gentry,* 42 Cal.4th at 459–461, 64 Cal.Rptr.3d 773, 165 P.3d 556. Plaintiff further argues that arbitration clauses are void if they operate as a waiver of a party's right to pursue statutory remedies. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 628, 637 n. 19, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Cole v. Burns Intern. Sec. Services,* 105 F.3d 1465, 1482 (D.C.Cir.1997) ("At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections."). Plaintiff concludes that because California policy recognizes that class actions are necessary for enforcing rights under California's labor and employment statutes, *Gentry* remains good law under the vindication of statutory rights doctrine.

***5** The Court cannot accept this argument given the current state of the law. Under the FAA, a state cannot ensure the vindication of statutory rights by making class procedures available in certain categories of cases. *Concepcion,* 131 S.Ct. at 1753; *American Exp. Co. v. Italian Colors Restaurant,* —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2013 WL 3064410, at *5–6 (2013). States may retain some power to adopt rules regarding the adequacy of the arbitral forum, but states may not seek to have private plaintiffs vindicate public policies by mandating the availability of class proceedings. *Italian Colors Restaurant,* —— U.S. —— at ——, 133 S.Ct. 2304, —— L.Ed.2d —— at ——, 2013 WL 3064410 at *4.

Therefore, the Court concludes that the rule announced in *Gentry* is preempted under the FAA, and accordingly does not provide grounds for invalidating the arbitration agreement.

B. Claims under PAGA

In addition to pursuing class claims, plaintiff has asserted a representative claim under PAGA. Plaintiff argues that his representative PAGA claim is within the scope of the arbitration agreement, and therefore that this claim can proceed in arbitration. Alternatively, in response to defendant's contention that the arbitration agreement does not permit representative PAGA claims, plaintiff argues that if the arbitration agreement does not allow him to pursue representative PAGA claims, it is unenforceable.

Prior to considering the parties' arguments, the Court sets out background legal principles describing the unique form of representative actions created by the California Legislature through PAGA.

1. Representative Actions under California's PAGA

California faced a budget shortfall in 2004 that led to understaffing in the Labor and Workforce Development Agency and insufficient resources to enforce the Labor Code. Ben Nicholson, *Businesses Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code,* 35 McGeorge L.Rev. 581, 584 (2004). To address these problems and ensure more vigorous enforcement of the labor and employment laws, the California Legislature passed PAGA. *Id.* PAGA allows an "aggrieved employee" to bring a lawsuit seeking civil penalties arising out of violations of the California Labor Code that could otherwise only be assessed and collected by California's Labor and Workforce Development Agency. Cal. Lab.Code § 2699(a). The California Legislature's purpose in creating this new claim was to create "an alternative private attorney general system for labor law enforcement." *Dunlap v. Superior Court,* 142 Cal.App.4th 330, 337, 47 Cal.Rptr.3d 614 (2006). In essence, PAGA "deputizes" employees by allowing them to pursue the same civil monetary penalties that, absent PAGA, would only be available to state law enforcement agents. *Franco v. Athens Disposal Co., Inc.,* 171 Cal.App.4th 1277, 1300, 90 Cal.Rptr.3d 539 (2009). By deputizing aggrieved employees, the California Legislature intended to create incentives for non-governmental actors to enforce the law in a growing labor market that could not be effectively controlled by public agents. *Dunlap,* 142 Cal.App.4th at 337, 47 Cal.Rptr.3d 614.

***6** A plaintiff proceeding under PAGA brings the action "on behalf of himself or herself and other current or former employees." Cal. Lab.Code § 2699. As this provision makes clear, PAGA allows an employee to seek penalties arising out of class-wide violations of labor rights. Because a PAGA plaintiff brings the action on behalf of herself and other employees, courts routinely refer to PAGA claims as "representative" claims. *See,* e.g., *Reyes v. Macy's, Inc.,* 202 Cal.App.4th 1119, 1123, 135 Cal.Rptr.3d 832 (2011). Allowing a PAGA plaintiff to bring a representative action

touching upon the rights of a group of employees promotes PAGA's legislative purpose of bringing about meaningful, vigorous private enforcement of the California Labor Code. *Id.; Brown v. Ralph's Grocery Co.,* 197 Cal.App.4th 489, 501–502, 128 Cal.Rptr.3d 854 (2011).

Since a representative action under PAGA allows an individual employee to seek monetary relief arising out of unlawful conduct directed at a group of employees, PAGA actions bear a superficial resemblance to a type of class action. There are, however, several factors distinguishing representative PAGA actions and class actions. First, a unique feature of a representative action under PAGA is that it is "fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct." *Franco,* 171 Cal.App.4th at 1300, 90 Cal.Rptr.3d 539. The purpose is not to collect damages on behalf of other employees or provide restitution to victims of Labor Code violations. *Id.* Consistent with this purpose, seventy-five percent of the civil penalties recovered in a representative PAGA action are paid to the California Labor and Workforce Development Agency. Cal. Lab.Code § 2699(i). The remaining twenty-five percent of the penalties recovered are distributed to the aggrieved employees who initiated the claim under PAGA, not to the group of aggrieved employees on whose behalf the claim was prosecuted. [1]

Second, unlike a class action, a judgment or dismissal with prejudice in a representative PAGA action is not binding on non-party employees. *Arias v. Superior Court,* 46 Cal.4th 969, 975, 95 Cal.Rptr.3d 588, 209 P.3d 923 (2009). This is because in a lawsuit brought under PAGA, "the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies-namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency." *Id.* at 986, 95 Cal.Rptr.3d 588, 209 P.3d 923. Consequently, the only parties bound by a PAGA lawsuit are the defendant, the private plaintiff, and the California Labor Workforce Development Agency. *Id.* [2] This holding is consistent with the theory underlying PAGA: the state—and not absent parties—is bound in PAGA litigation because a private plaintiff bringing a PAGA suit is acting as a private attorney general on behalf of the State of California, not as a representative of other employees.

Because a PAGA plaintiff is litigating the state's legal interest in collecting civil penalties, PAGA requires plaintiffs to notify the California Labor and Workforce Development Agency prior to bringing suit. Cal. Lab.Code § 2699.3. The Labor and Workforce Development agency then has an opportunity to investigate the alleged misconduct that the potential plaintiff has identified and issue a citation. *Id.* § 2699.3(b)(1)-(2). If an investigation takes place, the plaintiff is barred from bringing suit. *Id.* § 2699.3(b)(2)(A)(i). [3] If no investigation takes place, the potential employee must notify the employer about the alleged misconduct and give the employer an opportunity to cure any problems. *Id.* § 2699.3(c)(1)-(2). [4] If the employer does not adequately cure the violation, then the aggrieved employee may file a civil suit. *Id.* § 2699.3(c)(3). Under these provisions, the Labor and Workforce Development Agency retains substantial authority over investigations of labor violations, and the 'deputy' PAGA plaintiffs can only step in to enforce the law when public officials fail to act.

*7 Representative PAGA actions therefore are not a sub-species of class actions. Instead, representative PAGA actions are better characterized as a type "qui tam" action. *See Rockwell Intern. Corp. v. United States,* 549 U.S. 457, 462 n. 2, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007). In a qui tam action, a private party—often referred to as a relator—pursues a statutory claim on behalf of the government. If the relator prevails, the relator shares in the proceeds of the lawsuit with the government. Note, The History and Development of Qui Tam, 1972 Wash. U. L.Q. 81, 84–85 (1972). Although qui tam is a "creature of antiquity," qui tam actions are commonly used today to allow private plaintiffs to prosecute claims alleging fraud on the federal government under the False Claims Act ("FCA"). 31 U.S.C. § 3730 (qui tam provisions of the False Claims Act); Charles Doyle, Congressional Research Service, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 17 (2009), *available at* http://www.fas.org/sgp/crs/misc/R40785.pdf; David Freeman Engstrom, *Harnassing the Private Attorney General: Evidence from Qui Tam Litigation,* 112 Colum. L.Rev. 1244 (2012); *see also* Cal. Govt.Code § 12652 (California analogue to federal FCA qui tam provisions). [5] The policy underlying the qui tam provisions in the FCA is "the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain." *Hughes Aircraft Co. v. United States ex re. Schumer,* 520 U.S. 939, 949, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (quoting *United States ex rel.*

Marcus v. Hess, 317 U.S. 537, 541 n. 5, 63 S.Ct. 379, 87 L.Ed. 443 (1943)).

Two considerations show that representative actions under PAGA are, in essence, a form of qui tam action. The first is the remedy recovered in a PAGA action. Just as a qui tam relator seeks to recover funds on behalf of the government and then receive a portion of those funds as a bounty, a PAGA plaintiff pursues civil penalties on behalf of the government and receives a twenty-five percent portion of the recovered penalty as a bounty. The second is that PAGA, like a set of qui tam provisions, does not create new substantive duties or new provisions under which liability can be found, but merely changes how existing rules are enforced. *See Hughes Aircraft Co.,* 520 U.S. at 948 ("[T]he monetary liability faced by an FCA defendant is the same whether the action is brought by the Government or by a *qui tam* relator ..."). Taking these considerations together, both PAGA actions and qui tam actions reward individuals for enforcing existing duties by creating monetary bounties. *See* Note, The History and Development of Qui Tam, 1972 Wash. U. L.Q. 81, 84–85 (1972) (describing qui tam plaintiffs as "a class of bounty hunters.").

The similarities between PAGA actions and qui tam actions show that an employee's rights under PAGA are substantive in nature, not procedural. The right of a relator to pursue a bounty under the qui tam provisions of the FCA has been characterized as a substantive right to pursue a claim for relief. *Hughes Aircraft Co.* 520 U.S. at 949–951; *United States ex rel. Robinson v. Northrop Corp.,* 824 F.Supp. 830, 837 (N.D.Ill.1993) ("The False Claims Act grants substantive rights to particular private citizens .... the plaintiffs bring this suit for themselves, as well as for the government * * * and seek to vindicate rights that Congress gave specifically to them ...). Since a plaintiff's right under PAGA to pursue a bounty through a representative action is closely analogous to a qui tam relator's right to pursue a bounty, an aggrieved employee's rights under PAGA should also be characterized as substantive. By pursuing a claim arising out of the alleged Labor Code violations suffered by a class of employees, a PAGA plaintiff—operating "under the strong stimulus of personal ill will or the hope of gain"—seeks to vindicate her own right to a substantial portion of an award of civil penalties, not the rights of other employees. *See Hughes Aircraft Co.,* 520 U.S. at 949. [6]

*8 Through PAGA, then, California has adopted qui tam provisions that allow an employee to litigate claims for violation of the Labor Code in order to ensure more vigorous enforcement of its law and public policy. The question presented by this motion is whether an employee can waive his or her right to pursue such a claim by entering into an arbitration agreement, and whether such a claim can be pursued in arbitration.

2. Whether Plaintiff can Pursue a Representative PAGA Claim

Defendant argues that the arbitration agreement, by its terms, does not permit plaintiff to pursue a representative claim under PAGA. Since the arbitration agreement only extends to claims "that the Company may have against [plaintiff] or that [plaintiff] may have against [the Company]," defendant argues that the agreement only covers claims involving plaintiff and defendant, not claims involving employees other than plaintiff. Consequently, defendant concludes that plaintiff cannot bring a representative PAGA claim in arbitration. Instead, defendant states that plaintiff may assert an "individual PAGA claim," through which plaintiff recovers civil penalties arising out of violations of his rights under the Labor Code.

Defendant acknowledges that its position is inconsistent with the rule California law—announced in *Franco v. Athens Disposal Co.*—providing that a contract containing a waiver of the right to pursue a representative action under PAGA is unenforceable as contrary to public policy ("the *Franco* rule"). *Franco,* 117 Cal.App.4th at 1303, 12 Cal.Rptr.3d 678. [7] Defendant argues, however, that to the extent California law requires that a plaintiff be able to pursue a representative PAGA action rather than an individual PAGA action, it is preempted under *Concepcion.* According to defendant, under *Concepcion,* the FAA does not permit a state to mandate the availability of complex dispute resolution procedures inconsistent with arbitration, regardless of the state's public policy. *Quevedo v. Macy's,* Inc., 798 F.Supp.2d, 1122, 1141–42 (C.D.Cal.2011); *Grabowski v. Robinson,* 817 F.Supp.2d 1159, 1180–81 (S.D.Cal.2011). The fact that California policy demands that plaintiff be able to act as a private attorney general is, according to defendant, beside the point because "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion,* 131 S.Ct. at 1753.

Defendant's request, that the Court compel plaintiff to arbitrate an "individual PAGA claim," rests on a misconception of PAGA. While defendant appears to assume

that PAGA claims can be brought in either an individual or representative capacity, PAGA does not recognize the existence of an individual claim. *Urbino v. Orkin Services of California, Inc.*, 882 F.Supp.2d 1152, 1167 (C.D.Cal.2011) ("[T]here are no separate individual claims in a PAGA action; rather, the individual must bring a PAGA claim as a representative action on behalf of himself and other aggrieved employees."); *Reyes v. Macy's, Inc.*, 202 Cal.App.4th 1119, 1123, 135 Cal.Rptr.3d 832 (2011) ("A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action and include other current or former employees."). The only claim PAGA permits a plaintiff to pursue is a claim for statutory penalties arising out of violations of the Labor Code allegedly suffered by a group of employees. *Arias*, 46 Cal.4th at 986, 95 Cal.Rptr.3d 588, 209 P.3d 923. This is a straightforward consequence of PAGA's purpose of promoting the enforcement of California's labor laws, because an action asserting the rights of only one individual under the Labor Code will not have PAGA's intended punitive and deterrent effects. *See Brown v. Ralphs Grocery Co.*, 197 Cal.App.4th 489, 502, 128 Cal.Rptr.3d 854 (2011). The Court is not free to rewrite California law by compelling plaintiff to arbitrate a claim for civil penalties only arising out of violations of his rights under the Labor Code.

***9** More fundamentally, the Court rejects defendant's argument because the *Franco* rule is not preempted by the FAA. The *Franco* rule protects a plaintiff's right to pursue a representative PAGA action, either in court or in arbitration. Therefore, to the extent it invalidates an arbitration provision barring representative PAGA claims, it does so "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In fact, since the *Franco* rule exists to ensure that employees can pursue their substantive rights under PAGA, it promotes fundamental policies underlying the FAA. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.*, 473 U.S. at 628. By ensuring that an employee-plaintiff can assert a right to recover a bounty through a representative PAGA action in arbitration, the *Franco* rule ensures that an employee can assert the same right to recovery in the judicial and arbitral forums. If plaintiff is barred from pursuing a representative action under PAGA, he is wholly forbidden from asserting his right to pursue a twenty-five percent portion of the civil penalties recoverable by the government for labor code violations allegedly committed by defendant. Both the FAA and California law are inconsistent with this result. *American Exp. Co. v. Italian Colors Restaurant*, — U.S. – – – –, — S.Ct. —, —L.Ed.2d – – – –, 2013 WL 3064410, at *5 (2013) (arbitration provision need not be enforced to the extent that it "forbid[s] the assertion of certain statutory rights .").

The conclusion that the *Franco* rule is not preempted by the FAA is fully consistent with the Supreme Court's holding in *Concepcion*. Under *Concepcion*, the FAA prohibits states from enforcing their public policy through procedural mechanisms that are inconsistent with the nature of arbitration. Class action procedures impose a level of cost, formality, and complexity upon dispute resolution that the *Concepcion* Court found to be incompatible with arbitration under the FAA. This conclusion led the Court to hold that states could not require that class procedures be available in arbitration even if state public policy favored class proceedings for the enforcement of certain claims. *Concepcion*, 131 S.Ct. at 1753. Consequently, rules such as those announced by the California Supreme Court in *Gentry* and *Discover Bank* are preempted by the FAA because they attempt to enforce state policy through the procedural mechanism of a class action.

While PAGA, like the rules in *Gentry* and *Discover Bank*, exists to promote California's public policy in favor of the enforcement of California law, it is distinct because it executes this purpose by granting private plaintiffs substantive rights to relief through qui tam provisions. The fact that PAGA accomplishes state policy goals through granting substantive rights rather than access to procedures distinguishes the *Franco* rule from the rules in *Gentry* and *Discover Bank*, and leads to the conclusion that the *Franco* rule is not preempted under the analysis in *Concepcion*. Under *Concepcion*, the FAA is focused on preserving the procedural integrity of arbitration by preventing states from imposing costly, complex, and time consuming formalities upon the arbitration process. The FAA does not, however, place a categorical limit on a state's power to use private enforcement mechanisms to accomplish public policy goals above and beyond the resolution of individual claims. Consequently, although the FAA preempts state law imposing the presence of certain procedures in the arbitration, the FAA does not preempt state laws ensuring that a plaintiff may assert substantive rights in arbitration. [8]

*10 Certain courts have reached different conclusions in conflict with the Court's analysis, and found that because representative claims under PAGA increase the amount of damages at stake in a case and lead to a slower, more costly dispute resolution process, the *Franco* rule is inconsistent with arbitration. *Quevedo,* 798 F.Supp.2d at 1142; *Miguel v. JP Morgan Chase Bank, N.A.,* 2013 WL 452418, at *10 (C.D.Cal.2013) ("[R]equiring requiring arbitration agreements to permit representative PAGA claims to go forward would be inconsistent with the Supreme Court's holding in *Concepcion* because it would sacrifice the advantages achieved by arbitration."). This reading interprets *Concepcion* as severely limiting a state's power to implement laws that utilize private claims for relief in the service of enforcing state law and policy. Any novel law granting an unwaivable right to pursue a complex claim is, on this analysis, void as inconsistent with the FAA, regardless of state policy. The Court does not read *Concepcion* so expansively. The Court finds that *Concepcion* is more narrowly focused on state rules regulating arbitration procedure, and does not touch upon a state's power to grant private litigants novel claims for relief—such as PAGA claims—that utilize private enforcement mechanisms to promote public policy.

Finally, it bears mentioning that the Court's decision does not rest on the notion that a plaintiff must retain the right to pursue a representative PAGA action in arbitration because representative actions are practically necessary for the effective vindication of plaintiff's rights. As the Supreme Court recently affirmed in *Italian Colors Restaurant,* courts cannot require the use of class or other special proceedings to ensure that a plaintiff can prosecute a claim that would otherwise be too costly or impractical to litigate. *Italian Colors Restaurant,* —— U.S. ——, at ——–——, 133 S.Ct. 2304, —— L.Ed.2d ——, at ——–——, 2013 WL 3064410, at * 5–6. Here, however, the issue is not whether plaintiff will have access to an effective method of vindicating his rights under PAGA. If plaintiff cannot pursue a representative PAGA action, he will have been forbidden any means of asserting his right to seek the twenty-five percent share of civil penalties that he is entitled to pursue under California law. The Court's conclusion therefore does not rest on the continuing vitality of the "effective vindication" doctrine, which was limited by *Italian Colors Restaurant. See id.*

Accordingly, the Court rejects defendant's argument that, under *Concepcion,* the Court should compel plaintiff to arbitrate an "individual PAGA claim." The remaining issue to decide is whether plaintiff should be compelled to arbitrate his representative PAGA claim, or whether it must proceed in this Court. As mentioned above, the parties' arbitration agreement is broad, extending to all claims "that the Company may have against [plaintiff] or that [plaintiff] may have against the Company."

*11 When parties have agreed to arbitrate all of their disputes, it is improper to infer, from this fact alone, that their agreement encompasses class claims. *Stolt–Nielsen S.A. v. AnimalFeeds International Corp.,* 559 U.S. 662, 130 S.Ct. 1758, 1775, 176 L.Ed.2d 605 (2010). "This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* Among other differences, when class arbitration takes place, the rights of several absent parties are adjudicated in a single arbitration, necessitating the use of complex proceedings. *Id.* at 1776. This reasoning does not, however, apply when considering whether an agreement to arbitrate encompasses representative PAGA claims. As discussed in detail above, unlike class claims, PAGA claims do not bind absent employees, and hence do not require the complex proceedings that must be used when binding absent class members. *Arias,* 46 Cal.4th at 975, 95 Cal.Rptr.3d 588, 209 P.3d 923.

Accordingly, an agreement to arbitrate a representative PAGA claim can be inferred solely from an agreement to arbitrate claims arising out of employment.[9] The Court therefore finds that plaintiff's representative PAGA claim falls within the scope of the arbitration agreement. Since plaintiff's representative PAGA claim is a not akin to a class claim, but is instead a claim seeking individual relief in the form of a twenty-five percent share of penalties otherwise recoverable by the State of California, plaintiff's PAGA claim is nothing more than "a claim that [plaintiff] may have against the Company." Plaintiff should be compelled to arbitrate his representative PAGA claim.

C. Claim for Injunctive Relief

Under the *Broughton–Cruz* rule, California law provides that claims for public injunctive relief brought under the UCL must be adjudicated in a court, not before an arbitrator. *Cruz,* 30 Cal.4th at 315, 133 Cal.Rptr.2d 58, 66 P.3d 1157. "The central premise of *Broughton–Cruz* is that the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a

consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators." *Kilgore v. Keybank, Nat. Ass'n,* — F.3d ——, 2013 WL 1458876, at *5 (9th Cir.2013). Under the Ninth Circuit's decision in *Davis v. O'Melveny & Myers,* claims for public injunctive relief under the UCL and California's Labor Code are subject to the *Broughton–Cruz* rule, and hence are not arbitrable. 485 F.3d 1066, 1082 (9th Cir.2007).

Following the Supreme Court's decision in *Concepcion,* courts have questioned the continuing vitality of the *Broughton–Cruz* rule. *See,* e.g., *Arellano v. T–Mobile USA, Inc.,* 2011 WL 1842712, at *2 (N.D.Cal.2011).[10] The Court agrees with these decisions. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion,* 131 S.Ct. at 1747. Moreover, even though California public policy favors a judicial as opposed to an arbitral resolution of claims for public injunctive relief, this state public policy cannot override the FAA. *Id.* at 1753; *see also Italian Colors Restaurant,* — U.S. ——, at ——, 133 S.Ct. 2304, —L.Ed.2d ——, at ——, 2013 WL 3064410, at *4.

***12** Accordingly, the Court concludes that plaintiff's claim for injunctive relief is subject to arbitration.[11]

V. CONCLUSION

In accordance with the foregoing, defendant's motion to compel arbitration is hereby granted in part and denied in part. Defendant's motion is denied insofar as it seeks an order preventing plaintiff from pursuing a representative PAGA claim in arbitration. Otherwise, defendant's motion is granted, and plaintiff's claims must proceed in arbitration. These proceedings are hereby STAYED pending the completion of arbitration. The parties are ORDERED to file a joint status report regarding the posture of the arbitration every one hundred and eighty days from the date of this order, and within twenty days of the resolution of the arbitration.

IT IS SO ORDERED.

Footnotes

1 While the Court has not been presented with any case law or other authority directly addressing how penalties recovered by an employee are to be distributed, the best interpretation of PAGA is that the penalties not distributed to the Labor Workforce Development Agency are distributed to the individual employee who brought the action. The strongest consideration in favor of this interpretation is that the statute contains no provisions for distributing any portion of the recovery to non-party employees, even though PAGA contains detailed procedures setting out how a representative action is litigated. *See* Cal. Lab.Code § 2699.3. Moreover, the California Supreme Court has held that, under California law, non-party employees need not be given notice of representative actions under PAGA. *See Arias,* 46 Cal.4th at 986–987, 95 Cal.Rptr.3d 588, 209 P.3d 923. The lack of mandatory notice means that non-parties are never notified about their right to a portion of the recovery in a PAGA action, which implies that no such right exists. Furthermore, some courts seem to assume that the twenty-five percent recovery goes to the individual plaintiff. *Adoma v. University of Phoenix, Inc.,* — F.Supp.2d ——, 2012 WL 6651141, at *10 n. 5; *Amaral v. Cintas Corp. No. 2,* 163 Cal.App.4th 1157, 1195, 78 Cal.Rptr.3d 572 (2008). Finally, since the purpose of PAGA is to create incentives for private litigants to bring actions enforcing the Labor Code, not to provide restitution to aggrieved employees, rewarding prevailing litigants with a substantial recovery promotes PAGA's purpose. *See Franco,* 171 Cal.App.4th at 1300, 90 Cal.Rptr.3d 539.

2 While absent parties seeking to enforce their individual rights under California's Labor Code are not bound by the judgment in a representative PAGA action, they are precluded from re-litigating PAGA claims for civil penalties. *Arias,* 46 Cal.4th at 987, 95 Cal.Rptr.3d 588, 209 P.3d 923. Additionally, if the plaintiff in a representative PAGA action is successful, other employees can benefit from the victory under the doctrine of collateral estoppel. *Id.* ("[I]f an employee plaintiff prevails in an action under the act for civil penalties by proving that the employer has committed a Labor Code violation, the defendant employer will be bound by the resulting judgment. Nonparty employees may then, by invoking collateral estoppel, use the judgment against the employer to obtain remedies other than civil penalties for the same Labor Code violations.").

3 If an investigation occurs but no citation is issued, the potential plaintiff can challenge that decision in superior court. Cal. Lab.Code § 2699.3(b)(2)(A)(ii). The statute provides that the plaintiff may not bring a PAGA action if the court orders the Labor and Workforce Development Agency to issue a citation, but the statute does not specify whether the plaintiff can bring her own case if the court finds that no citation should have been issued.

4 An employer may only take advantage of the cure provisions three times during a twelve month period for the same violations. Cal. Lab.Code § 2699.3(c)(2)(B).

5 While qui tam provisions are most commonly used in the context of actions brought based on alleged fraud on the government, California was not the first jurisdiction to use qui tam provisions to enforce labor laws. In Seventh Century England, King Wihtred of Kent issued a decree outlawing labor on the Sabbath, and this decree included qui tam provisions granting anyone uncovering a violation of this rule half of the fine imposed and any profits from the labor. Linda J. Stengle, *Rewarding Integrity: The Struggle to Protect Decentralized Fraud Enforcement Through the Public Disclosure Bar of the False Claims Act,* 33 Del. J. Corp. L. 471, 476 (2008).

6 Although the right to pursue a representative action under PAGA is a substantive right, the related question of whether or not a plaintiff pursuing such an action in federal court must satisfy the requirements of Rule 23 is a procedural question. *See Fields v. QSP, Inc.,* 2012 WL 2049528 at * 4–5 (C.D.Cal.2012). Additionally, the Court acknowledges that the California Supreme Court has stated, in a wholly distinct context, that PAGA is "simply a *procedural* statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies." *Amalgamated Transit Union, Local 1756, AFL–CIO v. Superior Court,* 46 Cal.4th 993, 1003, 95 Cal.Rptr.3d 605, 209 P.3d 937 (2009) (emphasis added). This case is not in conflict with the Court's characterization of PAGA. The feature of PAGA highlighted by *Amalgamated* is that the statute creates no new legal duties for employers under the Labor Code. Instead, PAGA only creates a new mechanism for enforcing existing legal duties. Since this mechanism gives employees the affirmative right to recover penalties, however, it is nonetheless accurate to conclude that PAGA confers substantive rights to relief upon employees, even if it does not create any new duties for employers.

7 The *Franco* court reasoned that because the purpose of a representative action under PAGA is ensuring robust enforcement of California law, a waiver of the right to pursue a representative action improperly impedes California policy. *Franco,* 117 Cal.App.4th at 1303, 12 Cal.Rptr.3d 678.

8 Other decisions have also recognized that representative PAGA actions are distinct from class actions, and have therefore declined to extend the holding of *Concepcion* to PAGA cases. *Brown,* 197 Cal.App.4th at 503, 128 Cal.Rptr.3d 854 ("United States Supreme Court authority does not address a statute such as the PAGA, which is a mechanism by which the state itself can enforce state labor laws, for the employee suing under the PAGA does so as the proxy or agent of the state's labor law enforcement agencies."); *Urbino,* 882 F.Supp.2d at 1167 (*"[Concepcion]* concerned the enforceability of a consumer class arbitration waiver, rather than a representative PAGA claim waiver.").

9 Of course, where an agreement specifically states that the parties have not agreed to arbitrate representative PAGA claims, a Court cannot compel such claims to arbitration. *See,* e.g., *Brown v. Superior Court,* 216 Cal.App.4th 1302, —— Cal.Rptr.3d ——, 2013 WL 2449501, at *11 (Cal.Ct.App.2013) ("There is no basis for requiring arbitration of the claim on a representative basis because defendant has not agreed to arbitrate any representative actions.").

10 The Ninth Circuit has yet to address whether the *Broughton–Cruz* rule is still good law. *Kilgore,* 2013 WL 1458876 at *5.

11 Plaintiff makes one additional argument, which is unavailing. Plaintiff argues that a waiver of the right to pursue a labor and employment class action is void under the National Labor Relations Act, 29 U.S.C. § 141, *et seq* ("NLRA"), and concludes that he may pursue an action under the UCL seeking to enforce his rights under the NLRA. While this argument has been accepted by the National Labor Relations Board, *D.R. Horton Inc.,* 357 N.L.R.B. No. 184 (January 3, 2012), it has been rejected by courts, who have found that there is no reason to interpret the NLRA to override the FAA. *Jasson v. Money Mart Exp., Inc.,* 879 F.Supp.2d 1038, 1047 (N.D.Cal.2012); *Morvant v. P.F. Chang's China Bistro, Inc.,* 870 F.Supp.2d 831, 842–845 (N.D.Cal.2012).

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Jennifer LASTER, et al., Plaintiff,
v.
T–MOBILE USA, INC., et al., Defendant.

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ORDER GRANTING DEFENDANTS' MOTIONS TO COMPEL ARBITRATION

DANA M. SABRAW, District Judge.

*1 This is a consolidated putative class action wherein Plaintiffs contend Defendants—cellular phone companies and other entities involved in the sale of wireless telecommunication services—engaged in the unfair and deceptive practice of charging consumers sales tax on the full retail value of cellular phones which were advertised as "free" or "deeply discounted." The consumer contracts at issue included an arbitration clause, which precluded class action arbitrations. After Plaintiffs filed this action, Defendants moved to enforce their respective arbitration clauses to individually arbitrate Plaintiffs' claims.

In September 2005, Defendants Cingular Wireless, LLC and New Cingular Wireless PCS, LLC (now known as AT & T Mobility, LLC, collectively "ATTM") and T–Mobile USA, Inc., Omnipoint Communications, Inc. and TMO CA/NV, LLC (collectively, "T–Mobile") filed motions to compel arbitration, which, after briefing and oral argument, were denied on November 30, 2005.

Defendants immediately appealed the order, but ATTM later voluntarily dismissed its appeal. T–Mobile persisted, and thereafter the denial of its motion was affirmed on appeal. *Laster v. T–Mobile USA, Inc.*, 252 Fed. Appx. 777 (9th Cir.2007.) The case returned to this Court on September 28, 2007. In May 2009, Plaintiffs filed motions for class certification, and in July 2009, Defendants filed motions for summary judgment. Defendants' summary judgment motions were granted and Plaintiffs' class certification motions were denied as moot by order filed December 14, 2009. Plaintiffs appealed the judgment. On January 17, 2012, the Ninth Circuit Court of Appeals vacated the December 14, 2009 order and "remanded ... for reconsideration in light of *AT & T Mobility LLC v. Concepcion*, —— U.S. ——, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)." After receiving the mandate, this Court held a status hearing on February 24, 2012. Pursuant to the Ninth Circuit order and agreement of counsel, Defendants were granted leave to file motions to compel arbitration in light of *Concepcion*.

Accordingly, pending before the Court are motions to compel arbitration filed by Defendants Cellco Partnership, Verizon Wireless, LLC, and Airtouch Cellular (collectively, "Verizon"), ATTM, T–Mobile and Go Wireless, Inc. ("Go Wireless"). Plaintiffs filed an opposition and Defendants replied. In their opposition, Plaintiffs requested the Court to defer ruling on the motions until the Ninth Circuit Court of Appeals issued an order on petition for rehearing *en banc* filed in *Kilgore v. KeyBank, N.A.*, case nos. 09–16703 and 10–15934. Plaintiffs' request was granted on August 28, 2012. After the *en banc* decision in *Kilgore* was issued on April 11, 2013, *Kilgore v. KeyBank Nat'l Assoc.*, 718 F.3d 1052, 2013 WL 1458876 (*Kilgore II*), the parties were granted leave to file supplemental briefs. On June 20, 2013, the Supreme Court issued its decision in *American Express Co. v. Italian Colors Restaurant*, ——U.S. ——, 133 S.Ct. 2304, —— L.Ed.2d ——. Shortly thereafter, Defendants filed an ex parte application to file a notice of supplemental authority, citing *American Express*.

*2 Defendants' unopposed ex parte application to file supplemental authority is granted. Their notice of supplemental authority shall be deemed filed on July 1, 2013. For the reasons which follow, Defendants' motions to compel arbitration are granted.

Enforceability of arbitration agreements is governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), and California common law. "The FAA 'mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.' " *Kilgore II,* 718 F.3d 1052, 2013 WL 1458876 at *2 (emphasis in original), quoting *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). "As federal substantive law, the FAA preempts contrary state law." *Mortensen v. Bresnan Comm'cns, LLC,* — F.3d —, 2013 WL 3491415 *5 (9th Cir. Jul.15, 2013), citing Concepcion, 131 S.Ct. at 1746; *see also* U.S. Const. art. VI, cl. 2. However, the FAA does not require enforcement of arbitration agreements that may be invalidated on "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Concepcion,* 131 S.Ct. at 1746–47. This "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability...." *Concepcion,* 131 S.Ct. at 1746 (internal quotation marks and citations omitted). The burden of proving that the claims at issue are not suitable for arbitration is on the party resisting arbitration. *Green Tree Fin. Corp.—Ala. v. Randolph,* 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

When ATTM and T–Mobile initially filed their motions to compel arbitration, the parties' briefing focused on unconscionability. Under California law, a contract provision, including an arbitration clause, is unenforceable if it is both procedurally and substantively unconscionable. *Armendariz v. Found. Health Psychcare Servs. Inc.,* 24 Cal.4th 83, 99, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000). Procedural unconscionability focuses on "oppression or surprise due to unequal bargaining power," and substantive unconscionability focuses on "overly harsh or one-sided results." *Id.* A sliding scale is applied, so that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to find it unenforceable, and *vice versa. Id.*

The Court found both arbitration agreements procedurally unconscionable. (Nov. 30, 2005 Order at 10.) In addition, the Court accepted Plaintiffs' argument the agreements were substantively unconscionable because they included class action waivers. This finding was dictated by the California Supreme Court decision in *Discover Bank.* (*Id.* at 10–13, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

Discover Bank held a class waiver unconscionable under California law:

> [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for [its] own fraud.... (Civ.Code § 1668). Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

***3** 36 Cal.4th 148, 162, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005). The *Discover Bank* Court reasoned that when the foregoing circumstances are present, the class action waiver becomes in practice an exculpatory clause contrary to California law. *Id.* at 160–62 & 165, 30 Cal.Rptr.3d 76, 113 P.3d 1100. Based on the state of law at that time, this Court held *Discover Bank* was not preempted by the FAA. (Nov. 30, 2005 Order at 13–14.) That conclusion was later confirmed in *Shroyer v. New Cingular Wireless Servs., Inc.,* 498 F.3d 976, 987–93 (9th Cir.2007). Based on the Court's findings that the agreements were procedurally and substantively unconscionable, Defendants' motions to compel arbitration were denied.

On April 27, 2011, while Plaintiffs' appeal from the summary judgment order was pending, the United States Supreme Court issued its decision in *Concepcion,* finding *Discover Bank* preempted by the FAA. 131 S.Ct. at 1750. *Concepcion* noted that the FAA's savings clause, 9 U.S.C. § 2, preserves generally applicable contract defenses, including unconscionability, except if the "defenses apply only to arbitration or ... derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746. Accordingly, "even generally applicable state-law rules are preempted if in practice they have a 'disproportionate impact' on arbitration or 'interfere [ ] with fundamental attributes of arbitration and thus create [ ] a scheme inconsistent with

the FAA.' " *Mortensen,* 2013 WL 3491415 at *5 (brackets in original), quoting *Concepcion,* 131 S.Ct. at 1746–47. *Concepcion* held the FAA prohibits states from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures. 131 S.Ct. at 1744, 1753.

Defendants' pending motions to compel were filed in light of this change in law. Defendants contend the arbitration clauses are valid after *Concepcion,* and should be enforced. Plaintiffs counter primarily on grounds that Defendants have waived their right to compel arbitration. [1] Waiver can be asserted as a defense to enforcing an arbitration clause. *See. e.g., St. Agnes Med. Ctr. v. PacifiCare of Cal.,* 31 Cal.4th 1187, 1194–95, 8 Cal.Rptr.3d 517, 82 P.3d 727 (2003); *Lewis v. Fletcher Jones Motor Cars, Inc.,* 205 Cal.App.4th 436, 444, 140 Cal.Rptr.3d 206 (2012); *Cox v. Ocean Hotel Corp.,* 533 F.3d 1114, 1120 (9th Cir.2008). Several factors are relevant and properly considered in assessing a defense based on waiver:

> "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced' the opposing party."

*4 *Lewis,* 205 Cal.App.4th at 444, 140 Cal.Rptr.3d 206, quoting *St. Agnes,* 31 Cal.3d at 1196, 184 Cal.Rptr. 302, 647 P.2d 1081 (internal quotation marks omitted); *see also Cox,* 533 F.3d at 1124. "No one of these factors predominates and each case must be examined in context." *Lewis,* 205 Cal.App.4th at 444, 140 Cal.Rptr.3d 206. "Based in the public policy favoring arbitration, claims of waiver receive close scrutiny and the party seeking to establish a waiver bears a heavy burden." *Id.* (internal quotation marks and citation omitted); *see also Cox,* 533 F.3d at 1125 ("any examination of whether the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements").

Plaintiffs argue that Go Wireless and Verizon have waived their right to compel arbitration because they delayed filing their motions to compel arbitration until now; that ATTM waived its right to compel arbitration because it dismissed its appeal of the order denying its earlier motion to compel arbitration; and that T–Mobile waived its rights because, although it appealed the order denying its earlier motion to compel arbitration and lost, upon return to this Court it pursued discovery and filed a summary judgment motion against Plaintiffs. Plaintiffs further contend they have been prejudiced by expending 780 hours of attorney time (worth no less than $300,000) in responding to Defendants' pretrial motions and interlocutory appeals and participating in discovery.

However, a party does not act inconsistently with the right to arbitrate by electing not to pursue enforcement of an arbitration agreement that would be unenforceable under then-existing law. *See Fisher v. A.G. Becker Paribas Inc.,* 791 F.2d 691, 697 (9th Cir.1986); *Conover v. Dean Witter Reynolds, Inc.,* 837 F.2d 867 (9th Cir.1988); *Letizia v. Prudential Bache Sec., Inc.,* 802 F.2d 1185, 1187 (9th Cir.1986). Furthermore, under such circumstances, a plaintiff cannot claim he or she was prejudiced by litigating arbitrable claims, including preparation for trial, because it was the plaintiff's choice to file the action in court rather than demand arbitration. *Fisher,* 791 F.2d at 697, 698.

Prior to *Concepcion,* an arbitration agreement with a class waiver generally was not enforceable under California's *Discover Bank* rule. In the wake of *Concepcion,* the waiver issue has been extensively litigated and district courts have found no waiver where a party failed to move for arbitration prior to *Concepcion,* particularly when the arbitration agreement included a class action waiver. *See, e.g., Bryant v. Serv. Corp. Int'l.,* 801 F.Supp.2d 898 (N.D.Cal.2011); *Bailey v. Household Fin. Corp. of Cal.,* 2011 WL 5118723 (S.D.Cal.2011); *In re Cal. Title Ins. Antitrust Litig.,* 2011 WL 2566449 (N.D.Cal.2011); *Villegas v. U.S. Bancorp,* 2011 WL 2679610 (N.D.Cal.2011).

Because the arbitration agreements in this action include class action waivers, Defendants' litigation strategy prior to issuance of *Concepcion* must be viewed in that light. Thus, prior to *Concepcion* any failure to move to compel arbitration or to vigorously pursue appeal of this Court's pre-*Concepcion* order denying motions to compel, or any decision to litigate

the case in this Court to summary judgment, would not constitute a waiver.

*5 Plaintiffs also contend Defendants waived their right to arbitrate because they did not move to compel quickly enough after *Concepcion* was decided on April 27, 2011. But on April 27, 2011, this case was pending before the Ninth Circuit Court of Appeals on Plaintiffs' appeal of the December 14, 2009 summary judgment. At that time, the appeal had been fully briefed, but not yet argued. (Grant Reply Decl. at 1.) Defendants requested Plaintiffs to withdraw the appeal, and informed them Defendants intended to renew their motion to compel arbitration even if Plaintiffs prevailed on appeal. (*Id.*) Plaintiffs' counsel indicated they intended to proceed with the appeal. (*Id.*) On January 17, 2012, the Ninth Circuit vacated the summary judgment order and remanded the action to this Court for reconsideration in light of *Concepcion.* Shortly after receiving the mandate, this Court held a status conference and issued a briefing schedule for motions to compel arbitration based on agreement of counsel. Defendants' motions were timely filed. Accordingly, Plaintiffs have not established waiver based on delay since *Concepcion.*

Plaintiffs further contend Ms. Voorhies, who asserts a claim against Go Wireless, should not be compelled to arbitrate her claims because Go Wireless is not a signatory to any arbitration agreement. (Mot. at 11–12.) Go Wireless contends it may compel arbitration pursuant to the clause in ATTM's arbitration agreement with Ms. Voorhies because it is being sued as ATTM's agent.

"Nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles." *Letizia,* 802 F.2d at 1187–88; *see also Sacks v. Dietrich,* 663 F.3d 1065, 1070 (9th Cir.2011). This "rule is an outgrowth of the strong federal policy favoring arbitration." *Letizia,* 802 F.2d at 1188.

In her responses to interrogatories, Ms. Voorhies stated she had purchased a mobile phone "at a store named 'Go Wireless' ... which held itself out to be—and which Ms. Voorhies understood to be—ATTM's authorized agent for the marketing and sale of ATTM's telecommunications products and services." (Docket no. 257–10 at 5.) Consistently, all allegations against Go Wireless in the operative second amended complaint are coupled with the allegations against ATTM. (Docket no. 70 at 3, 8–9.) Plaintiffs do not deny that Go Wireless was ATTM's agent.

A relevant inquiry in determining whether a non-signatory agent may enforce an arbitration clause is whether any of the alleged agent's wrongdoing "relate to or arise from the contract containing the arbitration clause." *Britton v. Co–Op Banking Group,* 4 F.3d 742, 747 (9th Cir.1993). The arbitration clause was included in ATTM's standard wireless service contract when Ms. Voorhies renewed the contract and received a free new phone at a Go–Wireless store. (Nov. 30, 2005 Order at 2–3.) Go Wireless' alleged wrongdoing arises from the same transaction. In its capacity as ATTM's agent, Go Wireless is therefore entitled to enforce the arbitration clause.

*6 Plaintiffs next argue they cannot be compelled to arbitrate their claim under the Consumers Legal Remedies Act, Cal. Civ.Code § 1750 *et seq.* ("CLRA"), because the CLRA prohibits waiver of any of its provisions, including the provision for class actions, as contrary to public policy. Cal. Civ.Code §§ 1751 & 1781. Plaintiffs contend that enforcing an arbitration agreement with a class action waiver would thwart the vindication of an unwaivable statutory right under the CLRA to file a class action. This argument is foreclosed by *Concepcion* and *American Express.*

In finding state rules against enforcement of class action waivers in arbitration agreements preempted by the FAA, *Concepcion* noted that the FAA embodies "a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary.* " 131 S.Ct. at 1749 (internal quotation marks and citation omitted, emphasis added); *see also id.* at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even it is desirable for unrelated reasons."). Under *Concepcion,* "[a]ny general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA." *Mortensen,* 2013 WL 3491415 at *6. Because the CLRA prohibits class action waivers, it is inconsistent with the FAA and thus, is preempted. *See id.* at *6–7 (holding FAA preempts Montana public policy that invalidates adhesive arbitration agreements on grounds such agreements run contrary to consumers' reasonable expectations).

Plaintiffs' argument is also precluded by the Supreme Court's recent decision in *American Express.* There, the plaintiffs argued, as do Plaintiffs here, that enforcing a class action waiver would bar "effective vindication" of a statutory right. Assuming the "effective vindication" exception applies to *state* statutory rights,[2] that exception still would not assist

Plaintiffs. *American Express* limited the exception to the circumstance where an arbitration agreement constitutes a prospective waiver of a party's right to pursue statutory remedies, but declined to extend it to circumstances where the "classaction waiver merely limits arbitration to the two contracting parties." 133 S.Ct. at 2310–11 & n. 3. The outcome is no different where, as here, the statute at issue expressly permits class actions. *Id.* at 2311, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

Finally, Plaintiffs contend they cannot be compelled to arbitrate their claims under the CLRA and California Unfair Competition Law, Cal. Bus. & Prof.Code § 17200 *et seq.* ("UCL"), to enjoin future deceptive practices on behalf of the general public because California's *Broughton–Cruz* rule holds such claims are not subject to arbitration. (Mot. at 14–15, citing *Broughton v. Cigna Healthplans of Cal.*, 21 Cal.4th 1066, 1072, 90 Cal.Rptr.2d 334, 988 P.2d 67 (2003) & *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal.4th 303, 315–17, 133 Cal.Rptr.2d 58, 66 P.3d 1157 (2003).) Plaintiffs imply that *Concepcion* did not overrule the *Broughton–Cruz* rule, and in their supplemental brief, they argue the *Broughton–Cruz* rule was reaffirmed in *Kilgore II.*

*7 Plaintiffs' reliance on *Kilgore II* is unavailing. They point to *Kilgore v. KeyBank Nat'l Assoc.*, 673 F.3d 947 (9th Cir.2010) (*Kilgore I*), which held that the *Broughton–Cruz* rule was preempted by the FAA in light of *Concepcion. Kilgore I* was reheard *en banc.* The *en banc* decision did not reach the preemption issue, but held the injunctive relief requested was not on behalf of the general public, and therefore would not be subject to the *Broughton–Cruz* rule even if the rule remained valid after *Concepcion.* [3] *Kilgore II,* 718 F.3d 1052, 2013 WL 1458876 at *5. *Kilgore II* expressly did not decide the continued validity of the *Broughton–Cruz* rule. *Id.* Plaintiffs' contention that *Kilgore II* resurrected *BroughtonCruz* is therefore rejected.

As *Concepcion* noted, "When a state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." 131 S.Ct. at 1747. This rule was emphasized in *Marmet Health Care Center, Inc. v. Brown,* — U.S. —, 132 S.Ct. 1201, 1203–04, 182 L.Ed.2d 42 (2012), which held preempted West Virginia's prohibition against pre-dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes as a categorical rule prohibiting arbitration of a particular type of claim. Like West Virginia's rule in *Marmet,* the *Broughton–Cruz* rule bars arbitration of a particular type of claim, *i.e.,* certain CLRA and UCL claims for injunctive relief. The rule is therefore displaced by the FAA.

For the foregoing reasons, it is **ORDERED** as follows:

1. Defendants' unopposed ex parte application to file a notice of supplemental authority is granted. The notice of supplemental authority shall be deemed filed as of July 1, 2013.

2. Defendants' motions to compel arbitration, filed April 9, 2012, are granted.

3. Pursuant to 9 U.S.C. § 4, Plaintiffs' claims shall proceed to arbitration.

4. The Clerk shall administratively close Case No. 05–cv–1167. Either side may reopen the case by filing an appropriate motion within the time set forth in the FAA, 9 U.S.C. §§ 9–12.

IT IS SO ORDERED.

Footnotes

1 Plaintiffs do not contend the arbitration agreements are procedurally and substantively unconscionable. The Court therefore does not address that potential defense. *See* Civ. Loc. R. 7.1.f.3.b (requiring a "complete statement of all reasons in opposition") & c (waiver).

2 Thus far, the exception has been applied only to vindication of federal statutory rights. *See Am. Express,* 133 S.Ct. at 2310–11 & cases discussed therein; *see also Coneff v. AT & T Corp.*, 673 F.3d 1155, 1159 n. 2 (9th Cir.2012).

3 Plaintiffs contend that, unlike the injunctive relief requested in *Kilgore II,* the relief they request here would benefit the general public because Defendants' allegedly unlawful conduct is ongoing. (*See* Tomasevic Decl. dated May 3, 2013.) Only T–Mobile disputes this assertion. (*See* Defs' Joint Resp. Suppl. Brief at 8 & n. 4.) For purposes of this order, the Court assumes Plaintiffs' representation regarding public benefit is accurate as to all Defendants except T–Mobile.

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2013 WL 5372338
Only the Westlaw citation is currently available.
United States District Court, N.D. California

Steven McArdle, an individual, on behalf of himself, the general public and those similarly situated, Plaintiff,
v.
AT & T Mobility LLC; New Cingular Wireless PCS LLC; and New Cingular Wireless Services, Inc., Defendants.

No. C 09–1117 CW | Filed 09/25/2013

Attorneys and Law Firms

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ORDER GRANTING DEFENDANTS' RENEWED MOTION TO COMPEL ARBITRATION AND STAY ACTION

CLAUDIA WILKEN, United States District Judge

*1 Defendants AT & T Mobility LLC, New Cingular Wireless PCS LLC, and New Cingular Wireless Services, Inc. (collectively, ATTM) have filed a renewed motion to compel arbitration of Plaintiff Steven McArdle's claims. [1] Plaintiff opposes the motion. Having considered the parties' papers and oral argument on the matter, the Court GRANTS Defendants' motion.

BACKGROUND

ATTM is a cellular telephone service provider. It owns New Cingular Wireless PCS LLC and New Cingular Wireless Services, Inc. McArdle is a customer of ATTM who asserts claims, on behalf of himself and all others similarly situated, under California law for false advertising, unfair business practices, fraud and violation of the Consumers Legal Remedies Act.

McArdle's service agreement with ATTM contains a provision that requires the parties to the agreement to arbitrate "all disputes and claims" between them. The provision prohibits ATTM's customers from pursuing claims in arbitration on behalf of a class of individuals. According to its express terms, the prohibition on class arbitration is not severable from the rest of the arbitration provision.

Relying upon *Discover Bank v. Superior Court,* 36 Cal.4th 148 (2005), and *Shroyer v. New Cingular Wireless Services, Inc.,* 498 F.3d 976 (9th Cir.2007), the Court entered an order dated September 14, 2009, finding that the class arbitration waiver was unconscionable. Moreover, because the class arbitration provision was expressly not severable from the other portions of the arbitration provision, the Court found that the arbitration provision as a whole was not enforceable.

ATTM filed an interlocutory appeal of the Court's order and, when the United States Supreme Court granted *certiorari* in *AT & T Mobility LLC v. Concepcion,* 131 S.Ct. 1740 (2011), this Court stayed the case pending the Supreme Court's decision in that case.

Following the April 27, 2011 decision in *Concepcion,* in which the Supreme Court held that the *Discover Bank* rule was preempted by the Federal Arbitration Act, the Ninth Circuit reversed and remanded. *See McArdle v. AT & T Mobility,* 2012 U.S.App. LEXIS 18517 (9th Cir.). The purpose of the remand was for this Court "to consider in the first instance McArdle's arguments based on generally applicable contract defenses." *Id.* at *2.

On April 11, 2013, ATTM filed a renewed motion to compel arbitration and stay the action.

LEGAL STANDARD

Under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, et seq., written agreements that controversies between the parties shall be settled by arbitration are valid, irrevocable and enforceable. 9 U.S.C. § 2. A party aggrieved by the refusal of another to arbitrate under a written arbitration agreement may petition the district court which would, save for the arbitration agreement, have jurisdiction over that action, for an order directing that arbitration proceed as provided for

in the agreement. *Id.* § 4. *See Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005 (9th Cir.2010) (noting that the party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence). The FAA further provides:

> *2 If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement....

9 U.S.C. § 3. If the court is satisfied "that the making of the arbitration agreement or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* § 4. "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (citations omitted).

The FAA reflects a "liberal federal policy favoring arbitration agreements." *Concepcion*, 131 S.Ct. at 1745 (citations and internal quotation marks omitted). A district court must compel arbitration under the FAA if it determines that: (1) there is a valid agreement to arbitrate; and (2) the dispute falls within its terms. *Stern v. Cingular Wireless Corp.*, 453 F. Supp.2d 1138, 1143 (C.D.Cal.2006) (citing *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir.2000)).

The FAA "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. The party opposing arbitration bears the burden of proving that the arbitration provision is unconscionable. *Arguelles–Romero v. Superior Court*, 184 Cal.App. 4th 825, 836 (2010).

DISCUSSION

I. *Broughton–Cruz* Doctrine

McArdle first argues that arbitration is foreclosed by California's *Broughton–Cruz* rule which prohibits arbitration of public injunctive relief claims under the Consumer Legal Remedies Act (CLRA), Cal. Civ.Code § 1750 *et seq.*, and the Unfair Competition Law (UCL), Cal. Bus. and Prof.Code § 17200 *et seq.*, because such claims are "designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff." *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal.4th 303, 316 (2003); *see also Broughton v. Cigna Healthplans of California*, 21 Cal.4th 1066 (1999).

ATTM argues that the *Broughton–Cruz* doctrine is not a generally applicable contract defense because it applies only to certain types of cases and only to arbitration. Accordingly, ATTM argues, the Court lacks authority to consider McArdle's *Broughton Cruz* argument because that argument exceeds the scope of the Ninth Circuit's mandate. *See Mendez–Guttierrez v. Gonzalez*, 444 F.3d 1168, 1172 (9th Cir.2006) ("[A] district court is limited by this court's remand in situations where the scope of the remand is clear.").

McArdle responds that the Court could find that the arbitration provision is unenforceable because it violates the public policy set out in the *Broughton–Cruz* doctrine. In support of this argument, McArdle cites *Fisher v. DCH Temecula Imports LLC*, 187 Cal.App. 4th 601, 617 (2010), which holds that there is a "generally available contract defense" in California that "private contracts that violate public policy are unenforceable."

*3 The *Broughton* court relied on the United States Supreme Court's holding that "not ... all controversies implicating statutory rights are suitable for arbitration." 21 Cal.4th at 1075 (quoting *Mitsubishi Motors v. Soler Chrysler–Plymouth*, 473 U.S. 614, 627 (1985).[2] The *Broughton* court held that the issue of suitability "turns on congressional intent, which can be discovered in the text of the statute in question, its legislative history or in an inherent conflict between arbitration and the statute's underlying purposes." 21 Cal.4th at 1075 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)) (internal quotation marks omitted). The *Broughton* court went on to hold that "two factors taken

in combination" evidenced an inherent conflict "between arbitration and the underlying purpose of the CLRA's injunctive relief remedy." 21 Cal.4th at 1082. The two factors were that the relief sought was "for the benefit of the general public rather than the party bringing the action" and that "the judicial forum [had] significant institutional advantages over arbitration in administering a public injunctive remedy." *Id.* In *Cruz,* the California Supreme Court held that *Broughton* remained good law in the wake of intervening United States Supreme Court decisions and extended its holding to public injunctive relief claims under the UCL. 30 Cal.4th at 311–16.

The *Broughton–Cruz* doctrine applies only to arbitration agreements and only to certain claims brought pursuant to the CLRA and UCL. Although the *Broughton–Cruz* doctrine is based on public policy concerns, it is not a generally applicable contract defense as contemplated by the FAA. *See Concepcion,* 131 S.Ct. at 1746–47 (holding that, even though the *Discover Bank* rule finds "its origins in California's unconscionability doctrine and California's policy against exculpation," it is not a generally applicable contract defense). Because the *Broughton–Cruz* rule is not a generally applicable contract defense, it does not survive *Concepcion.*

McArdle argues that the Ninth Circuit's en banc opinion in *Kilgore v. Key Bank,* 718 F.3d 1052 (9th Cir.2013) *(Kilgore II),* "preserved the viability of" the *Broughton–Cruz* doctrine. Opposition at 8. This argument is based on the fact that the panel opinion in *Kilgore v. Key Bank,* 673 F.3d 947 (9th Cir.2010) *(Kilgore I),*held that the *Broughton–Cruz* doctrine was preempted by the FAA in light of *Concepcion.* McArdle notes that the en banc decision did not reach the preemption issue and contends that this indicates that the *Broughton–Cruz* rule survives *Concepcion.* In fact, the en banc court held, "Even assuming the continued viability of the *Broughton–Cruz* rule, Plaintiffs' claims do not fall within its purview." *Kilgore II,* 718 F.3d at 1060. *Kilgore* II expressly did not decide the continued viability of the *Broughton–Cruz* rule. For the reasons stated above, the Court finds that the *Broughton–Cruz* rule is preempted by the FAA in light of *Concepcion.*

II. Bar to Public Injunctive Relief

McArdle next argues that the arbitration agreement is unenforceable because it "purports to bar customers from seeking public injunctive relief in any forum." Opposition at 15. The arbitration agreement provides, "The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." Figueroa Dec., Ex. 2, ¶ 2.2(6). McArdle argues that this waiver of the right to seek public injunctive relief under the CLRA and UCL is unconscionable because it undermines the purposes of the statutes, which provide that individuals may seek public injunctive relief. *See* Cal. Bus. & Prof.Code § 17203; Cal. Civ.Code § 1780(a)(2).

***4** In other words, McArdle argues, even if *Concepcion* permits ATTM to compel arbitration of his CLRA and UCL claims, ATTM cannot preclude the arbitrator from awarding public injunctive relief. However, this argument relies on the United States Supreme Court's decision in *Mitsubishi Motors* for the proposition that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial forum." 473 U.S. at 628. Some courts have limited this "effective vindication" rule, applying it only to federal statutory rights, while others extended the rule to state statutory rights, such as the rights McArdle asserts in this case. However, in a recent Supreme Court case, *American Express Co. v. Italian Colors Restaurant,* the majority strongly suggested that the effective vindication rule applies only to federal statutory rights, repeatedly referring to federal rights or the pursuit of federal remedies. *See, e.g.,* 133 S.Ct. at 2310 n.2 (discussing "potential deprivation of a claimant's right to pursue federal remedies"); *id.* at 2311 (discussing " 'effective vindication' of a federal right"). The dissenting justices in *American Express* stated the point even more clearly in their effort to distinguish the case they were considering from *Concepcion.*

> And if that is not enough, *[Concepcion]* involved a state law, and therefore could not possibly implicate the effective-vindication rule. When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so–as the Court found in *[Concepcion]* –the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict

> with another federal law, like the Sherman Act here.

American Express, 133 S.Ct. at 2320 (Kagan, J. dissenting).

Moreover, the other cases McArdle cites are distinguishable. McArdle relies on *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.,* 622 F.3d 996 (9th Cir.2010), for the proposition that a waiver of a statutory right to injunctive relief is substantively unconscionable and accordingly unenforceable. In *Bridge Fund,* the Ninth Circuit affirmed the district court's finding that class action and injunctive relief waivers in the arbitration provision of a franchise contract were unconscionable and unenforceable. However, *Bridge Fund* relied in large part on a California Court of Appeal case which held that such waivers were unenforceable by applying the California Supreme Court's decision in *Discover Bank* to the California Franchise Investment Law. *Bridge Fund,* 622 F.3d at 1004 (citing *Independent Ass'n of Mailbox Center Owners, Inc. v. Superior Court,* 133 Cal.App. 4th 396 (2005)). As discussed above, the *Discover Bank* rule is preempted by the FAA.

McArdle also relies on a line of cases in which courts have found that representative action waivers cannot apply to California Private Attorney General Act (PAGA) claims. However, McArdle fails to address a key difference between, on the one hand, the CLRA and UCL, which permit an individual to seek public injunctive relief and, on the other, PAGA, which allows an individual to seek penalties under the Labor Code in an action brought "on behalf of himself or herself and other current or former employees." Cal. Lab.Code § 2699. The courts that have found representative action waivers unconscionable in PAGA cases have specifically noted this limitation. *See, e.g., Urbino v. Orkin Servs. of Cal,* 882 F.Supp.2d 1152, 1167 (C.D.Cal.2011) (noting that a court that found such waivers enforceable under *Concepcion* "failed to take into account that there are no separate individual claims in a PAGA action"), *rev'd on other grounds,* 2013 U.S.App. LEXIS 16718 (9th Cir.); *Brown v. Ralph's Grocery Co.,* 197 Cal.App. 4th 489, 503 (2011). The Court finds that these cases are not applicable here.

CONCLUSION

For the reasons stated above, the Court GRANTS ATTM' s motion to compel arbitration and stay the action. (Docket No. 222) The case is stayed pending arbitration, which must be diligently pursued.[3] Nothing contained in this order shall be considered a dismissal or disposition of this action, and, should further proceedings become necessary or desirable, any party may move to restore the case to the Court's calendar.

***5** IT IS SO ORDERED.

Footnotes

1 In a separately filed order, the Court granted Defendants' unopposed motion to compel arbitration of Kenneth Thelian's claims in the related case, *Thelian v. AT & T Mobility LLC,* No. 10–3440.

2 As discussed more fully below, both the majority and the dissent in *American Express* Co. *v. Italian Colors Restaurant,* 133 S.Ct. 2304 (2013), made clear that *Mitsubishi Motors* applies only to federal statutory claims. This further calls into question the continuing viability of the *Broughton–Cruz* rule.

3 There appears to be no further reason at this time to maintain the file as open for statistical purposes, and the Clerk is instructed to submit a JS–6 Form to the Administrative Office.

End of Document

2013 WL 452418
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Gerardo MIGUEL
v.
JPMORGAN CHASE BANK, N.A., et al.

No. CV 12–3308 PSG (PLAx). | Feb. 5, 2013.

Attorneys and Law Firms

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Alexander L Grodan, Carrie A Gonell, Christopher M Robertson, John D Hayashi, Morgan Lewis And Bockius LLP, Irvine, CA, for JPMorgan Chase Bank.

Proceedings: (In Chambers) Order GRANTING Motion to Compel Arbitration

The Honorable PHILIP S. GUTIERREZ, District Judge.

*1 Wendy K. Hernandez Deputy Clerk

Before the Court is Defendant JPMorgan Chase Bank, N.A.'s ("Defendant" or "JPMorgan") motion to compel Plaintiff Gerardo Miguel ("Plaintiff" or "Miguel") to submit to arbitration and to stay judicial proceedings until arbitration has been completed. *See* Dkt. # 23. The Court finds the matter appropriate for decision without oral argument. *See* Fed.R.Civ.P. 78(b); L.R. 7–15. Having considered the moving and opposing papers, the Court GRANTS the motion.

I. *Background*

On March 5, 2012, Plaintiff filed a putative class action complaint against JPMorgan. *See NOR,* Ex. A, at ¶ 12. The Complaint alleges claims for failure to pay wages owed under California Labor Code § § 510, 1194, and 1997; failure to timely pay wages owed under California Labor Code § § 201–204; failure to maintain and provide accurate itemized wage statements under California Labor Code § 226; failure to reimburse necessary business expenses under California Labor Code § 2802; penalties under the Private Attorneys General Act ("PAGA"), California Labor Code section 2698, *et seq.;* and violations of California's Unfair Competition Law ("UCL"), California Business & Professions Code section 17200, *et seq. See id.* at ¶¶ 20–60. Defendant removed the action to federal court on April 16, 2012. *See* Dkt. # 1.

Plaintiff worked as an hourly employee at JPMorgan's bank branch in Sun Valley, California from October 2010 to November 2011. *SAC* ¶ 10. Plaintiff signed an Arbitration Agreement ("Arbitration Agreement") containing the following clauses:

1. SCOPE: Any and all "Covered Claims" (as defined below) between me and JPMorgan Chase (collectively "Covered Parties" or "Parties", individually each a "Covered Party" or "Party") shall be submitted to and resolved by final and binding arbitration in accordance with this Agreement.

2. COVERED CLAIMS: "Covered Claims" include all legally protected employment-related claims ... that I have or in the future may have against JPMorgan Chase or its officers, directors, shareholders, employees or agents which arise out of or relate to my employment or separation from employment with JPMorgan Chase and all legally protected employment-related claims that JPMorgan Chase has or in the future may have against me, including, but not limited to, claims of employment discrimination or harassment if protected by applicable federal, state or local law, and retaliation for raising discrimination or harassment claims, failure to pay wages, bonuses or other compensation, tortious acts, wrongful, retaliatory and/or constructive discharge, breach of an express or implied contract, promissory estoppel, unjust enrichment, and violations of any other common law, federal, state, or local statute, ordinance, regulation or public policy, including, but not limited to Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, Section 1981 of the Civil Rights Act, the Worker Adjustment and Retraining Notification Act, and the Sarbanes–Oxley Act of 2002.

*2 ...

4. CLASS ACTION/COLLECTIVE ACTION WAIVER: All Covered Claims under this Agreement must be submitted on an individual basis. No claims may be arbitrated on a class or collective basis. Covered Parties expressly waive any right with respect to any Covered Claims to submit, initiate, or participate in a representative capacity, or as a plaintiff, claimant or member in a class action, collective action, or other representative or joint action, regardless of whether the action is filed in arbitration or in court. Furthermore, if a court orders that a class, collective, or other representative or joint action should proceed, in no event will such action proceed in the arbitration forum. Claims may not be joined or consolidated in arbitration with disputes brought by other individual(s), unless agreed to in writing by all parties.

The arbitrator's authority to resolve disputes and make awards under this Agreement is limited to disputes between: (i) an individual and JPMorgan Chase; and (ii) the individual and any current or former officers, directors, employees and agents, if such individual is sued for conduct within the scope of their employment. No arbitration award or decision will have any preclusive effect as to issues or claims in any dispute with anyone who is not a named party to the arbitration.

Denis–Roman Decl., ¶ 7, Ex. 1 at ¶¶ 1, 2, 4.

Defendant has requested that Plaintiff stipulate to arbitrate his claims against JPMorgan. *Gonell Decl.*, ¶ 2. Plaintiff refused to submit his claims to arbitration. *Id.* JPMorgan then brought this petition to compel arbitration. *See* Dkt. # 23.

II. *Legal Standard*

The Federal Arbitration Act ("FAA") governs arbitration agreements in contracts involving transactions in interstate commerce. *See* 9 U.S.C. §§ 1, 2; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). "The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.' " *AT & T Mobility LLC v. Concepcion*, —— U.S. ——, ——, 131 S.Ct. 1740, 1748, 179 L.Ed.2d 742 (2011) (citations omitted). The FAA states that written arbitration agreements "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. The FAA allows "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. As such, section 4 of the FAA "requires courts to compel arbitration 'in accordance with the terms of the agreement' upon the motion of either party to the agreement (assuming that the 'making of the arbitration agreement or the failure ... to perform the same' is not at issue)." *Concepcion*, 131 S.Ct. at 1748 (citations omitted).

*3 "Because the FAA mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed[,] the FAA limits courts' involvement to determining (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) (internal quotation marks omitted). However, "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4.

When deciding whether parties agreed to arbitrate, courts generally apply ordinary state law principles governing the formation of contracts. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Also, given "the federal policy favoring arbitration[,] ... any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including "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 Const. Corp*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

III. *Discussion*

The Court will discuss (1) whether a valid arbitration agreement exists between Plaintiff and Defendant, and, if an agreement exists, (2) whether Plaintiff's claims are covered by the agreement. Plaintiff argues that a valid arbitration agreement does not exist with Defendant because (1) JPMorgan's arbitration policy is procedurally and substantively unconscionable under California contract law, (2) JPMorgan employees lack the means to vindicate their statutory rights if compelled to arbitrate individually, (3) the *D.R. Horton* decision of the National Labor Relations Board supports invalidation of the Agreement, (4) Plaintiff's PAGA claims cannot be arbitrated, and (5) Plaintiff's claims for

injunctive relief cannot be arbitrated. The Court will address each of Plaintiff's arguments before turning to the issue of whether any potential arbitration agreement covers Plaintiff's claims.

A. *Validity of JPMorgan Arbitration Agreement*

The FAA governs arbitration agreements in contracts involving transactions in interstate commerce. 9 U.S.C. § 2. "Employment contracts, except for those covering workers engaged in transportation, are covered by the FAA." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002); *see also Luna v. Kemira Specialty, Inc.*, 575 F.Supp.2d 1166, 1176–77 (C.D.Cal.2008) (applying the FAA to employment contracts). Given that Defendant's Arbitration Agreement is an employment contract, the FAA governs in this case. See *Waffle House*, 534 U.S. at 288; *Luna*, 575 F.Supp.2d at 1176–77.

i. Unconscionability

Plaintiff claims that the arbitration agreement is invalid because it is unconscionable. In *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000), the California Supreme Court held that employment-related claims are arbitrable, unless the contract that requires arbitration is unconscionable. *Armendariz*, 24 Cal.4th at 113–114, 99 Cal.Rptr.2d 745, 6 P.3d 669. "[U]nconscionability has both a 'procedural' and a 'substantive' element." *Id.* at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. The procedural element focuses on whether one party used unequal bargaining power to impose a contract of adhesion on the other party. *Id.* at 113–114, 99 Cal.Rptr.2d 745, 6 P.3d 669; *see also Quevedo v. Macy's, Inc.*, 798 F.Supp.2d 1122, 1135–1136 (C.D.Cal.2011). The substantive element "centers on the terms of the agreement and whether those terms are so one-sided as to shock the conscience." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir.2003) (citations omitted); *Quevedo*, 798 F.Supp.2d at 1138 (internal quotation marks omitted). "[A] contract to arbitrate is unenforceable ... when there is 'both a procedural and substantive element of unconscionability.' " *Ingle*, 328 F.3d at 1170 (citations omitted).

1. Procedural Unconscionability

***4** "Procedural unconscionability focuses on oppression or unfair surprise." *Dotson v. Amgen, Inc.*, 181 Cal.App.4th 975, 980, 104 Cal.Rptr.3d 341 (2010). "Oppression results from unequal bargaining power, when a contracting party has no meaningful choice but to accept contract terms," while "[u]nfair surprise results from misleading bargaining conduct or other circumstances indicating that party's consent was not an informed choice." *Id.*

Plaintiff argues that the Arbitration Agreement was procedurally unconscionable because Plaintiff had unequal bargaining power and could not modify or opt out of the Arbitration Agreement. *Opp.* 4:16–17. Though unequal bargaining power is an indicator of procedural unconscionability, "[m]ere inequality in bargaining power ... is not a sufficient reason to hold that arbitration agreements [are unenforceable]." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32–33, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). Moreover, "a compulsory predispute arbitration agreement is not rendered unenforceable just because it is required as a condition of employment or offered on a 'take it or leave it' basis." *Lagatree v. Luce, Forward, Hamilton & Scripps LLP*, 74 Cal.App.4th 1105, 1127, 88 Cal.Rptr.2d 664 (1999).

Plaintiff offers other reasons why the Arbitration Agreement is allegedly procedurally unconscionable. Plaintiff asserts that he never received the Arbitration Agreement. At the end of Plaintiff's offer letter is a paragraph that reads:

Binding Arbitration Affirmation

> I understand my employment is subject to my and JPMorgan Chase's agreement to submit employment-related disputes that cannot be resolved internally to binding arbitration, as set forth in the ***Binding Arbitration Agreement*** **<http:// www.jpmorganchase.com/pdfdoc/ JPMCArbAgreement>.** By signing below I acknowledge and agree that I have read and understand the Binding Arbitration Agreement, have accepted its terms and understand that it is a condition of my employment with JPMorgan Chase.

Poliner Decl., Ex. A. Below that paragraph is Plaintiff's signature, dated September 27, 2010. *Id.* Plaintiff cannot claim that he failed to review the provisions of the Arbitration Agreement where he signed a document to indicate that he read it. *See Desert Outdoor Advertising v. Superior Court*, 196 Cal.App.4th 866, 872, 127 Cal.Rptr.3d 158 (2011) ("A cardinal rule of contract law is that a party's failure to read a contract, or to carefully read a contract, before signing it is no defense to the contract's enforcement.").

Furthermore, Plaintiff argues that JPMorgan's incorporation by reference of the Arbitration Agreement is invalid. However, other cases have recognized the propriety of incorporating an agreement to arbitrate by reference. For example, in *Baker v. Aubry,* 216 Cal.App.3d 1259, 1264, 265 Cal.Rptr. 381 (1989), the Court recognized that it was reasonable to incorporate an arbitration agreement by reference:

> ***5** Under California law, parties may validly incorporate by reference into their contract the terms of another document. The reference to the incorporated document must be "... *clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.*"

Id. (citation omitted). Here, the reference to the Arbitration Agreement is bolded and underlined. The reference to the Arbitration Agreement is unequivocal; it clearly states: "I understand my employment is subject to my and JPMorgan Chase's agreement to submit employment-related disputes that cannot be resolved internally to binding arbitration." Plaintiff consented to the terms of the Arbitration Agreement ("I acknowledge and agree that I have read and understand the Binding Arbitration Agreement, have accepted its terms and understand that it is a condition of my employment with JPMorgan Chase."). Finally, the terms of the incorporated document, the Arbitration Agreement, were easily available to Plaintiff, as he could have easily accessed the hyperlink in the document. Thus, according to California law, JPMorgan properly incorporated the Arbitration Agreement by reference.

Plaintiff also argues that the incorporation by reference of the American Arbitration Association ("AAA") rules in the Arbitration Agreement renders it invalid. In *Swarbrick,* a case dealing with the incorporation of the AAA rules into an arbitration agreement, the Court recognized that "[m]ere incorporation of the AAA rules ... does not constitute procedural unconscionability." *Swarbrick v. Umpqua Bank,* No. 2:08–cv–00532–MCE–DAD, 2008 WL 3166016, at *3 (E.D.Cal. Aug.5, 2008). The Court went on to explain that incorporation of the AAA rules gives rise to unconscionability only when the rules themselves are unconscionable. *Id.*

Plaintiff cites to *Harper v. Ultimo,* 113 Cal.App.4th 1402, 7 Cal.Rptr.3d 418 (2003) and *Fitz v. NCR Corp.,* 118 Cal.App.4th 702, 13 Cal.Rptr.3d 88 (2004). As explained in *Swarbrick,* those cases are distinguishable from this case. *Harper* found that incorporation by reference to the arbitration rules of the Better Business Bureau ("BBB") was unacceptable. *Harper,* 113 Cal.App.4th at 1406–07, 7 Cal.Rptr.3d 418. However, in *Harper,* the court's finding of procedural unconscionability was premised on the fact that the BBB arbitration rules limited the employee's ability to receive full relief. *Id.* Here, as in *Swarbrick,* there is no indication that the AAA rules limit the rights of employees.

In *Fitz,* an employer incorporated the AAA's arbitration rules by reference, and did not attach them to the agreement. *Fitz,* 118 Cal.App.4th at 721, 13 Cal.Rptr.3d 88. The Court found that this was unconscionable, but did not base its decision on the unconscionability of the AAA rules themselves, but rather on the fact that the Arbitration Agreement contained conflicting provisions with the AAA rules, which could be disadvantageous to the employee. *Id.* at 721, 13 Cal.Rptr.3d 88 ("NCR deliberately replaced the AAA's discovery provision with a more restrictive one, and in so doing failed to ensure that employees are entitled to discovery sufficient to adequately arbitrate their claims. NCR should not be relieved of the effect of an unlawful provision it inserted in the ACT policy due to the serendipity that the AAA rules provide otherwise."). Here, the Arbitration Agreement expressly provides that "[w]here there is a conflict between this Agreement and the AAA rules, this Agreement will govern." *Poliner Decl.,* Ex. B at 2. Plaintiff has failed to posit any way in which the incorporation of the AAA rules would be unfair to employees. *See also Lucas v. Gund, Inc.,* 450 F.Supp.2d 1125, 1131 (C.D.Cal.2006) ("Agreements which incorporate the rules of a third-party organization without providing the employee with those rules at the time of signing can be procedurally unconscionable if the employee is not provided a copy of the rules upon signing the agreement ... However, in those cases, the decisions seem to be based on the additional fact that the rules were not fair to the weaker party.").

***6** Thus, here, the Arbitration Agreement was procedurally unconscionable only in that it was presented to Plaintiff on a "take it or leave it basis." *See Dotson,* 181 Cal.App.4th at 981, 104 Cal.Rptr.3d 341. This small amount of procedural unconscionability on its own is not enough to render the contract unenforceable. *Lagatree,* 74 Cal.App.4th at 1127, 88 Cal.Rptr.2d 664.

In determining whether an arbitration contract is unenforceable, courts evaluate procedural and substantive unconscionability on a sliding scale. *Armendaiz,* 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. "In other words, the 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." *Id.* Here, the Arbitration Agreement is minimally procedurally unconscionable. *See Dotson,* 181 Cal.App.4th at 981–82, 104 Cal.Rptr.3d 341 (holding that an arbitration agreement that is procedurally unconscionable only because it is presented on a take it or leave it basis has only a minimal degree of procedural unconscionability). Therefore, the Arbitration Agreement is unenforceable only if the contract is also substantively unconscionable and the degree of substantive unconscionability is high. *See Dotson,* 181 Cal.App.4th at 982, 104 Cal.Rptr.3d 341.

2. Substantive Unconscionability

"Substantive unconscionability centers on the 'terms of [an] agreement and whether those terms are so one-sided as to shock the conscience.' " *Ingle,* 328 F.3d at 1172 (citations omitted). Plaintiff argues that the Arbitration Agreement is substantively unconscionable because Defendant has the unilateral right to terminate or modify the Arbitration Policy. *Opp.* 6:21–23. A provision in an arbitration agreement giving the employer the unilateral right to terminate or modify the agreement renders the provision substantively unconscionable. *Ingle,* 328 F.3d at 1179. Here, the Arbitration Agreement contains the following clause (hereinafter the "Provision"):

> JPMorgan Chase reserves the right to amend, modify or discontinue this Agreement at any time in its sole discretion to the extent permitted by applicable law. Such amendments may be made by publishing them on the JPMorgan Chase Intranet or by separate notification to me and shall be effective thirty (30) calendar days after such amendments are provided to me and will apply on a going forward basis. Continuation of my employment after receiving such amendments will be considered my acceptance of the amended terms.

Poliner Decl., Ex. B, ¶ 9. As Defendant points out, arbitration agreements that allow a party to prospectively modify them with notice are enforceable and not illusory. *See 24 Hour Fitness, Inc. v. Superior Court,* 66 Cal.App.4th 1199, 1214, 78 Cal.Rptr.2d 533 (1998) (finding that the ability to modify an agreement with 30 days written notice carries with it the duty to exercise that right fairly and in good faith and so does not render the contract illusory); *James G. Freeman & Associates, Inc. v. Tanner,* 56 Cal.App.3d 1, 10, 128 Cal.Rptr. 109 (1976) ("The contract was not illusory because each party was bound for at least the 30 days and even thereafter until the 30 days modification notice was given."); *Martin v. Citibank, Inc.,* 567 F.Supp.2d 36, 45 (D.D.C.2008) ("Finally, in order to modify the terms of the policy, defendant must provide thirty (30) days advance notice to employees, barring any 'unfair retroactive application of amendments' ... The Court is satisfied that requiring defendant to provide thirty days notice of prospective modifications affords employees sufficient protection against inequitable assertions of power."). Accordingly, because the Provision contains a thirty-day notice provision, the Court disagrees with Plaintiff and finds that the Provision is not illusory.

*7 Plaintiff also contends that the Arbitration Agreement is unconscionable because "Defendant specifically reserves the right to *decline arbitration* 'if a court orders that a class ... action should proceed." *Opp.* 7:18–25. However, the Agreement does not grant Defendant the right to decline arbitration if a court orders that a class action shall proceed. Rather, the Agreement states that, as to both parties, "[i]f a court orders that a class, collective, or other representative or joint action should proceed, in no event will such action proceed in the arbitration forum." *Poliner Decl.,* Ex. B, ¶ 4. Accordingly, any restriction on the forum is bilateral and affects both JPMorgan and Plaintiff equally.

Thus, in this case, there is no substantive unconscionability. Because the procedural unconscionability is low and there is no substantive unconscionability, the arbitration agreement is enforceable.

ii. Vindication of Statutory Rights

Plaintiff also argues that the Arbitration Agreement is unenforceable because, if compelled to arbitrate their claims individually, employees will lack the means to vindicate their statutory rights. *Opp.* 9:10–10:12. Plaintiff, citing *Sutherland v. Ernst & Young, LLP,* 847 F.Supp.2d 538 (S.D.N.Y.2012), argues that he will have no means to vindicate his statutory rights if not permitted to proceed in a class action because it would be difficult to secure representation with an estimated recovery of less than $1,200.

However, the Ninth Circuit interpreted the Supreme Court's holding in *Concepcion* to mean that banning class action waivers would be inconsistent with the FAA. *See Coneff*

v. AT & T Corp., 673 F.3d 1155, 1158 (9th Cir.2012). In *Coneff*, plaintiffs filed a class action against AT & T, which responded by seeking to enforce the arbitration agreements contained in plaintiffs' employment contracts. *Id.* at 1157. The district court denied AT & T's motion because the Washington Supreme Court had ruled that class action waivers were unconscionable in *Scott v. Cingular Wireless*, 160 Wash.2d 843, 161 P.3d 1000 (2007). *Id.* at 1159–60. On appeal, the Ninth Circuit determined that like the California rule analyzed in *Concepcion*, the Washington rule was preempted by the FAA. *Id.* In analyzing the Washington rule, the Court relied heavily on *Concepcion*, acknowledging that "the [Supreme] Court's majority expressly rejected the dissent's argument regarding the possible exculpatory effect of class-action waivers: 'The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. *But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.*' ") (emphasis added). Accordingly, the Arbitration Agreement is enforceable in spite of Plaintiff's claim that he cannot vindicate his statutory rights if compelled to arbitrate his claims individually.

iii. Applicability of D.R. Horton

***8** Plaintiff also points to a decision reached by the National Labor Relations Board ("NLRB") last year that found that an employer's mandatory arbitration agreement that prohibited employees from filing employment-related class actions violated Section 8(a)(1) of the National Labor Relations Act ("NLRA"). *In re D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012). The NLRA makes it an unfair labor practice for an employer to interfere with an employee's right "to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §§ 157, 158. Plaintiff argues that at least two courts have followed *D.R. Horton* in denying motions to compel arbitration, citing *Owen v. Bristol Care, Inc.*, No. 11–04258–CV–FJG, 2012 WL 1192005 at *4 (W.D.Mo. Feb.28, 2012) and *Herrington v. Waterstone Mortg. Corp.*, No. 11–cv–779–bbc, 2012 WL 1242318 at *4 (W.D.Wis. March 16, 2012). However, the Eighth Circuit reversed *Owen* last month. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 2013 WL 57874, *3 (8th Cir.2012). Because the Eighth Circuit is the first appellate court to address the impact of *D.R. Horton*, the Court finds the decision of the Eighth Circuit instructive.

In *Owen*, defendant appealed the denial of its motion to compel arbitration in a suit initiated by an employee asserting claims under the Fair Labor Standards Act ("FLSA"). Defendant argued that the district court incorrectly determined that the arbitration agreement was invalid because it contained a class action waiver. The Eighth Circuit explained that *D.R. Horton* carried little persuasive authority. 702 F.3d 1050, 2013 WL 57874 at *3. It explained that the NLRB's holding in *D.R. Horton* was limited to arbitration agreements that bar all protected concerted action. *Id.* (citing *D.R. Horton*, 2012 WL 36274 at * 16) ("So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration."). Thus, the *Owen* court explained that *D.R. Horton* does not apply in cases where the agreement permits filing complaints with administrative agencies, like the Equal Employment Opportunity Commission, which can file suit on behalf of a class of employees. 702 F.3d 1050, 2013 WL 57874 at *3.

In this case, the Arbitration Agreement expressly states: "I understand that this Agreement does not preclude me from filing an administrative claim or charge with the Equal Employment Opportunity Commission ("EEOC") and/or state and local human rights agencies to investigate alleged violations of laws enforced by the EEOC or those agencies." *Poliner Decl.*, Ex. B, ¶ 5. *Owen* also explicitly recognized that the courts owe no deference to the reasoning in *D.R. Horton*, 702 F.3d 1050, 2013 WL 57874 at *3 (citing *Delock v. Securitas Sec. Servs. USA*, —— F.Supp.2d ——, ——, No. 4:11–CV–520–DPM, 2012 WL 3150391, *3 (E.D.Ark. Aug.1, 2012) ("The Board's construction of the [NLRA] 'is entitled to considerable deference and must be upheld if it is reasonable and consistent with the policies of the Act,' ... the Board has no special competence or experience in interpreting the Federal Arbitration Act ."). As to the NLRB's attempt to distinguish *Concepcion*, the Eight Circuit recognized that it was "not obligated to defer to [the Board's] interpretation of Supreme Court precedent under *Chevron* or any other principle." *Delock*, 2012 WL 3150391, at *3 (quoting *N.Y. N.Y. LLC v. N.L.R.B.*, 313 F.3d 585, 590 (D.C.Cir.2002)).

***9** Additionally, every district court in this circuit to consider the decision has declined to follow it. *See Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F.Supp.2d 831, 842 (N.D.Cal. May 7, 2012) (finding that the "NLRA is not a bar to enforcement of agreements to arbitrate non-NLRA claims on an individual basis ... because *Concepcion* articulates a strong federal policy choice in favor of enforcing arbitration agreements and thereupon holds that class waiver provisions should not be stricken or be grounds to render

entire agreements unenforceable."); *Jasso v. Money Mart Express, Inc.*, 11–cv–5500 YGR, 2012 WL 1309171, at * 10 (N.D.Cal. April 13, 2012) ("Further, while the NLRB's analysis in *D.R. Horton,* relying on prior Supreme Court authority not directly on point, makes a somewhat compelling argument ... that reasoning does not overcome the direct, controlling authority holding that arbitration agreements, including class action waivers contained therein, must be enforced according to their terms."); *Sanders v. Swift Transp. Co. of Arizona, LLC,* 843 F.Supp.2d 1033, 1036, n. 1 (N.D.Cal.2012) ("Because Sanders makes no allegations in his complaint or in his opposition to Defendants' motion that his claims against Defendants are covered by the NLRA, *Horton* is inapposite and therefore the Court will not consider it in determining the motion.").

iv. Applicability of Arbitration Agreement to PAGA claim

Plaintiff argues that his claim under the Private Attorneys General Act ("PAGA") is not arbitrable and therefore must proceed in this forum. Under PAGA, "an aggrieved employee" can bring a civil action "on behalf of himself or herself and other current or former employees" to recover civil penalties for Labor Code violations. Cal. Labor Code § 2699(a). California law establishes civil penalties of $100 "for each aggrieved employee per pay period for the initial violation" and $200 "for each aggrieved employee per pay period for each subsequent violation." *Id.* § 2699(f). When an employee sues under PAGA, he acts "as the proxy or agent of the state's labor law enforcement agencies" to "supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves." *Arias v. Superior Court,* 46 Cal.4th 969, 95 Cal.Rptr.3d 588, 209 P.3d 923 (2009). In light of this, Plaintiff appears to argue that sending the PAGA claim to arbitration would prohibit Plaintiff from fulfilling the Legislature's mandate that he be deputized as an attorney general to remedy labor law abuses.

The Court disagrees. While the Court recognizes the unique nature of PAGA, it agrees with the reasoning of Judge Feess in *Quevedeo v. Macy's, Inc.* In that case, a plaintiff similarly argued that his PAGA claim was not arbitrable based on the purpose of PAGA. *Quevedeo v. Macy's, Inc.,* 798 F.Supp.2d 1122, 1141. However, Judge Feess recognized that the PAGA claim was arbitrable to the extent the plaintiff asserted it on his own behalf. *Id.* Judge Feess noted that "[n]othing in the arbitration Plan Document would appear to preclude Plaintiff from pursuing this *individual* claim for civil penalties in arbitration, and the agreement expressly provides that the same remedies that would be available in court are available in arbitration." *Id.* Judge Feess went on to explain:

> ***10** The fact that Plaintiff's PAGA claim on behalf of others is not arbitrable, however, does not mean that it can proceed in this Court. Plaintiff agreed to submit his employment-related claims to arbitration, and he has cited no authority suggesting that he can pursue PAGA claims in court on behalf of others without also pursuing them on behalf of himself. To the contrary, the PAGA statute indicates that [an] employee can pursue claims on behalf of others only if he also pursues claims on behalf of himself: the statute allows an aggrieved employee to bring a civil action "on behalf of himself or herself *and* other current or former employees," not on behalf of himself *or* other employees. Cal. Labor Code § 2699(a) (emphasis added).

Id. Judge Feess recognized that despite the unique nature of PAGA and the Legislature's intent to deputize private citizens, requiring arbitration agreements to permit representative PAGA claims to go forward would be inconsistent with the Supreme Court's holding in Concepcion because it would sacrifice the advantages achieved by arbitration. *Id.* at 1142.

Plaintiff cites to *Urbino v. Orkin Services of California, Inc.*, Case No. 2:11–cv–06456–CJC (PJWx), 2011 WL 4595249, *11 (C.D.Cal. Oct. 5, 2011), which distinguished PAGA claim waivers from *Concepcion,* noting the difference between a PAGA claim and a consumer class action. *Id.* This Court agrees that PAGA's legislative purpose means that it should be treated differently than a class action for purposes of, *inter alia,* class certification. However, this Court disagrees with *Urbino* insofar as it suggests that the nature of PAGA prevents the applicability of the FAA. Plaintiff has failed to offer any reason why prohibiting the arbitration of PAGA claims would not conflict with the purpose of the FAA. Because a rule prohibiting arbitration of PAGA claims would conflict with the FAA, PAGA claims are arbitrable. *See Concepcion,* 131 S.Ct. at 1747 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.") (citation omitted).

v. Ability to bring claims for injunctive relief

Finally, Plaintiff claims that it would be improper to require him to arbitrate his claims for injunctive relief under the "Broughton–Cruz rule". The Broughton–Cruz rule, established in *Broughton v. Cigna Healthplans of California,*

21 Cal.4th 1066, 90 Cal.Rptr.2d 334, 988 P.2d 67 (1999), and *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal.4th 303, 133 Cal.Rptr.2d 58, 66 P.3d 1157 (2003) prohibits the arbitration of claims for broad, public injunctive relief. However, in *Kilgore v. Key Bank Nat'l Assoc.*, 673 F.3d 947 (9th Cir.2011), the Ninth Circuit determined that the FAA preempted the Broughton–Cruz rule. *Id.* at 951. Plaintiff argues that the Court should not rely on *Kilgore* because the Ninth Circuit has ordered that the case be reheard en banc. *Kilgore v. KeyBank, Nat'l Assoc.*, 697 F.3d 1191, 1192 (9th Cir.2012) ("The three judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit."). Although the Ninth Circuit has clearly established that *Kilgore* is not binding precedent, and is therefore only persuasive authority, this Court recognizes the viability of *Kilgore* 's reasoning that *BroughtonCruz* is preempted by the FAA because of the Supreme Court's holding in *Concepcion*. *Concepcion* recognized that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 131 S.Ct. at 1747. Thus, because the Broughton–Cruz rule prohibits the arbitration of a particular type of claim, claims for injunctive relief, the Broughton–Cruz rule is preempted by the FAA. Thus, the Arbitration Agreement is not unenforceable on the basis of the Broughton–Cruz rule.

vi. Conclusion

***11** Based on the foregoing, the Court finds that a valid arbitration agreement exists between Defendant and Plaintiff.

B. *Agreement Encompasses Disputes at Issue*

Having determined that a valid arbitration agreement exists between Plaintiff and JPMorgan, the Court now evaluates whether the Arbitration Agreement covers Plaintiff's claims, recognizing that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *See Moses*, 460 U.S. at 24–25.

Plaintiff's Second Amended Complaint alleges five causes of action involving breach of contract and violations of the California Labor Code and California Unfair Competition Law. *SAC* ¶¶ 19–54. The Arbitration Agreement covers:

> all legally protected employment-related claims ... [including] failure to pay wages, bonuses or other compensation, tortious acts, wrongful, retaliatory and/or constructive discharge, breach of an express or implied contract, promissory estoppel, unjust enrichment, and violations of any other common law, federal, state, or local statute, ordinance, regulation or public policy ....

Poliner Decl., Ex. B, ¶ 2. Plaintiff's claims fall into the categories of "employment-related claims," "failure to pay wages, bonuses or other compensation," and "violations of any other common law, federal, state, or local statute, ordinance, regulation or public policy." As such, the Arbitration Agreement encompasses the disputes at issue in this case, and the Court GRANTS Defendant's motion to compel arbitration.

Also, in accordance with the FAA, the Court STAYS the judicial proceedings and administratively closes the case until arbitration has been completed. *See* 9 U.S.C. § 3 ("The court ... upon being satisfied that the issue involved ... is referable to arbitration ... shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.").

IV. *Conclusion*

For the foregoing reasons, the Court: GRANTS Defendant's motion to compel arbitration, STAYS the judicial proceedings, and administratively closes the case until arbitration between the parties has been completed.

IT IS SO ORDERED.

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action. My business address is: 2029 Century Park East, Suite 1800, Los Angeles, California 90067-3086.

On February 27, 2015, I served the foregoing document(s) described as: **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

-SEE ATTACHED SERVICE LIST-

☐ **(VIA PERSONAL SERVICE)** By causing to be delivered the document(s) listed above to the person(s) at the address(es) set forth above.

☒ **(VIA U.S. MAIL)** In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth below.

☐ **(VIA FACSIMILE)** By causing such document to be delivered to the office of the addressee via facsimile.

☒ **(VIA OVERNIGHT DELIVERY)** By causing such envelope to be delivered to the office of the addressee(s) at the address(es) set forth above by overnight delivery via Federal Express or by a similar overnight delivery service.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 27, 2015, at Los Angeles, California.

Diane Smith
[Type or Print Name]

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[Signature]

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