S220812

IN THE SUPREME COURT OF THE STATE

OF CALIFORNIA

TIMOTHY SANDQUIST,
Plaintiff and Appellant,

vs.

LEBO AUTOMOTIVE, INC., et al.
Defendants and Respondents.

Appeal from the Superior Court for the County of Los Angeles
Case No. BC476523
The Honorable Elihu M. Berle
After Review by the Court of Appeal,
Second Appellate District, Division Seven
Case No. B244412

DEFENDANTS AND RESPONDENTS' REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JIMMIE E. JOHNSON

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendants and Respondents LEBO AUTOMOTIVE dba JOHN ELWAY'S MANHATTAN BEACH TOYOTA *now known as* MANHATTAN BEACH TOYOTA, JOHN ELWAY, MITCHELL D. PIERCE, JERRY L. WILLIANS, and DARRELL SPERBER (collectively, "Respondents") herby request that this Court take judicial notice of the attached exhibits submitted concurrently with Respondents' Petition for Review Reply. Respondents make this request pursuant to *Evidence Code* sections 452, 453, and 459, as well as *Rules of Court*, Rule 8.252.

Exhibit A is Minute Order from the Honorable Katherine Bacal of the Superior Court of California for the County of San Diego, issued July 25, 2014 in *Randy Steel v. Walters Wholesale Electric Co.*, Case No 37-2013-00076992.

Exhibit B is an Order from the Honorable Thomas Anderle of the Superior Court of California for the County of Santa Barbara, issued April 22, 2014, in *Raphael Roberts v. Santa Barbara Automotive Ltd. et. al.,* Case No. 1439804

Exhibit C is an Order from the Honorable Kenneth Freeman of the Superior Court of California for the County of Los Angeles, issued March 10, 2014 in *Lujan v. Century Foods, Inc.*, Case No. BC513815.

Exhibit D is an Order from the Honorable Amy D. Hogue of the Superior Court of California for the County of Los Angeles, issued February 4, 2014 in *Gregorians v. ATV, Inc. et al.,* Case No. BC525591.

Exhibit E is an Order from the Honorable Geoffrey T. Glass of the Superior Court of California for the County of Orange, issued October 10, 2013, in *Network Capital Funding Corp. v. Papke*, Case No. 30-2013-00659735.

DATED: September 26, 2014

Respectfully submitted

FISHER & PHILLIPS LLP

By: _____

JAMES J. McDONALD, JR.
GRACE Y. HOROUPIAN
JIMMIE E. JOHNSON
FISHER & PHILLIPS LLP
Attorneys for Defendants and Respondents
Lebo Automotive, Inc. et al.

MEMORANDUM OF POINTS AND AUTHORITIES

California courts, including this Court, may take judicial notice of the records of any court of this State, as well as any facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. *Evid. Code*, §§ 452, subd. (d)(1) and (h), 453, 459. Each of the documents subject to this Request for Judicial Notice are records from various Superior Courts of California for cases in which Respondents' legal counsel represented the defendant employers.

Rules of Court, Rule 8.252, subd. (a) implements *Evidence Code* section 459 requires a party seeking judicial notice to file a separate motion stating (1) why the matters to be noticed are relevant to the underlying proceeding; (2) whether they were presented to the trial court, and if not, why they are subject to judicial notice; and (3) whether the matters relate to the proceedings occurring after the judgment. The documents subject to this Request were not presented to the trial court. Rather, they are subject to judicial notice now because Appellant TIMOTHY SANDQUIST asserts in his Opposition to the underlying Petition that "California courts consistently follow the *Bazzle* plurality to hold that an arbitrator should be the one to determine whether an arbitration agreement allows for class procedures...." *Opposition*, at 4. The Superior Court orders attached to this request evidence that the Los Angles and Irvine offices of Respondents' counsel alone have recently attained orders from several different Superior Courts in the southern part of California to the

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contrary. Whereas the documents subject to this Request establish that Appellant's argument is factually inaccurate, this Court should Notice them as relevant to the underlying Petition.

DATED: September 26, 2014

FISHER & PHILLIPS LLP

By: _____

JAMES J. McDONALD, JR.
GRACE Y. HOROUPIAN
JIMMIE E. JOHNSON
FISHER & PHILLIPS LLP
Attorneys for Defendants and Respondents
Lebo Automotive, Inc. et al.

DECLARATION OF JIMMIE E. JOHNSON

I, JIMMIE E. JOHNSON hereby declare and state as follows:

1. I am an attorney with the law firm Fisher & Phillips LLP, attorneys of record for Defendants and Respondents LEBO AUTOMOTIVE dba JOHN ELWAY'S MANHATTAN BEACH TOYOTA *now known as* MANHATTAN BEACH TOYOTA, JOHN ELWAY, MITCHELL D. PIERCE, JERRY L. WILLIANS, and DARRELL SPERBER in the above-captioned matter. I am admitted to practice before all the courts of the State of California. The facts stated below are of my own knowledge; except where stated upon information and belief, and as to those matters, I believe them to be true. If called upon to testify, I could and would testify competently and truthfully thereto.

2. Based upon information and belief, attached hereto as **Exhibit A** is a true and correct copy of the Minute Order issued on July 25, 2014 in *Randy Steel v. Walters Wholesale Electric Co.*, San Diego County Superior Court Case No 37-2013-00076992.

3. Based upon information and belief, attached hereto as **Exhibit B** is a true and correct copy of the Tentative Order which was adopted as the Formal Order on April 22, 2014 in *Raphael Roberts v. Santa Barbara Automotive Ltd. et. al.,* Santa Barbara Superior Court Case No. 1439804.

4. Based upon information and belief, attached hereto as **Exhibit C** is a true and correct copy of the Order issued on March 10, 2014 in *Lujan v. Century Foods, Inc.*, Los Angeles Superior Court Case No. BC513815.

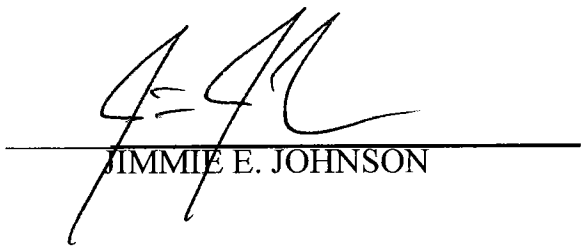
5. Attached hereto as **Exhibit D** is a true and correct copy of the Order issued on February 4, 2014 in *Gregorians v. ATV, Inc. et al.,* Los Angeles Superior Court Case No. BC525591.

6. Attached hereto as **Exhibit E** is a true and correct copy of the Order issued on October 10, 2013 in *Network Capital Funding Corp. v. Papke*, Orange

County Superior Court Case No. 30-2013-00659735.

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

Executed this 26th day of September, 2014, at Irvine, California.



JIMMIE E. JOHNSON

[PROPOSED] ORDER

Good cause appearing therefor, the Request for Judicial Notice submitted by Defendants and Respondents LEBO AUTOMOTIVE dba JOHN ELWAY'S MANHATTAN BEACH TOYOTA *now known as* MANHATTAN BEACH TOYOTA, JOHN ELWAY, MITCHELL D. PIERCE, JERRY L. WILLIANS, and DARRELL SPERBER is hereby GRANTED.

Dated: _____, 2014

_____
JUSTICE, SUPREME COURT FOR THE STATE OF CALIFORNIA

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/25/2014 TIME: 01:30:00 PM DEPT: C-69

JUDICIAL OFFICER PRESIDING: Katherine Bacal
CLERK: Jay Browder
REPORTER/ERM: Georgina Gomez CSR# 12775
BAILIFF/COURT ATTENDANT: Crystal Rice

CASE NO: **37-2013-00076992-CU-OE-CTL** CASE INIT.DATE: 11/22/2013
CASE TITLE: **Randy Steel v Walters Wholesale Electric Co [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Other employment

EVENT TYPE: Motion Hearing (Civil)
MOVING PARTY: WALTERS WHOLESALE ELECTRIC CO
CAUSAL DOCUMENT/DATE FILED: Motion for Change of Venue, 02/13/2014

EVENT TYPE: Motion Hearing (Civil)
MOVING PARTY: WALTERS WHOLESALE ELECTRIC CO
CAUSAL DOCUMENT/DATE FILED: Motion - Other Motion to Compel Arbitration, 04/14/2014

APPEARANCES
Alexander I Dychter, counsel, present for Plaintiff(s).
Usama Kahf, specially appearing for counsel JOHN E LATTIN, present for Defendant(s).

Now being the time previously set for hearing Defendant's Motion for Change of Venue and Motion to Compel Arbitration, counsel and/or parties appear as noted above and the hearing commences.

Appointment of Official Reporter Pro Tempore is signed and filed.

The Court hears argument.

The Court modifies the tentative ruling as follows:
Defendant Walters Wholesale Electric Co.'s motion to compel arbitration is granted in part. The Court refers the 1st and 2nd causes of action to arbitration on an individual basis. Plaintiff is not compelled to arbitrate the Private Attorney General Act (PAGA) and classwide claims.

Defendant's motion for change of venue to Riverside or Orange County is denied as premature.

Factual and Procedural Background

This is a putative class action on behalf of approximately 100 employees against their employer for its alleged failure to reimburse employees for travel and other business expenses.

Plaintiff Randy Steel currently resides in Riverside County. According to the first amended complaint

(FAC), plaintiff worked as an Outside Sales Representative until he was discharged in February 2013. ¶ 6. He was required to use his personal vehicle for business purposes but was either not allowed to seek reimbursement or was not fully reimbursed for these expenses. *Ibid.* He also was not reimbursed for work-related cell phone, entertainment, and home office expenses. *Id.*

Based on these allegations, plaintiff asserts causes of action for (1) violation of Labor Code section 2802; (2) unfair competition; and (3) violation of the Private Attorney General Act (PAGA).

Defendant moves to compel arbitration of plaintiff's individual claims, strike the class and representative claims, and stay the litigation pending the arbitration proceeding. Defendant also moves to change venue from San Diego to Riverside or Orange County based on the convenience of witnesses.

Discussion

A. Motion to Compel Arbitration

The parties agreed to "utilize binding arbitration to resolve all disputes that may arise out of the employment context. Both the Company and I agree that any claim, dispute, and/or controversy that either I may have against the Company ... or the Company may have against me, arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ...." Lombardo Decl., Ex. A [Comprehensive Agreement Employment at-Will and Arbitration].

Who Decides the Scope of the Arbitration Provision?

Preliminarily, the parties disagree whether the arbitrator or the Court must decide whether the parties contractually agreed to arbitrate class and representative claims.

"[U]nless an arbitration agreement expressly provides otherwise, a dispute regarding the arbitrability of a particular dispute is subject to judicial resolution. In performing its duty to determine whether a party has a contractual duty to arbitrate a particular dispute, a court is required 'to examine and, to a limited extent, construe the underlying agreement.' " *City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1096, quoting *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 480. The arbitration agreement here does not expressly provide for the arbitrator to decide whether the agreement extends to class and representative claims. Instead, the arbitration provision is limited to disputes "arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company." Plaintiff argues *Garcia v. DirecTV, Inc.* (2004) 115 Cal.App.4th 297 is controlling. However, the arbitration provision in *Garcia* extended to disputes arising out of the "interpretation" of the arbitration agreement itself. *Id.* at p. 301. Unlike the parties in *Garcia* who agreed to allow the arbitrator to interpret the arbitration agreement, the parties here did not expressly delegate that issue to the arbitrator. Plaintiff's reliance on *Oxford Health Plans LLC v. Sutter* (2013) 133 S.Ct. 2064 does not compel a different result because in that case the "parties agreed that the arbitrator should decide whether their contract authorized class arbitration." *Id.* at p. 2967. There was no such agreement here.

For these reasons, the Court, not the arbitrator, must decide whether the parties agreed to arbitrate class and representative claims.

Classwide Arbitration

"[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 684. Here, there is no express agreement for classwide arbitration. The only evidence before the Court is the language of the arbitration provision itself. The court may not imply an agreement to authorize class arbitration solely from the fact of the parties' agreement to arbitrate. *Stolt-Nielsen, supra,* 559 U.S. at p. 685. Plaintiff agreed to arbitrate disputes that "I" may have against the Company, and vice versa. There is no reference to employee groups or other employee's claims.

Citing to *Jock v. Sterling Jewelers, Inc.* (2nd Cir. 2011) 646 F.3d 113, plaintiff argues the agreement to arbitrate "any claim, dispute, and/or controversy" is sufficiently broad to authorize classwide and representative arbitration. In *Jock*, the arbitration provision required that any "any dispute, claim, or controversy" against the employer be submitted to an arbitrator for resolution. *Id.* at p. 116. In addition, the arbitrator was authorized "to award any types of legal or equitable relief that would be available in a court of competent jurisdiction." *Id.* at p. 117. Focusing on language in the agreement giving her the "power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction," the arbitrator concluded that this broad language reasonably implied the ability to grant classwide relief. *Id.* at pp. 126-127. The agreement here does not include similar language authorizing any type of legal or equitable relief. In fact, the arbitration provision here is almost identical to *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506 at p. 519. The *Kinecta* court emphasized that "[t]he arbitration provision identifies only two parties to the agreement and refers exclusively to 'I,' 'me,' and 'my' (designating Malone)." *Id.* at p. 517. Based on the fact that the agreement was limited by its terms to individual disputes, the court held that "the parties did not agree to authorize class arbitration in their arbitration agreement." *Id.* at p. 519.

Based on the evidence presented, the Court finds that the parties did not agree to classwide arbitration.

PAGA

Plaintiff argues if the Court dismisses the PAGA claim then the entire arbitration provision would be unenforceable because PAGA claims cannot be waived.

The California Supreme Court recently held that where "an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." *Iskanian v. CLS Transp. Los Angeles, LLC* (Cal. 2014) 173 Cal.Rptr.3d 289, 313. However, the arbitration provision there expressly waived arbitration of class and representative claims. *Id.* at pp. 294, 308. For the reasons already discussed, plaintiff's arbitration provision does not cover such claims. As a result, there is simply no issue of plaintiff being required to "waive" the PAGA claim. Rather, the PAGA and class claims can be litigated, which leads to the issue of how the case should proceed.

Where the parties are involved in pending litigation and a determination of issues in that case may make the arbitration unnecessary, the court may delay its order to arbitrate. Code Civ. Proc., § 1281.2. Defendant has requested the litigation be stayed. Given that Steele is the only named party at this time, the matter is stayed pending arbitration. CCP §1281.4. However, this is without prejudice to request to substitute named representative.

<u>B. Motion to Change Venue</u>

Given the Order compelling arbitration and staying the matter, the motion for change of venue is premature.

Defendant is directed to serve notice on all parties within 2 court days of the date of this ruling.

Judge Katherine Bacal

F
Doc ☒
Stat ___
CA ___
AC ___
Conf ___
Notice ___
FW ___
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

Dated and Entered: 04-22-14
Honorable: Thomas P Anderle
Deputy Clerk: Ayala, Monday
Deputy Sheriff: D Allcott
Court Reporter: Sandford, T.

Time: 9:30 am
Dept: SB3
Case No: 1439804

Raphael Roberts vs Santa Barbara Automotive Ltd et al

Present:
☒ P-Atty: Michael Morrison ☐ via Court Call
☒ D-Atty: Raul Zermeno ☐ via Court Call
☐ ☐ via Court Call
☐ ☐ via Court Call

NATURE OF PROCEEDINGS: Motion:Compel Arbitration & Stay or Dismiss Proceeding

☐ No appearance ☐ No Proof of Service ☐ Off calendar ☐ No opposition
☒ Continued to 11-25-14 at 8:30 ☒ a.m. ☐ p.m. in Dept. 3 per:
☒ Court ☐ Plaintiff ☐ Defendant ☐ Stipulation ☒ Case Management

☒ Motion(s) are submitted ☒ with ☐ without argument
☒ Motion ☒ granted ☐ denied
☐ Demurrer ☐ Overruled ☐ Sustained on grounds that _____

_____ is granted

_____ days leave within to ☐ amend ☐ answer
☐ Summary adjudication ☐ granted ☐ denied on grounds that: _____

☒ Case ordered stayed pending the disposition of arbitration.

☒ The Court further ordered that: the attached ruling be adopted.

☐ Order signed and filed
☐ Let an order be prepared
☐ Counsel waived notice
☐ Counsel for _____ is directed to: ☐ give notice ☐ prepare and serve a formal order ☐ have order approved as to form

DARREL E. PARKER, EXECUTIVE OFFICER by: _____, Deputy

state a cause of action, the common count is sufficient. (*Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 793.)

Coster's demurrer to the second cause of action will be overruled.

(3) Fraud

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] ... [¶] This particularity requirement necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered.' [Citation.]" (*Id.* at p. 645, internal quotation marks omitted.)

Coster argues that the allegations of Hernandez's fraud claim are insufficiently specific to meet the particularity required for this action. Hernandez provides the basic information of his fraud claim, namely, that Coster misrepresented the financial condition of the business. This allegation, however, fails to state how, when, where, and by what means these misrepresentations were made. For example, it is not possible to determine if the representations were made orally in person or over the telephone, or in writing by letter or by email. The pleading standard for fraud requires these missing details.

Coster also asserts that allegations of fraudulent intent are insufficient. This is incorrect. "Allegations of the defendant's knowledge and intent to deceive may use conclusive language ...." (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 803.) Hernandez has specifically alleged that in reliance upon the false representations he paid $20,000 and quit his job. These are adequate allegations of justifiable reliance, causation and damages to obtain a business that paid less than was promised.

Coster's demurrer to the fraud cause of action will be sustained, with leave to amend, on the ground that the misrepresentation is not specifically pleaded. The demurrer is overruled as to all other grounds asserted.

(6) **Raphael Roberts v. Santa Barbara Automotive Ltd, et al.**

Motion of Defendants to Compel Arbitration

Ruling:

For the reasons set forth herein, the motion of defendants to compel arbitration is granted. The individual claims of plaintiff Raphael Roberts are ordered to arbitration. This action is ordered stayed pending disposition of the arbitration.

Since this Court is "charged" with this case until it is completed, this Court sets November 25, 2014, at 8:30 am for a Case Management Conference about the "status" of the arbitration matter. No appearance is required if the CMCS for the CMC reports that arbitration has been completed and the Court case is dismissed; otherwise the Court would like a report on the status of the matter. Telephone appearances are permitted.

Background:

In this putative wage and hour class action, employer moves to compel arbitration of the named plaintiff's individual claims.

On January 28, 2014, plaintiff Raphael Roberts filed his complaint asserting eight causes of action against defendants Santa Barbara Automotive, Ltd, and SB Automotive, LP: (1) failure to pay compensation for all hours worked and minimum wage violations; (2) failure to pay overtime compensation; (3) failure to provide meal and rest period compensation; (4) waiting time penalties; (5) failure to provide accurate itemized statements; (6) failure to reimburse or indemnify expenses or losses incurred as a result of performing work duties; (7) conversion; and (8) unfair business practices (Bus. & Prof. Code, § 17200 et seq.)

Roberts asserts these causes of action against defendants on behalf of himself and on behalf of those similarly situated.

Roberts is an auto mechanic. (Roberts decl., ¶ 2.) In or around January 2009, Roberts discussed employment with a representative of defendants for a job at defendants' Santa Barbara dealership. (Roberts decl., ¶ 5.) Between January and March 2009, Roberts traveled to Santa Barbara as part of the application and interview process. (Roberts decl., ¶ 6.) During one of his visits to Santa Barbara on or around March 3, 2009, defendants' service manager, Julio Limon, provided Roberts with a packet of forms that was of approximately 20 to 30 pages and told Roberts he was required to sign all the forms. (Roberts decl., ¶ 7.) Roberts was told that the forms were "standard documents"; Roberts was not told that he was signing an employment contract. (Roberts decl., ¶¶ 8, 9.) Roberts was required to sign the documents as is. (Roberts decl., ¶ 13.) Roberts signed the documents and returned them to Limon. (Roberts decl., ¶ 14.)

At the time Roberts signed the documents, he was not told that he would become an employee of defendants. (Roberts decl., ¶ 15.) Roberts continued the interview process and only several weeks later was officially hired by defendants. (*Ibid.*)

Among the documents signed by Roberts was an "Applicant Statement and Agreement." (Preciato decl., ¶ 7 & exhibit A.) This agreement included a lengthy arbitration provision (also referred to herein as the arbitration agreement), which provides in part:

"I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another ... which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company ... arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract,

statutory, or equitable law, or otherwise, ... shall be submitted to and determined exclusively by binding arbitration."

"I agree and understand that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency ...; however, after I exhaust such administrative process/ investigation, I understand and agree that I must pursue such claims through this binding arbitration procedure."

"I understand and acknowledge that the Company's business and the nature of my employment in that business affect interstate commerce."

"I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. Sec 1280 et seq., including section 1283.05 and all of the Acts other mandatory and permissive rights to discovery)."

"Both the Company and I agree that any arbitration proceeding must move forward under the Federal Arbitration Act (9 U.S.C. §§ 3-4) even though the claims may also involve or relate to parties who are not parties to the arbitration agreement and/or claims that are not subject to arbitration: thus, the court may not refuse to enforce this arbitration agreement and may not stay the arbitration proceeding despite the provisions of California Code of Civil Procedure § 1281.2(c)."

Defendants now move to compel arbitration. Defendants assert that an arbitration agreement exists between defendants and Roberts which is enforceable under the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) as to Roberts's individual claims only.

Roberts opposes the motion to compel. Roberts argues that the arbitration agreement is unenforceable because it is unconscionable, is contrary to public policy, and is tainted with illegality. If Roberts is ordered to arbitration, Roberts argues that either the arbitrator should determine the arbitrability of the class claims or the Court should order arbitration of the class claims.

Analysis:

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

"(a) The right to compel arbitration has been waived by the petitioner; or

"(b) Grounds exist for the revocation of the agreement.

"(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. ..." (Code Civ. Proc., § 1281.2.)

(1) Federal Arbitration Act

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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.)

"For the FAA to apply, a contract must involve interstate commerce." (*Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 212.) The dispute at issue need not arise from the particular part of the transaction involving interstate commerce. (*Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 Cal.App.4th 1092, 1101.) It is sufficient that the contract involved an activity having a substantial relation to interstate commerce. (*Ibid.*)

The arbitration agreement expressly provides that it affects interstate commerce. Roberts provides no contrary evidence that the arbitration agreement has a substantial relation to interstate commerce. Hence, the FAA applies to this agreement.

Prima Paint Corp. v. Flood & Conklin Mfg. Co. (1967) 388 U.S. 395 [87 S.Ct. 1801, 18 L.Ed.2d 1270] and *Southland Corp. v. Keating* (1984) 465 U.S. 1 [104 S. Ct. 852, 79 L.Ed.2d 1] established three basic propositions that are relevant here: "First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts." (*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445-446 [126 S.Ct. 1204, 163 L.Ed.2d 1038].)

There is no dispute that Roberts signed the arbitration agreement and thus defendants have made a prima facie case of the existence of an agreement to arbitration Roberts's claims. Roberts makes a number of arguments that the arbitration agreement is nonetheless unenforceable.

(2) Unconscionability

"[A]fter *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740, 179 L.Ed.2d 742] (*Concepcion*)], unconscionability remains a valid defense to a petition to compel arbitration. Quoting the FAA's saving clause, *Concepcion* reaffirmed that the FAA 'permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract"' [citation], including '"generally applicable contract defenses, such as fraud, duress, or unconscionability ..." [citations]' [citation]. Although courts may not rewrite agreements and impose terms to which neither party has agreed, it has long been the proper role of courts enforcing the common law to ensure that the terms of a bargain are not unreasonably harsh, oppressive, or one-sided. [Citations.] After Concepcion, the exercise of that judicial function as applied to arbitration agreements remains intact, as the FAA expressly provides." (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1142-1143 (*Sonic*).)

"'[U]nconscionability has both a "procedural" and a "substantive" element,' the former focusing on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh"' or '"one-sided"' results. [Citation.] 'The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] 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." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).)

(A) Procedural Unconscionability

Roberts argues that the arbitration agreement is procedurally unconscionable. "The procedural element requires oppression or surprise. [Citation.] Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317, internal quotation marks and citations omitted.)

In support of this argument, Roberts provides evidence that the arbitration agreement was presented for signature, without discussion or negotiation, and among 20 to 30 pages of forms. In addition, the arbitration agreement is printed in small font (approximately 8 point type) in the middle of a larger one-page agreement that begins and ends with matters unrelated to arbitration. Defendants present no evidence to dispute the circumstances in which the arbitration agreement was signed or that the agreement is not adhesive. Consequently, there is strong evidence that the arbitration agreement is procedurally unconscionable.

As noted above, a finding of procedural unconscionability does not end the inquiry.

(B) Substantive Unconscionability

"'Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided. One such form ... is the arbitration agreement's lack of a 'modicum of bilaterality,' wherein the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration. Another kind of substantively unconscionable provision occurs when the party imposing arbitration mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed.' In determining unconscionability, our inquiry is into whether a contract provision was 'unconscionable at the time it was made.'" (*Sonic, supra*, 57 Cal.4th at pp. 1133-1134, internal quotation marks and citations omitted.)

In the context of statutory employment claims under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), the California Supreme Court established

criteria by which such claims would be subject to arbitration. "[S]uch claims are in fact arbitrable if the arbitration permits an employee to vindicate his or her statutory rights. As explained, in order for such vindication to occur, the arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration." (*Armendariz, supra*, 24 Cal.4th at pp. 90-91.) By extension and in the absence of other factors, an arbitration agreement that meets the requirements of *Armendariz* would not be substantively unconscionable.

In portions of the arbitration agreement not quoted above, the arbitration agreement requires arbitration by a retired California Superior Court Judge subject to disqualification on the same basis as would apply to a judge of that court. The arbitration agreement adequately provides for the neutrality of the arbitrator.

The arbitration agreement also expressly provides for discovery incorporating the discovery provisions of Code of Civil Procedure section 1283.05, subdivision (a). Such provisions are adequate for purposes of enforcing arbitration. (*Armendariz, supra*, 24 Cal.4th at p. 105.)

The arbitration agreement expressly provides that the arbitrator shall resolve the dispute solely upon the law governing the claims and that the award must include the arbitrator's reasoned written opinion. These provisions thus permit the limited form of judicial review required for purposes of enforcing arbitration. (See *Armendariz, supra*, 24 Cal.4th at p. 107.)

The arbitration agreement does not expressly provide for limitations on the costs of arbitrations. "[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Armendariz, supra*, 24 Cal.4th at pp. 110-111.)

"[A] mandatory employment arbitration agreement that contains within its scope the arbitration of FEHA claims impliedly obliges the employer to pay all types of costs that are unique to arbitration. Accordingly, we interpret the arbitration agreement ... as providing, consistent with the above, that the employer must bear the arbitration forum costs. The absence of specific provisions on arbitration costs would therefore not be grounds for denying the enforcement of an arbitration agreement." (*Armendariz, supra*, 24 Cal.4th at p. 113.)

Defendants agree that the arbitration agreement implies the obligation that defendants, as the employer, must bear the arbitration forum costs. (Reply, at p. 1.) The Court accepts this interpretation of the arbitration agreement. Accordingly, the arbitration agreement satisfies this last element under *Armendariz*.

Roberts argues that the arbitration agreement is nonetheless substantively unconscionable because it impedes state and federal agencies' prosecutorial authority. Roberts argues that the exception to arbitration regarding the filing of administrative charges is improperly limited to the administrative process and investigation and therefore interferes with the agencies' ability to prosecute defendants in court. (Opposition, at pp. 8-10.)

The arbitration agreement provides for the arbitration of Roberts's own claims. Whether or not the arbitration agreement would, by its terms, require arbitration of claims brought by an administrative agency based upon the conduct Roberts alleges, such claims are not presented here. Roberts brings his claims directly on his own behalf and on behalf of those similarly situated. Roberts does not, for example, allege a claim under the Private Attorneys General Act of 2004 (PAGA) (Labor Code, § 2699 et seq.). There is no substantive unconscionability shown here.

Balancing the procedural and substantive elements of unconscionability, the Court concludes that the arbitration agreement is not unconscionable so as to preclude its enforcement.

(3) Illegality and Public Policy

Roberts further argues that the arbitration agreement is tainted with illegality and contrary to public policy. The illegality asserted by Roberts is that the provision prohibits governmental agencies from instituting a civil action on behalf of Roberts, a waiver of class action claims, and a ban on representative actions brought pursuant to PAGA. With the exception of a waiver of class action claims, discussed below, the illegality, even if these items constituted illegality, is irrelevant to the claims asserted by Roberts in his complaint. Roberts asserts his own claims directly. Illegality is not a basis for refusing to enforce the arbitration provision.

Roberts also asserts that the arbitration provision should not be enforced as contrary to public policy because of a class action waiver.

In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*), the California Supreme Court "concluded that most class action waiver provisions in consumer contracts of adhesion are unconscionable and thus unenforceable. [Citation.] Specifically, the court held class action waivers should not be enforced if 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 the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money ....' [Citation.] The court reasoned that under such circumstances, the waiver is unconscionable because it 'becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another."' [Citation.]" (*Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 500-501 (*Truly Nolen*).)

In *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (Gentry), the California Supreme Court "held that a class action waiver must be invalidated if the trial court concludes, based on [certain stated] factors, that class arbitration is 'likely to be a significantly more effective practical means of vindicating the rights of affected employees than individual litigation or arbitration,' and that there would be a 'less comprehensive enforcement' of the applicable laws if the class action device is disallowed." (*Truly Nolen, supra*, 208 Cal.App.4th at pp. 507-508.)

In *Concepcion*, the United States Supreme Court overruled *Discover Bank*. "Rejecting the argument that a state may require a procedure inconsistent with the FAA because the state seeks

to ensure that parties with 'small-dollar claims' have redress in the legal system, the *Concepcion* court concluded that 'class arbitration, to the extent it is manufactured by [the] *Discover Bank* [rule] rather than consensual, is inconsistent with [and preempted by] the FAA.' [Citation.]" (*Truly Nolen, supra*, 208 Cal.App.4th at p. 504.)

The arbitration agreement here does not expressly contain a class action waiver. However, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." (*Stolt-Nielsen S. A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 684 [130 S.Ct. 1758, 176 L.Ed.2d 605] (*Stolt-Nielsen*).) The arbitration agreement does not provide for class arbitration and there is no evidentiary basis for implying such an agreement here. (See *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 510.) The legal effect, therefore, is equivalent of a class action waiver. Roberts argues this class action waiver is unenforceable as against public policy under *Gentry*.

"The California Supreme Court has not yet revisited *Gentry* after the *Concepcion* and *Stolt-Nielsen* decisions. However, most federal courts and at least one state court have concluded that Concepcion's broad language and reasoning undermines *Gentry*'s rationale. [Citations.]" (*Truly Nolen, supra*, 208 Cal.App.4th at pp. 505-506.) The state court decision cited in *Truly Nolen* was the subject of a grant of review by the California Supreme Court on the precise issue presented here of whether *Gentry* was impliedly overruled by *Concepcion*. (*Iskanian v. CLS Transportation Los Angeles, LLC*, review granted Sept. 19, 2012, S204032.) *Iskanian* has been argued and a decision is expected from the California Supreme Court within 90 days. Based upon the analysis in *Truly Nolen* and other cases, this Court anticipates that the California Supreme Court will determine that *Concepcion* impliedly overruled *Gentry* at least to the extent that the FAA preempts invalidation of arbitration class action waivers on public policy grounds. Thus, the class action waiver implied by law under *Stolt-Nielsen* is valid and enforceable as against Roberts's public policy challenge.

The Court therefore concludes that defendants have shown the existence of an agreement to arbitrate Roberts's individual claims. Roberts has not shown, and the Court does not find, that grounds exist for the revocation of the arbitration agreement.

(4) Class Arbitration

Roberts further argues that if the Court finds an enforceable arbitration agreement as to his individual claims, the Court should further order the class claims to arbitration or send the issue to the arbitrator. "Unless an arbitration agreement expressly provides otherwise, a dispute regarding the scope of a contractual duty to arbitrate is subject to judicial resolution." (*City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1093.) The issue of whether the scope of the arbitration agreement includes class-wide arbitration is therefore a question to be resolved by this Court. As discussed above, under *Stolt-Nielsen*, class arbitration can be ordered only if the arbitration agreement provides for such arbitration. The arbitration agreement here does not so provide.

Consequently, Roberts's request for class-wide arbitration will be denied and Roberts's request that the issue be referred to the arbitrator will be denied.

(5) Discovery

Roberts also requests "limited discovery" related to the issues raised by this motion. Although under some circumstances discovery may be appropriate, Roberts has not shown that such discovery would be appropriate here. This request is denied.

(6) Stay

For the reasons set forth above, the Court will grant the motion of defendants to compel arbitration and order Roberts's individual claims to arbitration.

"If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies." (Code Civ. Proc., § 1281.4.)

Defendants move to stay this action pending disposition of the arbitration. The motion to stay will be granted.

(7) Evidentiary Matters

Defendants have one objection to the declaration of Raphael Roberts. The objection is sustained.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

WILLIAM A. LUJAN, individually and on behalf of other persons similarly situated, Plaintiff, v. CENTURY FOODS, INC., a California Corporation, and DOES 1-50, Defendants.	LASC Case No: BC513815 COURT'S RULING AND ORDER RE: DEFENDANT CENTURY FOODS, INC.'S MOTION TO COMPEL ARBITRATION ON AN INDIVIDUAL BASIS, STRIKE CLASS ALLEGATIONS, AND STAY THE PROCEEDINGS PENDING ARBITRATION Hearing Date: February 26, 2014

I.

BACKGROUND

Plaintiff William Lujan sued his employer, Century Fast Foods, Inc. ("Century") in this putative class action for various violations of California wage-and-hour law. Defendant Century operates at least 40 Taco Bell franchise locations throughout Los Angeles County and other counties in California.[1] Plaintiff alleges claims for failure to reimburse expenses (Labor Code

[1] See Complaint, ¶8.

§2802); failure to provide meal breaks (Labor Code §226.7); failure to provide rest breaks (Labor Code §226.7), failure to pay minimum wages (Labor Code §§1194 and 1197); failure to furnish accurate wage statements (Labor Code §226); failure to pay all wages upon cessation of employment (Labor Code §§201 and 202); and unfair competition (Business & Professions Code §§17200, et seq.). Plaintiff brings the action on behalf of the following classes:

> Reimbursement Class: All current and former hourly paid food service employees of Century Foods, Inc. who, at any time beginning four (4) years prior to the filing of the complaint through the date notice is mailed to the class, were required to purchase non-slip shoes and did not receive reimbursement for said purchase.
>
> Meal and Rest Period Class: All current and former hourly paid food service employees of Century Foods, Inc. who, at any time beginning four (4) years prior to the filing of the complaint through the date notice is mailed to the class, were not permitted to leave the location of their employment with Century Foods, Inc. during their one-half hour meal period, or during their on-the-clock rest periods.
>
> Minimum Wage Class: All current and former hourly paid food service employees of Century Foods, Inc. who, at any time beginning four (4) years prior to the filing of the complaint through the date notice is mailed to the class, were not paid the statutory minimum wage for all hours worked.
>
> Paystub Class: All current and former hourly paid food service employees of Century Foods, Inc. who, at any time beginning one (1) year prior to the filing of the complaint through the date notice is mailed to the class, did not receive wage statements that accurately reflected all hours worked, all wages earned, and all wage penalties earned.
>
> Former Employee Class: All former hourly paid food service employees of Century Foods, Inc. who, at any time beginning three (3) years prior to the filing of the complaint through the date notice is mailed to the class, did not receive all wages owed them upon cessation of the employment relationship as required by Labor Code §§201 and 202.[2]

Defendant Century moves for an order compelling arbitration of Plaintiff Lujan's individual claim, striking the class allegations, and staying proceedings pending completion of

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[2] Complaint, ¶18.

the arbitration. For the reasons discussed *infra,* the motion to compel arbitration is granted, the class allegations are stricken, and the litigation is stayed, pending completion of the arbitration.

II.

DISCUSSION

A. Standards on Petitions/Motions to Compel Arbitration

"A written agreement to submit to arbitration a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." CCP §1281. California has a strong public policy in favor of arbitration. *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 9.

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and where a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate if it determines an agreement to arbitrate the controversy exists. CCP §1281.2; *Gorlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505 (noting that "when presented with a petition to compel arbitration, the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute").

The initial burden is on the party petitioning to compel arbitration to prove the existence of the agreement by a preponderance of that evidence. *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1230. Once petitioners allege that an arbitration agreement exists, the burden shifts to respondents to prove the falsity of the purported agreement, and no evidence or authentication is required to find the arbitration agreement exists. *Condee v. Longwood Mgt. Corp.* (2001) 88 Cal.App.4th 215, 219. *See also Brodke v. Alphatec Spine Inc.* (2008) 160 Cal.App.4th 1569, 1575-76 (petition or motion to compel arbitration must allege arbitration

agreement exists, and cannot contest it). *But see Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412, 423-24 ("in considering a Code of Civil Procedure section 1281.2 petition to compel arbitration, a trial court must make the preliminary determinations whether there is an agreement to arbitrate and whether the petitioner is a party to that agreement (or can otherwise enforce the agreement)."); *Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 633 ("petitioner bears the burden of proving the existence of a valid arbitration agreement...."); *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1284 ("'petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence....'"); *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 (as to a petition to compel arbitration, "petitioner bears the burden of proving its existence by a preponderance of the evidence."); *Banner Ent., Inc. v. Sup. Ct.* (1998) 62 Cal.App.4th 348, 356 (citing *Rosenthal, supra*).

"'Absent a *clear agreement* to submit dispute to arbitration, courts will not infer that the right to a jury trial has been waived.' [Citation.]" *Sparks v. Vista Del Mar Child & Family Services* (2012) 207 Cal.App.4th 1511, 1518 (emphasis added).

B. Analysis

1. Agreement to Arbitrate?

As the party moving for arbitration, the burden is on Defendant Century Fast Food to prove, by a preponderance of the evidence, that an agreement to arbitrate exists between Plaintiff Lujan and the Defendant.

During his application process, Plaintiff was given a job application form.[3] He states that he was told by the store manager, Jesse Suarez, that he needed to fill out the application, sign, and date it.[4] The form contained the following arbitration clause:

> **Agreement to Arbitrate.** Because of the delay and expenses of the court systems, TACO BELL and I agree to use confidential binding arbitration, instead of going to court, for any claims that arise between me and TACO BELL, *its related companies*, and/or their current or former employees. Without limitation, such claims would include any *concerning compensation, employment (including, but not limited to, any claims concerning sexual harassment or discrimination), or termination of employment.* Before arbitration, I agree (i) first to present any such claims in full written detail to TACO BELL; (ii) next, to complete any TACO BELL internal review process; and (iii) finally, to complete any external administrative remedy (such as with the Equal Employment Opportunity Commission). In any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration will apply, except that TACO BELL will pay that portion of the arbitration filing fee in excess of the similar court filing fee had I gone to court.[5]

By its terms, the agreement to arbitrate was with "Taco Bell", its "related companies," and/or their current or former employees. According to Plaintiff, "Taco Bell" was not his employer; it was Defendant, Century Fast Foods, Inc.

Generally, "[a]rbitration is recognized as a matter of contract, and a party cannot be forced to arbitrate something in the absence of an agreement to do so.' [Citation]" *Arista Films, Inc. v. Gilford Securities, Inc.* (1996) 43 Cal.App.4th 495, 501. However, certain persons who did not sign the agreement to arbitrate may be entitled to enforce it and prosecute the arbitration in their own names. See California Practice Guide, Alternative Dispute Resolution, ¶5:262 (The Rutter Group 2013) (citing *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 Cal.App.4th 761, 772).

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[3] Declaration of William A. Lujan, ¶4.

[4] *Id.*

[5] See Exhibit A to Declaration of Sheila Cook at 2 (emphasis added).

For instance, if the arbitration clause encompasses claims against a contracting party's employees *or associates*, those persons may compel arbitration of claims against them. California Practice Guide, Alternative Dispute Resolution, ¶5:265.7 (The Rutter Group 2013) (citing *Michaelis v. Schori* (1993) 20 Cal.App.4th 133, 139 and *Gravallis v. Coldwell Banker Residential Brokerage Co., supra,* 143 Cal.Ap.4th at 772).

Significantly, Plaintiff alleges at ¶8 of the Complaint that Defendant Century Foods "is a California corporation [which] is located in Los Angeles, California, *and operates Taco Bell franchises.*"[6] At the very least, this allegation can be reasonably read to mean that Defendant Century Foods is an "associate" of Taco Bell. The allegation constitutes a judicial admission that Defendant and Taco Bell are "associates"- notwithstanding the fact that Taco Bell itself is not a defendant in the litigation. *See Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 614-615 (finding in that case that all nonsignatory defendants to an arbitration agreement were entitled to arbitrate as agents of signatories to the agreement based on the complaint that made that allegation (a binding judicial admission)).

Accordingly, the Court finds that Defendant Century Foods, Inc. has standing to enforce the agreement.

2. Plaintiff's Minority Status

Plaintiff argues that because he was a minor at the time he entered into the arbitration agreement (Plaintiff states that he was seventeen (17) years old at the time he applied for his job on October 12, 2012, and did not turn eighteen until January 2013),[7] the arbitration provision is invalid.

Family Code §6700 provides:

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[6] Complaint, ¶8; see also ¶14 (emphasis added).

[7] Declaration of William Lujan, ¶¶2-3.

> Except as provided in Section 6701,[8] a minor may make a contract in the same manner as an adult, subject to the power of disaffirmance under Chapter 2 (commencing with Section 6710), and subject to Part 1 (commencing with Section 300) of Division 3 (validity of marriage).

Section 6710, in turn, provides that "[e]xcept as otherwise provided by statute, a contract of a minor may be disaffirmed by the minor *before majority* or *within a reasonable time afterwards* or, in case of the minor's death within that period, by the minor's heirs or personal representative." (Emphasis added.)

Plaintiff states that he was employed by Century Fast Foods, Inc. at its Chatsworth Taco Bell franchise location during the period November 2, 2012 through February 12, 2013.[9] The instant litigation was filed on July 2, 2013. As noted above, Plaintiff turned eighteen (i.e., the age of majority) in January 2013. There is nothing in the Lujan Declaration, however, which indicates that Plaintiff attempted to "disaffirm" the provision in the arbitration agreement before he reached the age of majority, or within a reasonable time after that. The circumstances of Plaintiff leaving his employment on February 12, 2013 are unclear, but there is nothing which demonstrates that Plaintiff disaffirmed the arbitration provision prior to leaving his position.

Under these circumstances, the Court determines that Plaintiff's minority status, at the time he entered employment with Defendant, does not stand as a defense to the arbitration agreement.

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[8] Section 6701 states:

> A minor cannot do any of the following:
>
> **(a)** Give a delegation of power.
>
> **(b)** Make a contract relating to real property or any interest therein.
>
> **(c)** Make a contract relating to any personal property not in the immediate possession or control of the minor.

[9] Lujan Decl., ¶7.

3. Unconscionability

Unconscionability in the arbitration context is something that denies "minimum levels of integrity" to the process. *Graham v. Scissor-Tail* (1981) 28 Cal.3d 807, 820. "[U]nconscionability has both a 'procedural' and a 'substantive' element," the former focusing on " 'oppression' " or " 'surprise' " due to unequal bargaining power, the latter on " 'overly harsh' " or " 'one-sided' " results." *Armendariz v. Foundation Health Psychcare Servs.* (2000) 24 Cal.4th 83, 114. If ***both*** elements of unconscionability are present, the Court must decline to enforce the arbitration agreement. *Id.* The *Armendariz* court also noted, however, that substantive and procedural unconscionability need not be present to the same degree, and that a "sliding scale" is invoked (i.e., the more substantively unconscionable the contract term, the less evidence of procedural unconscionability need be shown, and vice-versa). *Id.*

Recently, in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, the California Supreme Court noted:

> [A]fter [*AT&T Mobility LLC v.*] *Concepcion* [(2011) 131 S.Ct. 1740], unconscionability remains a valid defense to a petition to compel arbitration. Quoting the FAA's saving clause, *Concepcion* reaffirmed that the FAA "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract' " (*Concepcion, supra*, 563 U.S. at p. ___ [131 S. Ct. at p. 1746], quoting 9 U.S.C. § 2), including " 'generally applicable contract defenses, such as fraud, duress, or unconscionability ...' [citations]" (*Concepcion*, at p. ___ [131 S. Ct. at p. 1746]). Although courts may not rewrite agreements and impose terms to which neither party has agreed, it has long been the proper role of courts enforcing the common law to ensure that the terms of a bargain are not unreasonably harsh, oppressive, or one-sided. [Citation.] After *Concepcion*, the exercise of that judicial function as applied to arbitration agreements remains intact, as the FAA expressly provides. *Sonic-Calabasas A, Inc., supra,* 57 Cal.4th at 1142-1143.

Parties opposing arbitration have the burden to prove any fact necessary to a defense to enforcement. *Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 579; *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 795. In this case, the burden to demonstrate unconscionability falls on Plaintiff Lujan.

a. Procedural Unconscionability

"The procedural element focuses on two factors: 'oppression' and 'surprise.' [Citations.] 'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.'[Citations.] 'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal. App. 3d 473, 486. When the weaker party is presented the clause and told to "take it or leave it" without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present. *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal. App. 4th 1322, 1329; see also *Thompson v. Toll Dublin, LLC* (2008) 165 Cal.App.4th 1360, 1372.

The arbitration provision is set forth *supra.* The arbitration provision was presented on a "take it or leave it" basis to Plaintiff Lujan, and there was no opportunity for him to negotiate the Agreement to Arbitrate.[10] As such, the Court finds that "oppression" is present in the arbitration agreement. Moreover, the Court determines the arbitration agreement was a contract of adhesion.

There is a significant element of "surprise" in the agreement. The arbitration provision is written in very small font at the very end of the employment application (right above where Plaintiff signed the employment application). Lack of prominence is one factor the Court may consider in determining if the clause is procedurally unconscionable. *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89. It is not a separate, stand-alone arbitration agreement. In fact, the arbitration provision appears under the heading "Agreement", along with other subheadings such as "Nature of My Employment," "My Participation in TACO BELL's Drug Free Environment," "My

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[10] See Lujan Decl., ¶4.

Records and References," and "Information Certification." There is nothing else to distinguish the language in the arbitration provision from the rest of the agreement.

For instance, there is no bold-faced lettering, or anything else to make the arbitration agreement stand out from the rest of the application. Further, Plaintiff was not asked to separately initial the arbitration provision. *See, e.g., Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950, 959-960 (finding judicial reference provision in a home purchase contract contained no element of surprise when the provision was clearly written, entirely capitalized and initialed by the buyer and seller); *overruled on other grounds by Tarant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 545, n.5).

Finally, the failure to provide a copy of the arbitration rules to which the employee would be bound supports a finding of procedural unconscionability. *See, e.g., Sparks v. Vista Del Mar Child & Family Services, supra,* 207 Cal.App.4th at 1523; *Trivedi v. Curexo Technology Corp., supra,* 189 Cal.App.4th at 393; *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1146; *Zullo v. Inland Valley Publishing Co.* (2011) 197 Cal.App.4th 477, 485-486. Plaintiff was not provided a copy of any arbitration rules.

For these reasons, the Court finds the arbitration agreement is procedurally unconscionable, as it contains both oppression and surprise.

b. Substantive Unconscionability

The Court must next examine whether the Agreement is also substantively unconscionable.

"No precise definition of substantive unconscionability can be proffered. Cases have talked in terms of 'overly harsh' or 'one-sided' results. [Citations.] One commentator has pointed out, however, that '. . . unconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it.' [citation], which is only to say that substantive unconscionability must be evaluated as of the time the contract was made. [Citation.] The most

detailed and specific commentaries observe that a contract is largely an allocation of risks between the parties, and therefore that a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner." *A & M Produce Co. v. FMC Corp., supra*, 135 Cal. App. 3d at 487.

Further, pursuant to *Armendariz* and a line of other authorities, claims brought under the Fair Employment and Housing Act (FEHA) are subject to arbitration if there are provisions for arbitrator neutrality, discovery, written decisions, and expense limits. *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal. App. 4th 267, 273; *Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal. App. 4th 708, 716; *Armendariz v. Foundation Health Psychcare Services, Inc., supra* (2000) 24 Cal.4th 83, 96-121; *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 422-23; *Blake v. Ecker* (2001) 93 Cal.App.4th 728, 433, overruled in part on other grounds by *Le Francois v. Goel* (2005) 35 Cal.4th 1094. This rule has also been extended to non-FEHA employment claims. *Mercuro v. Sup. Ct.* (2002) 96 Cal. App. 4th 167, 180 n. 26 (*Armendariz* scrutiny also applies to non-FEHA employment claims).

With these requirements in mind, the parties agreed that "[i]n any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration [sic] will apply, except that TACO BELL will pay the arbitrator's fees, and TACO BELL will pay that portion of the arbitration filing fee in excess of the similar court filing fee in excess of the similar court filing fee had I gone to court."[11]

This arbitration provision is somewhat vague. While the agreement may very well have been referring to requiring arbitration under the rules of the American Arbitration *Association* ("AAA"), the agreement does not say this. Nevertheless, "[d]etermining the validity of an arbitration clause, like the interpretation of any contract, is a question of law unless the issue turns on the credibility of extrinsic evidence. ... The burden is on 'the party opposing arbitration

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[11] See Cook Decl., Exh. A.

to demonstrate that an arbitration clause *cannot* be interpreted to require arbitration of the dispute. Any doubt on the issue must be resolved in favor of arbitration." *Buckhorn v. St. Jude Heritage Medical Group* (2004) 121 Cal.App.4th 1401, 1406 (internal citations omitted).

In the Court's view, the Plaintiffs have not demonstrated that the arbitration clause cannot be interpreted to require arbitration under the rules of the AAA. Under the Court's interpretation of the provision, the only reasonable meaning of the clause is an agreement to arbitrate under AAA rules. As such, the Court determines that the provision requiring arbitration under the rules of "the American Arbitration" intended to require arbitration under the rules of "the American Arbitration Association."[12]

The Court turns to the remainder of the arbitration agreement. First, the agreement requires the Plaintiff "to use confidential binding arbitration, instead of going to court, for any claims that arise between me and TACO BELL...." While Defendant Century claims (and the Court agrees) that the Plaintiff's discovery rights are protected under the rules of the AAA (specifically, Rule 9), the requirement that the arbitration be "confidential" may very well infringe on the right of Plaintiff to conduct discovery to support his claims. Plaintiff claims the provision requiring the arbitration to remain "confidential" would result in him being barred from interviewing witnesses, seeking declarations from co-workers, or conducting any meaningful third party investigation.[13] This, in the Court's view, is a reasonable interpretation of the "confidential" requirement of the arbitration. As such, the Court finds this provision is substantively unconscionable.

Further, the agreement requires Plaintiff to complete a three-part internal procedure process before he can even *instigate* his arbitration claim. In particular, Plaintiff must: 1) present

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[12] Even so, "[a]n agreement to arbitrate is enforceable even if it does *not* designate the ADR provider and makes no mention of the rules to govern the arbitration process." See California Practice Guide, Alternative Dispute Resolution, ¶8:83 (The Rutter Group 2013) (emphasis supplied by Practice Guide).

[13] Plaintiff's Opposition at 12:10-11.

any claims in "full written detail" to Taco Bell; 2) complete any Taco Bell internal review process; and 3) complete any external administrative remedy (such as with the Equal Employment Opportunity Commission). There is no similar requirement imposed on Defendant before it can instigate a claim against Plaintiff, and this serves to "chill" Plaintiff's right to bring an arbitration proceeding. In any event, these provisions are also vague, as they make reference to "any Taco Bell internal review process" and "any external administrative remedy." Rhetorically, what other types of administrative remedies are there, besides those before the EEOC? The Court determines the provision is substantively unconscionable. Significantly, one federal court has found the same provision substantively unconscionable. *See Collins v. Taco Bell Corp.*, 2013 U.S. Dist. LEXIS 108951 at *24.

With respect to arbitrator neutrality and written decisions, there is no specific reference to these in the arbitration agreement. However, the rules of the AAA do require a neutral arbitrator experienced in the field of employment law (Rule 12), and a written decision (Rule 39(c)).[14] There is also no limitation of damages imposed under the agreement, and Rule 39(d) of the AAA rules allows an arbitrator to "grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law."[15]

As to the cost provision, the agreement provides that Taco Bell will pay the arbitrator's fees, and will pay that portion of the arbitration filing fee in excess of the similar court filing fee had the case gone to court. This clause places an expense limit on the costs Plaintiff would be required to pay, and thus, satisfies this requirement of *Armendariz*.

As such, the Court determines that the agreement is substantively unconscionable as to the "confidential" portion of the agreement, and as to the three-part "investigation" procedure

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[14] See Giamela Decl., Exh. B.

[15] Giamela Decl., Exh. B, Rule 39(d).

contemplated in the agreement. However, the remaining criteria under *Armendariz* are generally satisfied: 1) due to the incorporation of the AAA Rules; and 2) by the face of the agreement itself (i.e., arbitrator neutrality, discovery, written decisions, and expense limits).

Severance of Substantively Unconscionable Provisions

Civil Code §1670.5(a) provides that "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

Trial courts have some discretion as to whether to sever unenforceable provisions, or refuse to enforce the entire agreement, including where inconsistent adjudications would result. *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1411. *See also Armendariz, supra,* 24 Cal.4th at 122 (noting that a trial court has discretion to refuse to enforce an entire agreement if it is "permeated" by unconscionability). "An arbitration agreement can be considered permeated by unconscionability if it 'contains more than one unlawful provision .... Such multiple defects indicate a systematic effort to impose arbitration ... not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage.'" *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 826. "The overarching inquiry is whether ' "the interests of justice ... would be furthered" ' by severance." *Armendariz, supra,* at 124 (citing *Benyon v. Garden Grove Medical Group* (1980) 100 Cal.App.3d 698, 713).

Here, the Court will sever the provisions requiring a three-part internal review procedure from the Agreement, as well as the "confidential" nature of the arbitration, and will enforce the remainder of the agreement. With the severance of these two provisions, the remainder of the agreement is not substantively unconscionable, and the Court determines that the interests of justice would be furthered by severance.

Conclusion on Unconscionability

The Court finds the agreement is procedurally unconscionable, as it contains significant elements of both oppression and surprise. The Court, pursuant to Civil Code §1670.5(a), severs from the agreement the substantively unconscionable provisions requiring a three-part internal review procedure and the "confidential" arbitration requirement. Under the "sliding scale" referenced under *Armendariz*, the agreement has a great degree of procedural unconscionability, with no substantive unconscionability (following the severance of the two substantively unconscionable provisions). Since both procedural and substantive unconscionability must be present to deem the agreement unconscionable, and since only procedural unconscionability is present in the agreement, the Court determines the agreement is not unconscionable. The arbitration agreement will be enforced.

4.. Class arbitration

Defendant also seeks an order striking the class allegations. In *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, the U.S. Supreme Court essentially reversed *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148. The Court commented that "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion,* 131 S.Ct. at 1748. Significantly, the arbitration provision in that case specifically required a waiver of any class arbitration claims.

Concepcion referenced *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp., supra,* 130 S.Ct. 1758. In *Stolt-Nielsen,* the Supreme Court held in pertinent part that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen,* 130 S.Ct. at 1775 (emphasis in original).

Here, as noted *supra*, there was no class action waiver, and nothing stating that any party agreed to class arbitration. The arbitration agreement Plaintiff Lujan signed was completely silent on class arbitration (despite Plaintiff's assertion that he "vigorously" contests that the agreement itself does not reference class arbitration). Under these circumstances, the Court determines *Stolt-Nielsen* is controlling with respect to Plaintiff's claims, and Defendants could not be compelled to defend the claims in any class arbitration proceeding. The appropriate remedy is to strike the class allegations from the Complaint.

Plaintiff claims the AAA employment arbitration rules provide that the "arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law." Plaintiff submits that since any remedy available ***in court*** should be available through arbitration classwide resolution would be available through arbitration. While this is a novel argument, this does not overcome *Stolt-Nielsen* and *Concepcion*. Further, a class action itself is not a "remedy"; it is a procedural device utilized by courts to more efficiently manage cases.

Plaintiff also raises additional arguments as to class arbitration, including his assertions that: 1) the class action ban violates 29 U.S.C. §8(a)(1) and 29 U.S.C. §102-103 because it bars workers from exercising their right to engage in the concerted activity of petitioning courts or arbitral bodies for redress of grievances on behalf of a group; 2) the NLRA protects all forms of concerted activity by employees to improve wages or working conditions, and the class action ban is unenforceable on that ground; 3) the agreement eliminates the parties' substantive rights; and 4) the Court should give equal credence to the FAA, the Norris-LaGuardia Act ("NLA"), and the National Labor Relations Act ("NLRA"). Again, however, these arguments do not overcome clear precedent under *Concepcion* and *Stolt-Nielsen,* and are not persuasive.

Plaintiff submits that, assuming arguendo there is an enforceable arbitration agreement, it is the arbitrator's role – not the Court's – to determine the arbitrability of the class claims. This

is an open question. Generally, "[u]nless the parties clearly and unmistakably provide otherwise, the question whether they agreed to arbitrate the particular dispute is to be decided by the court, not the arbitrator." California Practice Guide, Alternative Dispute Resolution, ¶5:212 (The Rutter Group 2013) (citing *First Options of Chicago, Inc. v. Kaplan* (1995) 514 US 938, 944, 115 S.Ct. 1920, 1924; see *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 US 79, 83–84, 123 S.Ct. 588, 591–592; *Parker v. Twentieth Century–Fox Film Corp.* (1981) 118 CA3d 895, 901, 173 CR 639, 641). Moreover, "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam v. Dean Witter Reynolds, Inc., supra,* 537 U.S. at 84. "Whether or not a (party) is bound to arbitrate, as well as *what issues* it must arbitrate, is a matter to be determined by the court, and a party cannot be forced to 'arbitrate the arbitrability question[.]'" *Doe v. Princess Cruise Lines, Ltd.* (11th Cir. 2011) 657 F.3d 1204, 1213.

Recently, in dicta, the U.S. Supreme Court commented on the "unsettled nature" of this issue, commenting:

> Those questions – which 'include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy' – are presumptively for courts to decide. [Citation.] A court may therefore review an arbitrator's determination of such a matter *de novo* absent 'clear[] and unmistakabl[e]' evidence that the parties wanted an arbitrator to resolve the dispute. [Citation.] *Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability. [Citation.] *Oxford Health Plans, LLC v. Sutter* (2013) 133 S.Ct. 2064, 2068, fn.2.

As such, given the general presumption that courts are to decide whether the parties agreed to arbitrate a dispute, it is within the Court's authority to resolve whether the class action claim is arbitrable. The Court determines in this case that the class allegations are not arbitrable, pursuant to *Stolt* and *Concepcion.*

III.

RULING AND ORDER

For the foregoing reasons, the motion to compel arbitration is granted. The Court determines there was a valid agreement to arbitrate between the parties. While the Court finds the agreement is procedurally unconscionable, and contains two substantively unconscionable provisions, the remainder of the agreement is not substantively unconscionable. The Court severs the provisions requiring a three-part internal review procedure from the Agreement, as well as the "confidential" nature of the arbitration, and will enforce the remainder of the agreement. The Court strikes the class allegations, and stays the litigation pending completion of the arbitration of Plaintiff Lujan's individual claim.

The parties shall commence and complete arbitration pursuant to the rules of the American Arbitration Association. The Court sets a non-appearance review for June 13, 2014. The parties shall submit a joint brief by noon on June 12, 2014, notifying the Court of the status of the arbitration.

Dated: March 10, 2014

KENNETH R. FREEMAN

Kenneth Freeman
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/04/14			DEPT. 322
HONORABLE AMY D. HOGUE	JUDGE	N. NAVARRO	DEPUTY CLERK
HONORABLE #2	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. CARRILLO, C.A.	Deputy Sheriff	NONE	Reporter

10:00 am	BC525591	Plaintiff Counsel	PAUL HAINES (X)
	EDWIN GREGORIANS VS ATV INC ET AL	Defendant Counsel	LONNIE GIAMELA (X)

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANTS ATV, INC. AND AMERICAN TIRE DEPOT, INC. TO COMPEL ARBITRATION AND STAY PROCEEDINGS PENDING ARBITRATION

The parties are provided with the Court's tentative ruling.

The matter is called for hearing and argued.

Motion of Defendants to Compel Arbitration and Stay Proceedings is GRANTED.

The Court's "ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION" is signed and filed this date.

Moving party is to give notice.

MINUTES ENTERED
02/04/14
COUNTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

EDWIN GREGORIANS, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

ATV, INC. dba AMERICAN TIRE DEPOT; AMERICAN TIRE DEPOT, INC.; and DOES 1 through 10,

Defendants.

Case No.: BC525591

[~~TENTATIVE~~] ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION

Hearing Date: February 4, 2014
Time: 10:00 A.M.
Dept.: 322

Defendants ATV, Inc. and American Tire Depot, Inc. move for individual arbitration of Plaintiff's wage and hour claims in this putative class action. Because Plaintiff signed an enforceable arbitration agreement with Defendant ATV, which covers the claims at issue in this action that waived his right to pursue his claims as a class action, the Court GRANTS the motion to compel. Moreover, because Plaintiff alleges that Defendant American Tire Depot, Inc. acted as a single, cohesive unit with Defendant ATV, Plaintiff is equitably estopped from seeking to avoid arbitration as against American Tire Depot. However, binding decisional authority clearly holds that Plaintiff's representative claim for under the Private Attorneys General Act is cannot, as a

matter of law, constitute an "individual" claim and that Plaintiff had no authority to waive the right to bring a law enforcement action under that statute. Accordingly, the motion to compel individual arbitration of Plaintiff's individual (i.e., non-PAGA) claims is GRANTED and Plaintiff's class action allegations are DISMISSED WITH OUT PREJDUCIE. As to Plaintiff's PAGA cause of action, Defendant only seeks to compel arbitration of Plaintiff's individual cause of action and has, therefore, not sought arbitration of Plaintiff's unwaivable representative PAGA cause of action.

I. Introduction:

Plaintiff Edwin Gregorians brought the this putative class action suit on October 24, 2013 alleging various wage and hour claims against Defendants ATV, Inc. dba American Tire Depot and American Tire Depot, Inc. Plaintiff alleges class and individual claims for:

- Unpaid overtime;
- Unpaid meal period premiums;
- Failure to provide accurate wage statements;
- Waiting time penalties
- Violation of the Unfair Competition Law ("UCL," Bus. & Prof. Code § 17200);
- Civil penalties under the Private Attorneys General Act ("PAGA," Lab. Code § 2698);

In the Complaint, Plaintiff makes no distinction between Defendant ATV and Defendant American Tire Depot. Rather, Plaintiff alleges that he "was employed by Defendants as an hourly non-exempt employee" and was subject to "Defendants polices and/or practices complained of" in the Complaint. (Comp., ¶ 3.) That is, Plaintiff alleges that Defendants ATV and American Tire Depot jointly acted as a single employer. Indeed, Plaintiff alleges that ATV and American Tire Depot are a single unit, asserting that, together, "Defendants are **one** of the leading independent tire companies in the United States… ." (Comp., ¶ 6 [emphasis added].)

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Consistent with those allegations, Defendants jointly move to compel arbitration pursuant to an arbitration agreement that Plaintiff signed on September 11, 2012. The agreement provided that, subject to certain express exceptions not relevant here:

> "Company and Employee agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to Employee's employment, including but not limited to the termination of Employee's employment and Employee's compensation. Employee and Company each specifically waive and relinquish their right to bring a claim against the other in a court of law, and this waiver shall be equally binding on any person who represents or seeks to represent Employee or Company in any lawsuit against the other in a court of law. Both Employee and Company agree that any claim, dispute, and/or controversy that Employee may have against Company (or its owners, directors, officers, managers, employees or agents) or Company may have against Employee shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ("FAA"), and to the extent that they do not conflict with the terms of the Agreement, in conformity with the procedures of the California Arbitration Act... ."

(Decl. of Ashjian, Exh. A, ¶ 3.) The agreement provided that "[a]wards shall include the arbitrator's written reasoned opinion." (Decl. of Ashjian, Exh. A, ¶ 4.) With respect to review of the arbitrator's decision, the parties agreed that "[w]ithin thirty days of the arbitrator's final written opinion and order, the opinion shall be subject to affirmation, reversal, or modification, at either party's written request, following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following a court trial." (Decl. of Ashjian, Exh. A, ¶ 6.)

The arbitration agreement at issue further stated any arbitration "will not proceed as a class action, collective action, private attorney general action or any similar representative action." (Decl. of Ashjian, Exh. A, ¶ 5.) However, that provision notwithstanding, the arbitration agreement also provided Plaintiff an opportunity to opt-out of the representative action waiver. Namely, in signing the agreement, Plaintiff acknowledged that:

> "the terms of this Agreement include a waiver of any substantive or procedural rights I may have to bring an action on a class, collective, private attorney general, representative, or other similar basis. However, Due to the nature of this waiver, the Company has provided me with the ability to chosoe to retain these rights by affirmatively checking the box at the end of this paragraph."

(Decl. of Ashjian, Exh. A, ¶ 9.) Plaintiff did not check the box, which would have preserved his rights to assert class or representative claims in arbitration. (Decl. of Ashjian, Exh. A, ¶ 9.)

Finally, the arbitration agreement included a severance clause, agreeing: "[i]f any term or provision, or portion of this Agreement is declared void or unenforceable it shall be severed and the remainder of this Agreement shall be enforceable." (Decl. of Ashjian, Exh. A, ¶ 10.)

Plaintiff declares that he was provided with the arbitration agreement "[p]rior to beginning [his] employment with Defendants ATV, Inc., and American Tire Depot, Inc." (Decl. of Gregorians, ¶ 1.) Plaintiff further declares that "[w]hen the arbitration agreement ... was provided to [him], no one explained to [him] what an arbitration was, and [he] did not know what an arbitration was until after the filing of this lawsuit." (Decl. of Gregorians, ¶ 2.) Plaintiff states that it was his "understanding that these were standard new-hire paperwork that [he] needed to complete in order to be eligible for employment with Defendants." (Decl. of Gregorians, ¶ 2.)

Defendants now move for individual arbitration and move to dismiss Plaintiff's class and representative claims and to stay the action pending arbitration. Plaintiff opposes.

II. Analysis

Before addressing the areas of dispute, it is worth noting several points which Plaintiff does not dispute. Defendants contend that the agreement falls under the scope of the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*) and that the agreement covers the wage and hour claims at issue in this action. (Mtn., pp. 2, 4.) Plaintiff does not oppose the motion on either of these grounds. Rather, Plaintiff opposes the motion on the grounds that: "(1) [the arbitration agreement] is procedurally and substantively unconscionable, (2) there is no agreement to arbitrate between Plaintiff and Defendant American Tire Depot, Inc., and (3) Plaintiff's representative claim for civil penalties brought under the [PAGA] should not be compelled to arbitration on an individual basis...." (Opp., p. 2.)

A. The Arbitration Agreement is Not Unconscionable

As with any other contractual term, a contract term providing for arbitration is subject to the general contract defense of unconscionability. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114; *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687.) "[T]he party asserting unconscionability as a defense has the burden of establishing that condition." (*Woodside Homes of California, Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 727.) "[U]nconscionability has both a 'procedural' and a 'substantive' element. (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.) Procedural and substantive unconscionability "must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1533 [emphasis in original].)

"[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." (*Armendariz v. Foundation Health Psychcare Services, Inc., supra*, 24 Cal.4th at 114.) Nevertheless, no matter how procedurally unconscionable, a contract term that is not also substantively unconscionable is enforceable. "Even if the manner of formation of a contract involves oppression and thereby satisfies the procedural unconscionability element, the challenged provision is unenforceable only if it is unduly unfair or oppressive in substance." (*Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 583 fn.5.) "A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to 'shock the conscience.'" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 [internal quotes omitted].) The party resisting a motion to compel arbitration on the grounds that it is unconscionable bears the burden of proving unconscionability by substantial evidence. (*Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 692.)

Because the Court concludes as discussed below that Plaintiff has not met his burden to demonstrate by substantial evidence that the arbitration agreement is substantively unconscionable, the Court need not address Plaintiff's additional claims that the agreement is procedurally unconscionable.

1. Judicial Review

In opposition, Plaintiff advances three respects in which the arbitration agreement is substantively unconscionable. First Plaintiff contends that the arbitration agreement precludes judicial review of the arbitrator's award. (Opp., pp. 6-7.) Plaintiff argues that, at minimum, an arbitration agreement must include "a requirement that the award decision be written to enable judicial review." (Opp., p. 6 [citing *Armendariaz, supra*, 24 Cal.4th at 102-03].) Plaintiff asserts that the arbitration agreement "denies Plaintiff the right to judicial review of the arbitrator's

award" because it provides for full appellate review of the arbitrator's decision by a second arbitrator. (Opp., p. 7.)

Plaintiff's concern that the agreement precludes judicial review of the arbitrator's award is unsupported by the language of the agreement itself. As noted above, the agreement expressly states that the procedural provisions of the California Arbitration Act apply to the extent that they are not inconsistent with the agreement. Included in the procedural rights afforded under the CAA is the right to petition the Superior Court to vacate or confirm the arbitration award. (Code Civ. Proc. § 1286.2.) Plaintiff's insistence that the provision for appellate review by a second arbitrator, therefore, presumes that review by a second arbitrator is somehow "inconsistent" with judicial review in the Superior Court.

However, nothing about the fact that the agreement provides for substantive review by a second arbitrator is inconsistent with judicial review in the Superior Court pursuant to Code of Civil Procedure section 1286.2. Indeed, rather than divesting the parties of a substantive right, the appellate review provision *adds* a substantive right. Without the subject provision, the remedy for losing party in arbitration would be substantially limited. Judicial review of the arbitrator's award under the CAA is significantly circumscribed. Under the CAA "neither the merits of the controversy nor the sufficiency of the evidence to support the arbitrator's award are matters for judicial review [citations], and where .. the arbitrator decided a point pursuant to a valid contract, the parties are bound by the award even if the decision of the arbitrator is wrong." (*De Mello v. Souza* (1973) 36 Cal.App.3d 79, 86-87.) Rather than abrogating that limited right, the appellate review clause adds an additional right to an initial review of the merits of the arbitrator's award. (See Decl. of Ashjian, Exh. A, ¶ 6 [agreeing that the second arbitrator is to review the arbitrator's award in the same manner as a full "appellate review by the California Court of Appeal of a civil judgment following a court trial."].) However, nothing in that provision precludes a party from subsequently seeking court review of that decision pursuant to Code of Civil Procedure section

1286.2. Indeed, it would appear that the agreement expressly permits it. (Decl. of Ashjian, Exh A, ¶ 3.)

There is nothing substantively unconscionable about adding a contractual right beyond what is provided by law, particularly where that additional right does not supplant any right provided at law. Here, the appellate review provision is entirely mutual and neither expressly nor implicitly favors either party. (Compare *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1073-74 [finding a similar provision for appellate review by a second arbitrator substantively unconscionable, not because it eliminated the right to judicial review, but because it only afforded the right to appellate review of awards exceeding $50,000 and the $50,000 threshold was clearly "geared toward giving the arbitral defendant a substantial opportunity to overturn a sizable arbitration award"].) The Court does not find that such a provision "shocks the conscience." If anything, it adds an extra level of fairness to the agreement often missing from standard arbitration agreements.

2. "Substantive" Rights to Bring a Representative Action

Plaintiff next contends that the agreement is substantively unconscionable because it "strips Plaintiff of his substantive rights" by waiving any right to arbitrate his PAGA claim. But as Defendants rightly note (reply, p. 7), Plaintiff offers nothing to suggest that it would shock the conscience to enforce a provision excluding a PAGA claim from arbitration[1] when the agreement explicitly afforded him the opportunity to avoid that term by merely checking a box. More importantly, however, Plaintiff cites no authority to support his contention that that his ability to arbitrate a representative PAGA claim is somehow a "substantive right." Quite the contrary:

[1] As discussed below, the fact that Plaintiff agreed not to *arbitrate* a PAGA claim is not the same as saying he waive the right to litigate the claim in Court. The right to litigate a claim under the PAGA belongs to the State, and Plaintiff could not waive that right.

unenforceable." (*Id.*) The Supreme Court flatly rejected Plaintiff's argument. "[S]ilence about costs in an arbitration agreement is not grounds for denying a motion to compel arbitration." (*Id.* at 1284.) Rather, in the employment context, a court faced with an arbitration agreement that is silent as to costs "should require the employer to pay ... 'all types of costs that are unique to arbitration.'" (*Id.* at 1085; see also *Armendariz*, *supra*, 24 Cal.4th at 113 [holding that where an employment arbitration agreement is silent as to costs "that the employer must bear the arbitration forum costs. The absence of specific provisions on arbitration costs would therefore not be grounds for denying the enforcement of an arbitration agreement"].)

B. Defendant American Tire Depot, Inc. May Enforce the Arbitration Agreement

Plaintiff next opposes arbitration as to Defendant American Tire Depot, Inc. because American Tire Depot, Inc. was not a identified as a party to the arbitration agreement. (Opp., p. 10.) "Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it." (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.) Nevertheless, "[t]here are exceptions to the general rule that a nonsignatory to an agreement cannot be compelled to arbitrate and cannot invoke an agreement to arbitrate, without being a party to the arbitration agreement." (*Id.* at 765.) "One pertinent exception is based on the doctrine of equitable estoppel." (*JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1237.)

Under the doctrine of equitable estoppel, "a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are 'intimately founded in and intertwined' with the underlying contract obligations." (*Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 271.) "The focus is on the nature of the claims asserted by the plaintiff against the nonsignatory defendant." (*Id.* at 272.) "[A] plaintiff who seeks to hold nonsignatories liable ... by alleging they are unified with the signatory entity, cannot also adopt the inconsistent position that the arbitration provision in the

contract is unenforceable by or against those individuals." (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1288.)

Here, Plaintiff clearly alleges that Defendants ATV and American Tire Depot acted as a single, unified entity and Plaintiff's claims against American Tire Depot are not only "intertwined" with his claims against ATV, they are entirely coextensive. Plaintiff alleges that both ATV and American Tire Depot jointly acted as his employer (see Comp., ¶ 3), that they jointly operate tire stores (see Comp., ¶ 4), and that together Defendants "are **one** of the leading independent tire companies" in the United States. (Comp., ¶ 6.) Other than separately naming both defendants, Plaintiff fails to offer a single allegation that would distinguish ATV and American Tire Depot or their conduct in any way. Plaintiff cannot have it both ways. Having alleged a comprehensive unity between ATV and American Tire Depot, he is equitably estopped from inconsistently arguing that American Tire Depot lacks standing to invoke the arbitration agreement. "It is [Plaintiff] who, by the manner in which he crafted his claims in the litigation, subjected himself to the arbitration of those claims." (*Rowe v. Exline*, *supra*, 153 Cal.App.4th at 1288.)

C. The PAGA Claim Is not Subject to Arbitration

Finally, Plaintiff contends that his cause of action under the PAGA cannot be compelled to arbitration because claims under the PAGA are not individual and may be subject to "individual" arbitration. Defendants only move for arbitration of Plaintiff's "individual claims" (see Ntc. of Mtn., p. 1, Mtn. p 15), and Plaintiff argues that Defendants have not moved to compel arbitration of the PAGA claim because such claims are not individual claims for damages, but law enforcement actions brought on behalf of the state. (Opp., p. 11.) Defendants assert that Plaintiff's arguments are preempted by the United States Supreme Court's holding in *AT&T Mobility, LLC v. Concepcion* (2011) __ U.S. __ [131 S.Ct. 1740]. (Reply, pp. 1-3.)

Though Defendants point to several non-controlling federal authorities to assert that PAGA claims are subject to individual arbitration in light of *Concepcion* (Mtn., pp. 13-14), the relevant binding California authorities disagree. The First and Second District Courts of Appeal have expressly considered whether, in light of *Concepcion*, PAGA actions are subject to individual arbitration, and both have concluded that PAGA claims are not subject to arbitration under *Concepcion*. (*Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1122-24; *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 498-503.) Under that line of cases "a "PAGA claim is not an individual claim." (*Reyes*, *supra*, 202 Cal.App.4th at 1124.) Instead "[a]n employee plaintiff suing, as here, under the Labor Code Private Attorneys General Act of 2004, does so as the proxy or agent of the state's labor law enforcement agencies." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) A claim under the PAGA is necessarily a representative action brought on behalf of the state and an individual may not waive the right to assert a representative PAGA action. (*Brown v. Ralphs Grocery*, *supra*, 197 Cal.App.4th 489, 502.) Under *Reyes* and *Ralphs Grocery* there is no such thing as an "individual" claim under the PAGA, and Plaintiff cannot be compelled into individual arbitration of a law enforcement action that he had no ability to waive.

The only California authorities Defendants rely upon to argue that *Reyes* and *Ralphs Grocery* are not binding on this Court are *Nelson v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115 and *Truly Nolen v. Superior Court* (2012) 208 Cal.App.4th 487, neither of which addressed the arbitrability of PAGA claims or the viability of *Reyes* and *Ralphs Grocery*. It is true that a later decision – *Brown v. Superior Court* (2013) 216 Cal.App.4th 1302, which followed both *Reyes* and *Ralph's Grocery* –was depublished by a grant of review and this issue is currently before the California Supreme Court. Nonetheless, *Reyes* and *Ralphs Grocery* remain published and are binding upon this Court unless and until the Supreme Court holds differently.[2]

[2] This is different than saying that PAGA claims are categorically exempt from arbitration. The Court merely holds that under the controlling authority of *Ralphs Grocery* and *Reyes*, Plaintiff cannot be compelled to arbitrate an *individual* PAGA claim because no individual PAGA claim exists as a matter of law. Defendant only seeks to compel arbitration of Plaintiff's individual claims. However, nothing would prevent the parties from agreeing to submit the PAGA claim to arbitration on a representative basis.

III. Conclusion

In light of the foregoing, the motion to compel arbitration of Plaintiff's individual (non-PAGA) statutory claims is GRANTED and Plaintiff's class action claims are DISMISSED WITHOUT PREJUDICE. (See *Kinecta*, *supra*, 205 Cal.App.4th at 518-19 [where arbitration agreement provides for bilateral arbitration and party successfully moves to compel individual arbitration, court commits reversible by not dismissing class action claims].) However, Plaintiff's PAGA claim asserted on behalf of the State are not subject to Defendants' motion to compel arbitration of Plaintiff's individual claims.[3] Defendants' request to stay the instant action until arbitration may be had on the arbitrable issues is GRANTED. (Code Civ. Proc. § 1281.4.)[4] In light of the agreement's silence as to costs, Defendants are to pay "'all types of costs that are unique to arbitration.'" (*Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th at 1085; *Armendariz*, *supra*, 24 Cal.4th at 113.)

PARTIES MAY SEEK RECONSIDERATION RE PAGA if change in law (Iskanian decided).

Dated: 2/4/14

HON. AMY D. HOGUE
JUDGE OF THE SUPERIOR COURT

[3] Should Defendant seek to resolve all of Plaintiff's claims in a single forum, the Court encourages the parties to informally address the possibility of such a streamlined proceeding.

[4] The Court will remove this case from the civil active list unless or until there is a motion to confirm or vacate the arbitration award or judgment is otherwise entered.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 10/10/2013 TIME: 03:18:00 PM DEPT: C32

JUDICIAL OFFICER PRESIDING: Geoffrey T. Glass
CLERK: Donna J Honomichl
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: None

CASE NO: **30-2013-00659735-CU-BC-CJC** CASE INIT.DATE: 06/28/2013
CASE TITLE: **Network Capital Funding Corp. vs. Papke**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

EVENT ID/DOCUMENT ID: 71822223
EVENT TYPE: Chambers Work

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 10/7/13 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The court overrules the demurrer.

The court grants the motion for a preliminary injunction. Network Capital has shown a probability of prevailing on the merits in that the issue of whether the agreement requires arbitration of class actions is one for the court and the court determines that the agreement allows for the arbitration of Mr. Papke's personal claims, but does not address Mr. Papke asserting the claims of others, including class members. The balance of harm weighs in favor of the moving party since it may be forced to arbitrate a class action not allowed by the arbitration agreement. Since this is a final decision on the merits, the court waives the bond requirement. Moving party to give notice.

The court denies the motion to compel Network Capital to binding arbitration of a class action. The court does not address the right of Mr. Papke to arbitrate his individual claims because Network Capital does not oppose it. The court is only ruling that Network Capital cannot be forced to arbitrate the class action under the circumstances shown in these three motions.

Court orders clerk to give notice.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

Central Justice Center
700 W. Civic Center Drive
Santa Ana, CA 92702

SHORT TITLE: Network Capital Funding Corp. vs. Papke

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **30-2013-00659735-CU-BC-CJC**

I certify that I am not a party to this cause. I certify that a true copy of the Minute Order was mailed following standard court practices in a sealed envelope with postage fully prepaid as indicated below. The mailing and this certification occurred at Santa Ana, California on 10/15/2013

Clerk of the Court, by: Dana Hornichl , Deputy

FISHER & PHILLIPS LLP
2050 MAIN # 1000
IRVINE, CA 92614

RIGHETTI GLUGOSKI, P.C.
456 MONTGOMERY STREET # 1400
SAN FRANCISCO, CA 94104

State of California)
County of Irvine) **DECLARATION OF SERVICE**

I, Susan Jackson, declare that I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action. I am employed with the law office of Fisher & Phillips LLP, and my business address is 2050 Main Street, Suite 1000, Irvine, CA 92614.

On the below date, I caused to be served the attached **DEFENDANTS AND RESPONDENTS' REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JIMMIE E. JOHNSON** as follows:

Janette Wipper Felicia Medina SANFORD HEISLER LLP 555 Montgomery Street, Suite 1206 San Francisco, CA 94111 Ph: (415) 795-2020 Fax: (415) 795-2021 Attorney for Plaintiff/Appellant - Timothy Sandquist **Copy (1) via Federal Express**	Clerk for the Hon. Elihu Berle SUPERIOR COURT OF CALIFORNIA County of Los Angeles (Central District) Central Civil West Courthouse 600 South Commonwealth Avenue Los Angeles, California 90005 Trial Court Judge **Copy (1) U.S. Mail**
Office of the Clerk SUPREME COURT OF CALIFORNIA 350 McAllister Street San Francisco, California 94102-4797 **Electronically Submitted and Original and eight (8) copies delivered via Federal Express**	Clerk of the Court California Court of Appeal Second Appellate District, Division Seven Ronald Reagan State Building 300 South Spring Street, Second Floor Los Angeles, CA 90013 **Copy (1) U.S. Mail**

By properly addressing wrapper in a Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of California; by electronically serving the above-noted parties in accordance with the Rules stated above, and by causing to be delivered by messenger such envelope(s) by hand to the office of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 26, 2014 at Irvine, California.

SUSAN JACKSON
[PRINT NAME]

[SIGNATURE]