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APPEAL FROM AIKEN COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Doyet A Early, III, Circuit Court Judge

Circuit Court Case No 2006-CP-02-1230

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease Michael Watts individually and for the benefit of all car buyers who paid "administrative fees" as described below to Defendants, **Respondents,**

v

Century BMW d/b/a Sonic Automotive, Dick Dyer & Associates, Inc , Galeana Chrysler Plymouth, Inc , a/k/a Galeana Chrysler Jeep, Inc J L H Investments LP a/k/a Hendrick Honda, Overland, Inc , d/b/a Land Rover of Columbia Taylor Toyota a/k/a Taylor Investments, and Toyota of Greenville, Inc , **Defendants**

of whom Century BMW d/b/a Sonic Automotive is the

Appellant

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United States District Court, W D Washington
at Seattle

Bonnie ADAMS et al Plaintiffs

v

AT & T MOBILITY LLC Defendant

No C10-763RAJ

Sept 20 2011

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ORDER

RICHARD A JONES District Judge

I INTRODUCTION

*1 This matter comes before the court on motions to compel arbitration pending in this case and in *Stoican v Celco P'ship* No C10-1017RAJ In each case the Defendant is a wireless phone service provider invoking § 4 of the Federal Arbitration Act (FAA) (9 U S C § 4) to force arbitration of a claim from a consumer who prefers to litigate the dispute in court AT & T Mobility LLC (ATTM) is the Defendant in this case and Celco Partnership doing business as Verizon Wireless (Verizon) is the Defendant in the *Stoican* case The only party to request oral argument on either motion was ATTM The court finds both motions suitable for disposition without oral argument For the reasons stated below the court GRANTS ATTM's motion to compel arbitration (Dkt # 37) as well as Verizon's motion The court DENIES ATTM's motion to seal (Dkt # 60) and GRANTS its motion for leave to file an additional brief (Dkt # 67) Because no party has requested a stay pending arbitration, the court directs the clerk to DISMISS both actions without prejudice to Plaintiffs raising their claims in arbitration The clerk shall enter

judgments for Verizon and ATTM The court will issue a separate order in the *Stoican* case memorializing its decision

II BACKGROUND

A Plaintiffs and Their Claims

Ms Stoican is a Washington resident and a longtime Verizon customer She does not dispute that she is a party to Verizon's wireless service agreement She claims that she declined an offer from Verizon in 2009 for a free trial of its Navigator data service Nonetheless beginning in May 2009 Verizon charged her \$9 99 each month for the service It continued to do so for nine months despite Ms Stoican's efforts to cancel the service and obtain a refund Ms Stoican asserts that Verizon's conduct violated the Communications Act of 1934 (FCA) specifically its prohibition on unjust and unreasonable charges and practices 47 U S C § 201(b) She also claims that Verizon breached its wireless service agreement and violated the Washington Consumer Protection Act (CPA) She hopes to represent a class of all Washington customers whom Verizon charged for Navigator service without their consent

Unlike Ms Stoican Plaintiffs Bonnie Adams Melissa Meece and Alexandra Severance (collectively the Adams Plaintiffs) did not enter a service agreement with the cellular phone company they are now suing Each of them is a resident of Vermont and each of them entered a service agreement with Unicef Inc (Unicef) Verizon (by coincidence) sought to purchase Unicef a transaction that drew scrutiny from federal antitrust regulators To win federal approval for the transaction Verizon agreed to divest itself of Unicef customers in certain regions including virtually all of Vermont Verizon arranged to sell its Vermont service agreements to ATTM in December 2008 ATTM itself did not acquire the service agreements, it instead used its subsidiary New Cingular Wireless PCS LLC (New Cingular) to make the acquisition ^{FNI} No one disputes that New Cingular acquired

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the Adams Plaintiffs Unice! agreements in December 2008 Carroll Decl (Dkt # 38) ¶ 3 McGee Decl (Dkt # 39) ¶ 4 No one disputes that at all relevant times New Cingular was an ATTM subsidiary that held the Adams Plaintiffs' Unice! agreements McGee Decl ¶ 5

FN1 ATTM has moved to seal a single exhibit to the declaration of an ATTM paralegal Wilder Decl (Dkt # 59) Ex 1 The exhibit is a 2008 contract evidencing an asset transfer from a Verizon subsidiary to an ATTM subsidiary Dkt # 62 Although ATTM's counsel has declared that the contract is subject to a confidentiality agreement he does not provide that agreement for the court's review reveal who the confidentiality agreement binds or explain why it is still necessary to enforce the confidentiality agreement three years later Bateman Decl (Dkt # 61) ATTM has accordingly not met its obligation to establish at a minimum good cause to file a document under seal Local Rules W D Wash CR 5(g)(2)

*2 ATTM hoped to convince the Unice! customers whose service agreements it had acquired to enter new agreements with ATTM To that end it sent text messages in 2009 to Unice! customers including the Adams Plaintiffs The text messages touted ATTM's services Each Plaintiff contacted either ATTM or Unice! to request that they receive no more messages, but they received additional messages nonetheless

The Adams Plaintiffs sued contending that ATTM's unsolicited text messages violated the FCA's ban on certain automated messages 47 U S C § 227(b) ^{FN2} They seek to pursue not only their own claims but the claims of a nationwide class of Unice! customers who received similar unsolicited text messages from ATTM

FN2 The statute on which the Adams Plaintiffs rely initially became part of the

FCA via the Telephone Consumer Protection Act of 1991 Congress has amended it several times since

B Terms of Plaintiffs' Wireless Service Agreements

Each of the Plaintiffs entered a wireless service agreement that contains an arbitration clause that includes a prohibition on class arbitration Ms Stoican's Verizon service agreement includes a clause entitled Dispute Resolution and Mandatory Arbitration Verizon Agr (Diaz Decl (Dkt # 6) Ex B) at original pp 12-13 (cited hereinafter as Verizon Arb Cl) ^{FN3} In relevant part, it mandates arbitration for disputes arising out of the service agreement or arising out of products or services furnished in accordance with the agreement Verizon Arb Cl preamble & ¶ 1 The only claims exempt from the arbitration clause are qualifying small claims court cases *Id* ¶ 1 For claims over \$10 000 the clause specifies the use of the Wireless Industry Arbitration (WIA) Rules developed by the American Arbitration Association (AAA) *Id* ¶ 2 For smaller claims the clause specifies the use of AAA consumer arbitration rules or the arbitration rules of the Better Business Bureau (BBB) *Id* ¶ 2 Critically the clause doesn't permit class arbitrations even if [the applicable arbitration rules] would *Id* ¶ 3 Verizon agrees to pay for the consumer's arbitration filing fees administrative fees arbitration appeal fees and the cost of the arbitrator so long as the consumer first participates in at least one telephonic session of a non binding mediation program that Verizon provides *Id* ¶¶ 3-4 Verizon employees may serve as mediators in the program *Id* ¶ 3 In the event however that an arbitrator finds the consumer's claim to be frivolous or brought for improper purposes within the meaning of Federal Rule of Civil Procedure 11 Verizon reserves the right to seek payment of arbitration fees and costs in accordance with the applicable arbitration rules *Id* ¶ 4 If the consumer recovers more than any Verizon pre arbitration offer (or recovers any amount in the event that Verizon makes no offer) Verizon agrees to pay not only the con

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sumer's attorney fees but an award of \$5000 if the arbitration award is less than \$5000 *Id* ¶ 5 The Verizon arbitration clause specifies that an arbitrator can award the same damages and relief and must honor the same limitations in this agreement as a court would *Id* (preamble) In a separate clause entitled Waivers and Limitations of Liability the agreement declares that unless the law forbids it in any particular case, neither Verizon nor the consumer may claim indirect special consequential treble or punitive damages

FN3 The wireless service agreements at issue have evolved over time Except as noted no one disputes that the versions included in the record are materially identical to the ones that Plaintiffs entered Because the agreements often contain no useful numbering or other means of citation the court endeavors to be explicit about which portions it cites Moreover the court generally will not reproduce the capitalization and other formatting in the agreements

*3 The Unice! Agreement that the Adams Plaintiffs entered contains an arbitration clause that is less friendly to consumers than Verizon's Unice! Agr (Sargent Decl (Dkt # 40) Ex 1) ¶ 2 (cited hereinafter as Unice! Arb Cl) It permits either Unice! or the consumer to force the arbitration of any claim *Id* ¶ 2(a) WIA Rules apply *Id* ¶ 2(b) Unice! agrees to pay the initial filing fee and the costs of the arbitration proceeding except that it requires a consumer who initiates arbitration to pay the first \$75 of the initial filing fee *Id* ¶ 2(d) Each party is responsible for its own attorney witness and expert fees and costs *Id* A consumer has no right to have any claim arbitrated as a class action under the [applicable] Rules or under any other rules of civil procedure *Id* ¶ 2(e) Like the Verizon agreement the Unice! agreement contains a clause separate from the arbitration clause that excludes punitive indirect special or consequential damages but that waiver applies only to the fur

thest extent allowed by the law *Id* ¶ 15 The Unice! agreement also includes a waiver of any claim for equitable relief but only to the fullest extent allowed by the law *Id*

ATTM has offered the Adams Plaintiffs the opportunity to avoid the relatively unfriendly terms of the Unice! agreement and arbitrate their claims in accordance with the arbitration agreement in ATTM's arbitration clause ^{FN4} ATTM agrees to pay all of a consumer's arbitration costs for any claim under \$75 000 Only in the event that an arbitrator finds the consumer filed a claim for an improper purpose or filed a frivolous claim (with the meaning of Rule 11) can ATTM seek reimbursement of its arbitration costs If a consumer wins an arbitration award larger than ATTM's last settlement offer, ATTM will pay the consumer the larger of \$10 000 or the amount of the award In that event ATTM will also pay double the consumer's attorney fees and reimburse any expenses including expert witness fees and costs Like the Unice! and Verizon arbitration clauses however the ATTM clause prohibits class arbitration Unlike Unice! and Verizon ATTM does not attempt to limit the types of damages a consumer can recover in arbitration

FN4 ATTM's wireless service agreement is not part of the record The court relies instead on the summary of arbitration rights that ATTM offers on its website Weiman Decl (Dkt # 41) Ex 5 No one disputes that the summary accurately describes the ATTM arbitration clause

C Consumer Arbitration Agreements and the Federal Arbitration Act

As the court will now discuss a substantially similar version of the ATTM arbitration agreement features prominently in new legal authority that bears on the arbitrability of these Plaintiffs' disputes Last year Verizon and ATTM filed motions to compel arbitration of the disputes Ms Stoican and the Adams Plaintiffs raised At the time it filed its motion Verizon conceded that Washington law

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and Ninth Circuit precedent spelled doom for its motion to compel arbitration. In *Scott v Cingular Wireless*, 161 P 3d 1000 (Wash 2007), the Washington Supreme Court held that the arbitration clause in the wireless service agreement before it was unenforceable because it was unconscionable under Washington law. Like the agreements at issue here, the agreement in *Scott* prohibited class arbitration. The *Scott* court explained that the bar on all classwide proceedings effectively exculpated the wireless provider from liability because consumers would virtually never pursue individual arbitration of small claims like the ones likely to arise from their wireless service agreements. 161 P 3d at 1008.^{FN5} The court further held that the FAA did not preempt its application of Washington law. In *Lowden v T-Mobile USA Inc*, 512 F 3d 1213 (9th Cir 2008), the Ninth Circuit followed *Scott* in its application of Washington law and agreed that the FAA did not preempt that application. The *Scott* court employed much of the same unconscionability and preemption analysis that the California Supreme Court had applied in *Discover Bank v Superior Court*, 113 P 3d 1100 (Cal 2005). *Discover Bank* concerned a challenge to the enforceability of ATTM's arbitration clause. The court held that an arbitration agreement in a consumer contract of adhesion is unconscionable under California law where the agreement permits neither class actions nor class arbitration. *Id.* at 1110. It also held that the FAA did not preempt the application of this aspect of California law. *Id.* The Ninth Circuit reiterated that holding in several cases, including *Laster v ATTM*, 584 F 3d 849 (9th Cir 2009). ATTM successfully petitioned the United States Supreme Court to review *Laster v ATTM v Concepcion*, 130 S Ct 3322 (May 24, 2010) (granting writ of certiorari).

^{FN5} It has become all but obligatory, when discussing the potentially exculpatory effect of a class action waiver for consumer disputes, to cite Judge Posner's pithy explanation. The realistic alternative to a class action is not 17 million individual

suits but zero individual disputes as only a lunatic or a fanatic sues for \$30. *Carnegie v Household Int'l Inc*, 376 F 3d 656, 661 (7th Cir 2004) (emphasis in original).

*4 When they moved to compel arbitration last year, both Verizon and ATTM included requests to stay these litigations pending the Supreme Court's resolution of *Concepcion*. The court granted those requests. The Supreme Court issued its opinion in *Concepcion* in April, 131 S Ct 1740 (2011). In a 5-4 ruling, the Court overruled the FAA preemption rulings in *Discover Bank* and *Laster*. The Court held that the application of state unconscionability law to invalidate an arbitration clause's class action waiver interfered with the FAA's fundamental purpose—enforcing arbitration clauses according to their terms. This court lifted the stay in these litigations and permitted the parties to file supplemental briefs addressing *Concepcion*. The court now considers whether to grant either Verizon's or ATTM's motion to compel arbitration of Plaintiffs' claims.^{FN6}

^{FN6} Ms. Stoican requests that the court again stay her case because Congress is considering amendments to the FAA that would overcome the ruling in *Concepcion*. Stoican Supp. Br. at 10 (pointing to draft Arbitration Fairness Act of 2011). The court denies her request. There is no evidence that Congress is likely to pass these amendments, much less that Congress would do so quickly enough to make a stay in these cases a reasonable option.

III ANALYSIS

Before determining whether the Unicef and Verizon arbitration agreements are enforceable in light of *Concepcion*, the court must resolve Plaintiffs' arguments that they did not agree to arbitrate these particular disputes with their wireless providers. *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 U S 614, 626 (1985) ([T]he first task of a court asked to compel arbitra

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tion of a dispute is to determine whether the parties agreed to arbitrate that dispute) The Adams Plaintiffs contend that the arbitration clause to which they agreed does not give ATTM the right to request arbitration They and Ms Stoican also argue that the claims they raise are beyond the scope of the arbitration clauses at issue Resolving these arguments requires the court to apply federal substantive law of arbitrability *Id* (citation omitted) That law respects the liberal federal policy favoring arbitration agreements embodied in the FAA *Moses H Cone Mem Hosp v Mercury Constr Corp* 460 U S 1 24 (1983) That law requires the court to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration including any doubts about contract interpretation *Id* at 24-25

A The Adams Plaintiffs Entered Contracts that Permit ATTM to Demand Arbitration

First, the court considers the Adams Plaintiffs' threshold contention that the Unice! arbitration clause does not permit ATTM to invoke it The key sentence is the first sentence of the arbitration clause

We (including our assignees agents employees officers directors shareholders parent companies subsidiaries affiliates predecessors and successors) or you may elect to have any claim dispute or controversy (Claim) of any kind (whether in contract tort or otherwise) arising out of or relating to your Service or this agreement (including any renewals or extensions) any goods or services provided to you any billing disputes between you and us or any prior or future dealings between you and us resolved by binding arbitration

*5 Unice! Arb Cl ¶ 2(a) The first sentence of the Unice! agreement which comes two sentences before the arbitration clause declares that it will use the terms Unice!, we or us to refer to Unice! The parenthetical expansion of we in the first sentence of the arbitration clause however unambiguously overrides that prior definition at least

within that sentence Thus, as long as ATTM is an assignee parent company affiliate or successor of Unice! it is entitled to make an arbitration demand The Adams Plaintiffs point out that ATTM is not an assignee of or successor to Unice! because it was not ATTM who acquired their Unice! agreements but rather ATTM's subsidiary New Cingular Similarly ATTM was not Unice!'s parent company Plaintiffs thus contend that ATTM cannot invoke the arbitration clause

The court disagrees with the Adams Plaintiffs it finds that ATTM can invoke their Unice! arbitration clauses When New Cingular acquired the Unice! service agreements it replaced Unice! as the contracting party in those agreements No one argues otherwise Once New Cingular did so the first sentence of the arbitration clause effectively read as follows We meaning New Cingular (including our assignees agents parent companies) or you may elect There is no dispute that ATTM was New Cingular's parent company It therefore became entitled to invoke the arbitration clause once New Cingular acquired the Unice! agreements Any other reading leads to absurd results For example under the Adams Plaintiffs' interpretation not even New Cingular could invoke the arbitration clause because New Cingular was not the assignee of the agreements, but rather the assignee of the original assignee Verizon That interpretation is untenable because it makes the agreement assignable once and only once Plaintiffs' suggestion that the parent company of a first assignee cannot invoke the clause fares no better

B Plaintiffs' Claims are Within the Scope of the Applicable Arbitration Clauses

The Adams Plaintiffs and Ms Stoican both contend that their disputes are beyond the scope of the arbitration clause that applies to them The court disagrees

The Adams Plaintiffs argument again turns on the first sentence of the Unice! arbitration clause It extends to any claim of any kind arising out of a host of circumstances including any prior or

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future dealings between you and us Unice! Arb Cl ¶ 2(a) The Adams Plaintiffs' unsolicited-text-messaging claims against ATTM arise out of future dealings with ATTM They do not argue otherwise they argue instead that the word us in the key sentence refers *only* to Unice! (or its successor) They base this interpretation on the first sentence of the Unice! agreement which explains that the agreement will use Unice! we or us to refer to Unice! Plaintiffs acknowledge that the first sentence of the arbitration clause parenthetically expands the meaning of we but they contend that the sentence did not similarly redefine us and thus the court should not interpret us as expansively Defendants deride this interpretation as a grammatical flight of fancy but the court does not share that view

*6 The court finds the meaning of us within the Unice! arbitration clause to be ambiguous Even within the same sentence we and us do not necessarily refer to the same set of people For example consider the second of the following two sentences I met Janet at noon We (along with our friends) went to the courthouse because the judge wanted to speak with us It is possible that the judge wanted to speak with Janet and the author with their friends serving merely as moral support it is also possible that the judge wanted to speak with Janet the author and their friends Without more context no one can say In this case the additional context of the Unice! agreement provides no answers It is reasonable to conclude that Unice! meant the agreement to apply broadly to essentially any claim arising between a customer and Unice! or any person or entity with a relationship with Unice! It is also reasonable however to conclude that Unice! did not intend such an expansive interpretation A consumer's dispute with a parent company might have nothing to do with wireless service and Unice! might not have wished to submit those disputes to arbitration

Despite the ambiguity in the arbitration clause federal arbitrability law dictates that the dispute

between the Adams Plaintiffs and ATTM is arbitrable When courts consider two reasonable interpretations of an arbitration clause one that requires arbitration of a particular dispute and one that does not, they must send the dispute to arbitration *AT & T Techs Inc v Commc'ns Workers of Am* 475 U S 643 650 (1986) ([I]t has been established that where the contract contains an arbitration clause there is a presumption of arbitrability in the sense that [an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute) (internal quotation omitted) In this case the Unice! arbitration clause is reasonably susceptible to an interpretation in which the Adams Plaintiffs' claims against ATTM are arbitrable Accordingly the court finds that the dispute they raise is within the scope of the arbitration clause^{FN7}

FN7 The court notes that the Unice! arbitration clause gives the parties the option to submit the question of whether a particular claim is arbitrable to an arbitrator Unice! Agr ¶ 2(a) (A Claim may include the issue of whether any particular Claim must be submitted to arbitration No party has invoked this portion of the clause with respect to their dispute over whether the Adams Plaintiffs' claims are arbitrable

The Adams Plaintiffs contend that the court should not independently determine the scope of the Unice! arbitration clause arguing instead that collateral estoppel requires this court to follow the ruling in *Porter v ATTM* a case pending in Chittenden County Superior Court in Vermont In *Porter* pro se plaintiff Pike Porter like the Adams Plaintiffs sued ATTM contending that it violated the FCA and Vermont law by sending him unsolicited text messages Like the Adams Plaintiffs Mr Porter was a Unice! customer Unlike the Adams Plaintiffs, Mr Porter did not seek to represent a class On March 18 2010 the *Porter* court con-

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cluded that [b]ased on the undisputed fact that Porter did not become a customer of AT & T until 11/6/09 the court denies [ATTM's] motion [to compel arbitration] Andrews Decl (Dkt # 47) Ex G In a one page order, the court explained that although the Unisel arbitration clause could bind Porter and Unisel as to prior events between *them* as of the date it was agreed to it cannot bind Porter with regard to events between him and AT & T that took place at a time when his only contract was with Unisel, not AT & T *Id* (emphasis in original) ATTM moved for reconsideration arguing that although Mr Porter might not have been an ATTM customer ATTM owned his Unisel agreement during the time he received the unsolicited text messages *Id* Exs H & J (ATTM motion & reply) ATTM attached various documents to prove this point *Id* Ex H The court denied the motion for reconsideration explaining that while ATTM had proven that it acquired between 100 000 and 150 000 of Unisel's Vermont service agreements it had not establish[ed] that the acquisition included all Vermont Unisel contracts, or Mr Porter's in particular *Id* Ex K (Jul 9 2010 order denying reconsideration) (emphasis in original)

*7 A court considering the preclusive effect of a prior ruling applies the law of the jurisdiction that issued it In Vermont a party can invoke issue preclusion only if it meets five conditions It must assert preclusion against a party to the prior litigation or the party's privy the issue must be one resolved in a final judgment on the merits the issue must be identical to the one the asserting party raises in the subsequent action the party to the prior litigation must have had a full and fair opportunity to litigate the issue and the application of issue preclusion must be fair *Trepanier v Getting Organized* 583 A 2d 583, 587 (Vt 1990) Moreover when a party not present in a prior litigation asserts issue preclusion offensively against a party to the prior litigation courts must be particularly mindful of fairness concerns *Id* at 587 n 2

Here the court cannot be confident that the

Porter court resolved any issue essential to this litigation It is at least arguable that the court's first ruling was that Mr Porter's dispute with ATTM was beyond the scope of the Unisel arbitration clause thus agreeing with the same argument the Adams Plaintiffs make here But in light of the court's ruling on reconsideration it is arguable even likely that the court merely held that ATTM had failed to prove that it ever acquired Mr Porter's Unisel contract The Adams Plaintiffs cannot take refuge in that ruling because they do not dispute ATTM's evidence that it acquired their Unisel agreements in December 2008

The court declines to apply issue preclusion where it cannot be certain that the *Porter* court resolved the issue now before this court ^{FN8} The court notes moreover that ATTM had a lesser incentive to litigate the *Porter* case because Mr Porter was not attempting to represent a class of all of ATTM's former Unisel customers in Vermont Under these circumstances it would not be fair to apply issue preclusion against ATTM

FN8 ATTM appealed the Porter ruling to the Vermont Supreme Court which heard oral argument in March of this year Although the Vermont Supreme Court's ruling will perhaps clarify the basis on which ATTM's arbitration demand succeeds or fails no one has asked this court to delay its ruling pending the Vermont Supreme Court's decision

The court next rejects Ms Stoican's argument that her claim is beyond the scope of the Verizon arbitration clause because she could have brought it in a small claims court The Verizon arbitration clause twice mentions small claims actions Ms Stoican cites only the first which states as follows

The Federal Arbitration Act applies to this agreement except for qualifying small claims court cases any controversy or claim arising out of or relating to this agreement or any product or service provided under or in connection with this

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agreement will be settled by one or more neutral arbitrators

Verizon Arb Cl ¶ 1 She contends that the plain reading of this sentence is that only claims that are in excess of the jurisdictional limit of the small claims court will be arbitrated Stoican Supp Br (Dkt # 19) at 8 The court does not agree Moreover Ms Stoican's interpretation ignores the second paragraph of the Verizon clause which states that the complaining party can choose either the AAA's [arbitration procedures] an individual action in small claims court or the BBB's rules for binding arbitration Verizon Arb Cl ¶ 2 This paragraph coupled with the first paragraph of the clause shows unequivocally that Verizon merely agreed to permit its customers to bring their disputes to small claims court rather than arbitrate them Verizon did not agree to permit a customer to bring a claim in whatever court the customer prefers as long as the claim could be the subject of a small claims suit

C Concepcion Dictates that the Court Must Enforce the Arbitration Clauses to Which Plaintiffs Are Bound

*8 Having established that the disputes that Plaintiffs raise are within the scope of the arbitration clauses and that their wireless providers are entitled to invoke those clauses it remains to decide whether Plaintiffs may avoid the enforcement of the clauses The FAA explains that arbitration agreement is 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 State law may supply grounds for declaring a contract unenforceable including state unconscionability law *Doctor's Assocs Inc v Casarotto* 517 U S 681 686–87 (1996) Federal law may also provide grounds for avoiding enforcement of an arbitration clause For example Congress may declare explicitly or implicitly that certain statutory claims are not subject to arbitration See e g *Gilmer v Interstate/Johnson Lane Corp* 500 U S 20 26 (1991) (considering whether federal Age Discrimination in

Employment Act claims are arbitrable) Courts addressing this question often consider whether arbitration is inconsistent with the framework and purposes of the statute at issue *Id* at 27 The court now considers whether either state or federal law provides a basis for declaring the Verizon or Unicef arbitration clauses unenforceable

1 Concepcion Disposes of Plaintiffs' Contention that State Law Provides a Ground For Declaring Their Arbitration Agreements Unenforceable

The decisions in *Discover Bank Scott Laster* and *Lowden* embody the view that the FAA does not preempt state unconscionability law so long as that law applies to all contracts not just arbitration contracts Even before *Concepcion* states could not explicitly single out arbitration contracts For example in *Perry v Thomas* 482 U S 483 491 (1987) the Court held that the FAA preempted a California statute declaring that suits to recover unpaid wages could not be arbitrated In *Discover Bank* and cases like it courts held that because any consumer contract that barred class resolution of a dispute would be unenforceable under state law whether it was an arbitration agreement or not the FAA did not preempt this application of state law

Concepcion is at a minimum the death knell for any application of state law that declares arbitration agreements unenforceable because they bar class actions and class arbitrations The Court observed that even if the unconscionability rule in *Discover Bank* applied to all contracts it had a disproportionate impact on arbitration agreements *Concepcion* 131 S Ct at 1747 The Court explained that while § 2 of the FAA preserves generally applicable contract defenses nothing in it suggests an intent to preserve state law rules that stand as an obstacle to the accomplishment of the FAA's objectives *Id* at 1748 What the Court called the *Discover Bank* rule ran afoul of this prohibition because [r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA *Id* One of the funda-

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mental attributes of arbitration is that it allows the parties to design [] efficient streamlined procedures tailored to the type of dispute that is likely to arise from a contract *Id* at 1749 To mandate class arbitration in the court's view was to mandate a slower more costly process one that was more likely to generate procedural morass than final judgment *Id* at 1751 It would also mandate procedural formality even where the parties had agreed otherwise *Id* Moreover the court found that the risks to a corporate defendant inherent in class arbitration of consumer disputes greatly exceeded the risk of the individual arbitrations it had bargained for *Id* at 1752

*9 The court further observes that the decision in *Concepcion* did not depend on the relatively consumer friendly terms of the ATTM arbitration agreement In a final note the *Concepcion* majority responded to a concern that the dissent raised that class proceedings are necessary to prosecute small dollar legal claims that might otherwise slip through the legal system 131 S Ct at 1753 As the court has noted this concern animated the holdings in both *Scott* and *Discover Bank* *Scott* 161 P 3d at 1007 (contending that class actions are often the only meaningful redress available for small but widespread injuries) *Discover Bank* 113 P 3d at 1108-09 The *Concepcion* majority dismissed this concern with a single sentence States cannot require a procedure that is inconsistent with the FAA even if it is desirable for other reasons 131 S Ct at 1753 Thereafter in what this court can only characterize as dicta the majority remarked that the ATTM arbitration agreement was unlikely to exculpate ATTM from liability

Moreover the claim here was most unlikely to go unresolved As noted earlier the arbitration agreement provides that AT & T will pay claimants a minimum of \$7500 and twice their attorney fees if they obtain an arbitration award greater than AT & T's last settlement offer

Id The court finds nothing in *Concepcion* to support the notion that Court would have decided

the case differently had it confronted a less consumer-friendly arbitration agreement

Neither Ms Stoican nor the Adams Plaintiffs articulate a state-law ground for declaring their arbitration agreements unenforceable that passes muster under *Concepcion* The parties concede that they cannot avoid the agreements on state law grounds merely because they bar class actions Ms Stoican does not attempt to construct an alternate argument that Washington law bars enforcement of her arbitration agreement The Adams Plaintiffs, by contrast insist that despite *Concepcion* Vermont law mandates the conclusion that the Unicel arbitration agreement is unconscionable

Putting aside the preemptive sweep of the FAA the court is skeptical that Vermont's courts would declare the Unicel Agreement to be unconscionable Before *Concepcion* Vermont's Supreme Court had not joined the chorus of states that declared class arbitration waivers to be unconscionable *Fleming v Kruziffer Motors Inc* No 440-9-06 Wmcv, 2007 Vt Super LEXIS 61 at *10 (Vt Super Ct Jul 20 2007) (declining to consider whether class action prohibition is unconscionable in Vermont) Now that *Concepcion* prohibits state law that invalidates arbitration agreements because they contain class action waivers Plaintiffs are effectively forced to argue that Vermont would invalidate the Unicel arbitration agreement even without the waiver They have little support for that argument Plaintiffs point to no authority from any state declaring unconscionable an arbitration agreement in a wireless service contract that does not contain a class action waiver Vermont like Washington and California considers both the procedural and substantive unconscionability of a contract *Maglin v Tschannerl* 800 A 2d 486 491 (Vt 2002) A Vermont court will not invalidate a contract merely because of the parties' unequal bargaining power *Id* at 490 Instead it looks for evidence that the party with greater power forced substantively unreasonable terms on a party who had no meaningful choice but to accept them *Id* at 491 Even if the

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court accepts that the Adams Plaintiffs had no meaningful choice but to enter the Unicel agreement it finds no substantively unconscionable terms in that agreement^{FN9} The agreement purports to waive any right to special or punitive damages but it explicitly does so only to the extent the law allows such a waiver^{FN10} Unicel Arb Cl ¶ 15 The same is true of the agreement's waiver of the right to seek injunctive relief *Id* The agreement requires the consumer to bear up to \$75 in arbitration costs but this hardly seems an unconscionable burden The agreement mandates the use of WIA Rules rules which so far as the court is aware no court has ever held to be unconscionable Moreover ATTM has agreed to waive the terms of the Unicel Arbitration agreement and permit Plaintiffs to take advantage of the friendlier terms of the ATTM Agreement Plaintiffs insist that ATTM cannot force them to arbitration in accordance with the Unicel agreement but then offer the more generous terms of the ATTM agreement for conducting that arbitration The court sincerely doubts that any Vermont court would adopt their position *See Ragone v Atlantic Video* 595 F 3d 115 124 (2d Cir 2010) (noting that New York law permits courts to accept waiver of portions of arbitration agreement before considering its unconscionability) In short the court finds it unlikely at best that the Unicel arbitration agreement is unconscionable in Vermont especially in light of ATTM's agreement not to enforce much of it

FN9 Plaintiffs argue that the Unicel agreement requires the consumer not the wireless provider to waive the right to a jury trial full discovery and other elements of a civil action They are mistaken The agreement permits either party to demand arbitration and in that event no party will have the right to a jury trial discovery or other aspects of a civil action

FN10 ATTM contends that the arbitrator not the court should decide whether the agreement's limitation on special and pun

itive damages is enforceable The court need not reach that argument in light of its disposition today

***10** Rather than rule on an issue of Vermont law however the court finds that Plaintiffs have not articulated any application of Vermont law that would survive the preemptive sweep of the FAA in light of *Concepcion* Even before *Concepcion* at least one Vermont court noted that the FAA constrained the application of Vermont law to invalidate an arbitration clause In *Fleming* the court observed that almost any arbitration agreement in any consumer contract would seem to be logically suspect under Vermont law because the agreement will be a contract[] of adhesion characterized by a disparity of power and a lack of meaningful choice on the part of the consumer *Fleming* 2007 Vt Super LEXIS 61 at *6-7 The court recognized however that it could not reach that conclusion where the federal policy [expressed in the FAA] trumps any desires state legislatures and courts may have to protect their citizens from compelled arbitration *Id* at *7 Even if the Adams Plaintiffs had articulated an application of Vermont law that invalidated the Unicel agreement that application would invalidate virtually any consumer arbitration agreement The FAA as the *Concepcion* Court interpreted it does not permit that result

2 Federal Law Does Not Invalidate These Arbitration Agreements

Federal law like state law can also supply a ground for declaring an arbitration agreement unenforceable Congress can declare explicitly or implicitly that a federal statute creates a right to a judicial forum *See Mitsubishi* 473 U S at 628 *see also Greenwood v CompuCredit Corp* 615 F 3d 1204 1209 (9th Cir 2010) (holding that right to sue for violations of federal Credit Repair Organization Act prohibits mandatory arbitration) *cert granted* 131 S Ct 2874 (2011)

Ms Stoican argues that the FCA guarantees access to a judicial forum She is mistaken *Lozano v AT & T Wireless Servs Inc* 504 F 3d 718 727

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(9th Cir 2007) (We hold that FCA claims may be subject to agreements to arbitrate) For reasons she does not explain Ms Stoican does not cite *Lozano* and urges the court to apply the *Greenwood* court's analysis to the FCA Even if the court believed that the *Greenwood* analysis would lead to the conclusion that the FCA guarantees a judicial forum the court could not ignore *Lozano* whose holding is squarely to the contrary 504 F 3d at 725-27

Federal courts also recognize another federal ground for declaring an arbitration clause unenforceable that the clause deprives the plaintiff of the ability to effectively vindicate a statutory right The *Mitsubishi* Court provided the seeds of this vindication of statutory rights defense It considered an American manufacturer's attempt to avoid a clause mandating arbitration of virtually any dispute in Japan *Mitsubishi* 473 U S at 617 The manufacturer asserted among other counterclaims a claim for violation of the Sherman Antitrust Act *Id* at 619-20 It argued that public policy in favor of antitrust enforcement demanded that it not be forced into international arbitration The Court disagreed declining to assume that an international arbitration would not vindicate the manufacturer's antitrust claims *Id* at 636 The Court noted that an arbitrator might well apply United States antitrust law *Id* at 636-37 It explained that so long as the prospective litigant effectively may vindicate its statutory cause of action the statute will continue to serve both its remedial and deterrent function *Id* at 637 It further explained that if the arbitrator construed the arbitration agreement in a way that operated as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations we would have little hesitation in condemning the agreement as against public policy *Id* at 637 n 19 Rather than speculate about the outcome of Japanese arbitration it observed that a court could invalidate any award that violated public policy *Id* (*Mitsubishi* seeks to enforce the agreement to arbitrate not to enforce an award) see also 9 U S C §§ 9-10 (stating procedures for

challenging an arbitral award in court)

*11 The Supreme Court has recognized the *Mitsubishi* dicta as a potential basis for avoiding an arbitration agreement In *Green Tree Fin Corp v Randolph* 531 U S 79 90 (2000) the Court considered a consumer's argument that it should not enforce an arbitration agreement because the cost of arbitration would leave her unable to effectively vindicate her claims invoking the federal Truth in Lending Act and Equal Credit Opportunity Act The court recognized the viability of her argument but held she had not carried her burden to prove that the costs of arbitration were prohibitive

It may well be that the existence of large arbitration costs could preclude a litigant from effectively vindicating her federal statutory rights in the arbitral forum But the record does not show that [the consumer in this case] will bear such costs if she goes to arbitration The risk that [the consumer] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement

Id at 90-91

From *Mitsubishi* and *Green Tree* sprang numerous lower court decisions considering the vindication-of-statutory rights defense to an arbitration agreement In most instances courts find that the party invoking the defense has not carried its burden to prove that the arbitration agreement effectively prevents the vindication of statutory rights See e g *In re Am Express Merchants Litig* 634 F 3d 187 196-97 (2011) (citing cases from Fourth and Seventh Circuits) The Ninth Circuit has applied the defense to invalidate an arbitration clause that was inconsistent with the federal Petroleum Marketing Practices Act *Graham Oil Co v ARCO Prods Co* 43 F 3d 1244 1247-48 (9th Cir 1994) (invalidating limits on exemplary damages attorney fees and witness expenses and statute of limitations) *id* at 1249 (finding remainder of arbitration clause not severable from invalid portions) It has also acknowledged similar federal policy in con-

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cluding that the FAA does not preempt a state law-based vindication-of-statutory rights defense *Ting v AT & T Corp* 319 F 3d 1126 1151 (9th Cir 2003) ([P]arties that agree to arbitrate statutory claims still are entitled to basic procedural and remedial protections so that they can effectively realize their statutory rights)

Plaintiffs hope to find refuge in *Am Express* where the Second Circuit found that the plaintiffs, a collection of merchants who accepted American Express charge cards had proven that requiring individual arbitration of their antitrust claims would deny them the ability to vindicate their statutory rights. The merchants invoked the Sherman Act claiming that American Express's requirement that those who accept its charge cards must also accept its credit and debit cards was an illegal tying arrangement. *Id* at 191–92. The plaintiffs provided a detailed affidavit from an economist who opined that even a merchant with yearly charge card revenue of as much as \$1.7 million per year could expect damages of only about \$40,000. *Id* at 198. The economist believed that the costs of obtaining that award would be prohibitive where the expert economic studies necessary to prove the antitrust claims would cost much more. *Id* ([I]t would not be worthwhile for an individual plaintiff to pursue individual arbitration or litigation where the out-of-pocket costs just for the economic study and services would be at least several hundred thousand dollars and might exceed \$1 million). Finding that American Express had brought no serious challenge to the economist's opinion, the court found that the merchants had carried their burden of proving that the arbitration agreement's class action waiver effectively deprived them of the protection of federal antitrust law. *Id* at 199. The court was careful to explain that class action waivers were not per se unenforceable but rather that courts must evaluate them on a case by case basis. *Id*

*12 Even assuming that the Ninth Circuit would apply the vindication-of-statutory-rights defense just as the *American Express* court did.^{FN11}

it would be of no benefit to either the Adams Plaintiffs or Ms Stoican. No Plaintiff has shown that their arbitration agreement deprives them of the opportunity to vindicate their statutory claims.

FN11 Some courts have questioned whether *Concepcion* implicitly limits the vindication of statutory rights defense. *E.g. D'Antuono v Serv Road Corp*, No. 3:11cv33 (MRK) 2011 U.S. Dist. LEXIS 57367 at *82 (D Conn. May 25, 2011) ([T]he Court knows of no principled reason why federal law rules that have essentially the same purpose and effect as the *Discover Bank* rule would continue to be permissible after [*Concepcion*]).

The Adams plaintiffs contend that the Unicef arbitration agreement's limitation on discovery damages and injunctive relief make them unable to vindicate their FCA claims. They fall well short of proving as much. As the court has noted, the Unicef Agreement dictates that an arbitrator cannot enforce the damages limitation or bar on injunctive relief if doing so would be contrary to law. The Adams Plaintiffs make no attempt to prove that an arbitrator would not follow the law. As to the agreement's limitation on discovery, Plaintiffs do not explain why they need more than limited discovery to prove the crux of their claim—that they received unsolicited text messages from ATTM. Nothing in the record suggests that any of the Adams Plaintiffs would be unable to obtain evidence necessary to support their claims in an individual arbitration. Indeed, given that ATTM has offered to substitute the terms of its arbitration agreement, which contains none of the limitations identified above, the Adams Plaintiffs will be hard-pressed to prove that they cannot vindicate their statutory rights in arbitration.

Ms Stoican similarly fails to prove that the Verizon arbitration agreement deprives her of the ability to vindicate her FCA rights.^{FN12} Like the Adams Plaintiffs, she points to the Verizon agreement's limits on damages. Like the Adams Plaintiffs, she fails to recognize that the agreement

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provides for enforcement of those limits only if the law allows. She also attempts to follow the path that the *American Express* merchants charted, providing an affidavit from an expert witness who opines that arbitration would be prohibitively expensive. Telecommunications industry expert Charles Clapsaddle opines that the cost of proving that Verizon's charges to Ms. Stoican for its Navigator services were a systematic problem would be tens of thousands of dollars. Clapsaddle Decl ¶¶ 11–13. What neither Mr. Clapsaddle nor Ms. Stoican acknowledges is that she has no need to prove that Verizon's overcharging was a systematic problem. Nothing in the FCA requires her to prove that Verizon systematically charges customers for Navigator service that they did not request. It merely requires her to prove that *she* was charged for a service that she did not request. There is no evidence in the record that she cannot effectively prove this in arbitration.

FN12 Ms. Stoican does not argue that the arbitration agreement effectively deprives her of the ability to vindicate her Washington law claims, including her CPA claim. *But see In re DirecTV Early Cancellation Fee Litig.* No. ML 09–2093 AG (ANx) 2011 U.S. Dist. LEXIS 102027 at *35–39 (C.D. Cal. Sept. 6, 2011) (holding that arbitration agreement effectively prevented plaintiffs from vindicating right to act as private attorney general to enforce two California statutes).

IV CONCLUSION

For the reasons stated above, the court GRANTS ATTM's motion to compel arbitration (Dkt # 37) and DENIES its motion to seal (Dkt # 60). The court directs the clerk to UNSEAL the document at Docket No. 62. The court GRANTS ATTM's motion (Dkt # 67) for leave to file an additional brief because the court's consideration of that unsolicited brief (and Plaintiffs' unsolicited brief in response) prejudiced no party.

*13 No party has requested that the court stay

this proceeding pending arbitration. *See* 9 U.S.C. § 3. The court accordingly directs the clerk to DISMISS this action without prejudice to the resolution of Plaintiffs' claims in arbitration.

The court will enter a separate order memorializing its decision to compel arbitration in Ms. Stoican's case against Verizon. No. C 10–1017RAJ.

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United States District Court
W D Pennsylvania
Karin J BLACK et al Plaintiff
v
JP MORGAN CHASE & CO et al Defendants

Civil Action No 10-848
Aug 25 2011

Matthew L Kurzweg Pittsburgh PA for Plaintiff

Arthur H Stroyd Jr Matthew T Logue Del Sole
Cavanaugh Stroyd LLC Thomas L Allen Reed
Smith Mark D Shepard Babst Calland Clements
& Zomnir Dennis A Watson Grogan Graffam
P C George E Yokitis Deforest Koscelnik Yokit-
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& Whitney LLP Minneapolis MN for Defendants

REPORT AND RECOMMENDATION

LISA PUPO LENIHAN United States Chief Ma
gistrate Judge

I RECOMMENDATION

*1 It is respectfully recommended that the Mo-
tion of Defendant Discover Financial Services to
Compel Arbitration (ECF No 28) be granted and
the Motion to Dismiss the Complaint (ECF No 28)
be denied as moot It is further recommended that

this case be stayed only as to Defendant Discover
Financial Services while Plaintiff submits her claim
to arbitration

II REPORT**A Background and Procedural History**

Plaintiff Karin Black, has filed a purported
class action complaint alleging that the Defendants
violated the Sherman Act 15 U S C § 1 Generally
Black alleges that the Defendants-consumer
lenders credit reporting agencies and credit scor-
ing companies conspired to restrain the availability
of consumer loans and inflate or fix the price of that
credit at artificially high levels by sharing pricing
data in the form of credit history information
Plaintiff also alleges a national boycott of con-
sumers who are unable or unwilling to pay mono-
polistic prices (Compl ¶ 67) She seeks an order
declaring that this action be maintained as a class
action and declaring Plaintiff as representative of
the Classes and her counsel as counsel for the
Classes an order enjoining the Defendants' anti-
competitive conduct and an award of damages for
herself and the Classes ^{FN1}

FN1 Black invokes this Court's subject
matter jurisdiction pursuant to 15 U S C
§§ 15 and 26 and 28 U S C §§ 1331 and
1337 Venue lays in this district under 15
U S C §§ 15 22 and 26 and 28 U S C §
1391

In response to the Complaint Defendant Dis-
cover Financial Services (DFS) one of three
lender defendants in this case has filed a motion to
compel arbitration of Plaintiffs individual claims
or in the alternative to dismiss the Complaint
(ECF No 28) which is the subject of this Report
and Recommendation In support of its alternative
argument seeking dismissal of the Complaint pursu-
ant to Rule 12(b)(6) DFS joins in the memorandum
of law filed by the other two lender defendants JP

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Morgan Chase & Co and Bank of America Corporation^{FN2} Plaintiff filed a memorandum of law opposing the motion to compel arbitration and reply brief. On February 10, 2011, the Court heard oral argument on DFS's motion. As the motion has been fully briefed and argued, it is now ripe for disposition.

FN2 JP Morgan Chase and BOA filed a motion to dismiss the Complaint under Rule 12(b)(6) (ECF No. 32) arguing that under *Bell Atlantic Corp v Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and its progeny, Plaintiff failed to allege sufficient facts to show that her antitrust claims against them were plausible. On August 10, 2011, the undersigned filed a Report and Recommendation (ECF No. 84) recommending that the motion to dismiss (ECF No. 32) filed by JP Morgan Chase and BOA be granted. Because the Court concludes that this case should proceed to arbitration, the Court does not reach the merits of DFS's motion. In the alternative, to dismiss the Complaint under Rule 12(b)(6).

B Legal Standard—Motion to Compel Arbitration

The standard of review on a motion to compel arbitration is the same as the standard of review on a motion for summary judgment. *Quilloin v Tenet HealthSystem Philadelphia, Inc.*, 763 F.Supp.2d 707, 715 (E.D.Pa.2011) (quoting *Hopkins v New Day Fin.*, 643 F.Supp.2d 704, 713–14 (E.D.Pa.2009) (citing *Par-Knit Mills, Inc. v Stockbridge Fabrics Co.*, 636 F.2d 51, 54 & n.9 (3d Cir.1980))) *see also Kirlis v Dickie, McCamey & Chilcote*, 560 F.3d 156, 159 n.3 (3d Cir.2009).

Accordingly, the Court may consider all affidavits, exhibits, and discovery in the record. *Quilloin*, 763 F.Supp.2d at 715 (quoting *Hopkins*, 643 F.Supp.2d at 713–14 (citing *Par-Knit Mills*, 636 F.2d at 54 & n.9)). A motion to compel arbitration should be granted only where there is no genuine issue of fact concerning the formation of the agree-

ment to arbitrate. *Kirlis*, 560 F.3d at 159 (quoting *Par-Knit Mills*, 636 F.2d at 54). In making this determination, the party opposing arbitration is entitled to the benefit of all reasonable doubts and inferences that may arise. *Id.*

C Facts^{FN3}

FN3 The factual allegations relating to the alleged antitrust violations are set forth in detail in Part II C of the Court's Report and Recommendation (ECF No. 84) on the motions to dismiss filed by the other defendants, and thus will not be repeated here.

*2 The facts relating to DFS's motion to compel arbitration are straightforward and are not disputed.^{FN4} Plaintiff's Discover Card is issued by Discover Bank, a federally issued bank chartered and incorporated in the State of Delaware, with its principal place of business in Delaware (Declaration of Leo Linian (Linian Decl.), ¶¶ 2–4, ECF No. 28–2). Discover Bank operates a facility in Delaware that provides a full array of retail and depository banking services to its customers (Linian Decl., ¶ 3). DFS Services LLC is the servicing affiliate of Discover Bank and, as such, administers a variety of the business aspects of the Discover Card program, including the servicing and collection of credit card accounts, the issuance of statements, the handling of disputes and settlement with merchants (Linian Decl., ¶¶ 2, 5). Both DFS Services LLC and Discover Bank (collectively, Discover) are subsidiaries of DFS, are incorporated in the State of Delaware, and have their principal places of business in Illinois (Linian Decl., ¶¶ 2–3).

FN4 In support of its motion to compel arbitration, DFS has submitted the declaration of Leo Linian, Director of Collection Strategy for DFS Services LLC, as subsidiary of Discover Financial Services (Linian Decl., ¶ 2). Plaintiff has not submitted any affidavit or other competent

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evidence to contradict Mr Linean's statements

Plaintiff has been a Discover credit card member since 1999 (Linian Decl ¶ 6) When Ms Black's application was approved her credit card and the Cardmember Agreement were mailed to her at the address she provided in her application per Discover's standard practice (Linian Decl ¶ 7) The Cardmember Agreement provides that by using her credit card Ms Black agrees to the terms of the Cardmember Agreement According to Discover's records Ms Black did use her card thereafter (Linian Decl ¶ 8)

The Discover Cardmember Agreement provided to Plaintiff in 1999 contained a broad arbitration provision that encompassed any past present or future claim or dispute (whether based upon contract tort statute common law or equity) between you and us arising from or relating to your Account (Ex 1 to Linian Decl at 8 ECF No 28-3) This Cardmember Agreement also provided that it would be governed by Delaware law and applicable federal laws (Ex 1 to Linian Decl at 10)

The arbitration provision of the Cardmember Agreement has been amended several times since Plaintiff first opened her Discover Card account pursuant to the Change of Terms provision of the Cardmember Agreement (Linian Decl ¶ 9 Ex 1 to Linian Decl at 8) and Delaware law 5 Del C § 952(a)^{FN5} When a change has been made to the terms of the Cardmember Agreement Discover inserts and mails a Notice of Change to the Cardmember Agreement with the billing statements of all Discover card members who have open accounts and are receiving statements (Linian Decl ¶ 9) The Cardmember Agreement provides Ms Black with the right to reject any such changes to the terms of the Cardmember Agreement and close her account (*Id*) According to Discover's records Ms Black did not reject any of the changes that Discover Banks made to the terms of her Cardmember Agreement (*Id*)

FN5 The amendments are attached to the Linian Declaration See Linian Decl ¶ 10-17

*3 As amended the arbitration provision in the 2009 Cardmember Agreement applicable to the current dispute states in relevant part

Arbitration of Disputes *Agreement to arbitrate*
In the event of any past present or future claim or dispute (whether based upon contract tort statute common law or equity) between you and us arising from or relating to your Account any prior account you have had with us your application the relationships which result from your Account or the enforceability or scope of this arbitration provision of the Agreement or of any prior agreement you or we may elect to resolve the claim or dispute by binding arbitration IF EITHER YOU OR WE ELECT ARBITRATION NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS OR LITIGATE IN COURT OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY (Class Action Waiver)

Ex 10 to Linian Decl at 11 ECF No 28-4
The arbitration clause also delineates who shall conduct the arbitration

The arbitration shall be conducted at the option of whoever files the arbitration claim by either the American Arbitration Association (AAA) or the National Arbitration Forum (NAF) in accordance with their procedures in effect when the claim is filed No other arbitration forum will be permitted except as agreed to pursuant to

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either the Changes to this Agreement section or a writing signed by both parties

Id

In addition the arbitration clause provides that Discover Bank's rights and obligations under this arbitration provision shall inure to the benefit of and be binding upon our parent corporations subsidiaries affiliates (including without limitation DFS Services LLC) predecessors successors assigns as well as the officers directors and employees of each of these entities *Id* at 12 As DFS is the parent corporation of Discover Bank (Linian Decl ¶ 2) the arbitration provision is binding upon DFS

In 2003 Plaintiff was given the option of rejecting the arbitration provision without cancelling her account or affecting any of her other rights or privileges under the remainder of the Cardmember Agreement (Linian Decl ¶ 11 Ex 4 ECF No 28-3) In particular Discover Bank inserted into and mailed with Plaintiff's billing statement a "NOTICE OF RIGHT TO REJECT ARBITRATION," which became effective April 1, 2003 (Linian Decl ¶ 11) The Notice of Right to Reject Arbitration required that notice of rejection be made in writing and provided to Discover Bank by March 25 2003 (Ex 4) According to Discover's records Plaintiff did not exercise her right to opt out of or otherwise reject the arbitration provision (Linian Decl ¶ 11)

*4 Similarly in 2004 2005 2006 2007 and 2008 Discover Bank also sent to Plaintiff notices of amendments to the Arbitration of Disputes section included with her billing statements (Linian Decl ¶¶ 12-16 Exs 5-9 attached thereto ECF No 28-4)

D Analysis

The Federal Arbitration Act (FAA) creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate 9 U S C § 1 *et seq* *John Hancock Mut*

Life Ins Co v Olick 151 F 3d 132 136 (3d Cir 1998) (quoting *Moses H Cone Mem'l Hosp v Mercury Constn Corp* 460 U S 1 25 n 32, 103 S Ct 927 74 L Ed 2d 765 (1983)) The FAA provides that a written arbitration provision in any contract evidencing a transaction involving commerce is valid and enforceable except upon such grounds as exist at law or in equity for the revocation of any contract 9 U S C § 2^{FN6} In addition the FAA favors the enforcement of arbitration agreements requiring that such agreement be enforced to the same extent as other contracts *Harris v Green Tree Fin Corp* 183 F 3d 173, 178 (3d Cir 1999) The FAA also provides that [a] party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court for an Order directing that such arbitration proceed in the manner provided in the agreement 9 U S C § 4

FN6 The parties do not dispute that the contract in this case involves commerce as defined in 9 U S C § 1

The FAA clearly reflects a strong policy in favor of the resolution of disputes through arbitration *Kirleis* 560 F 3d at 160 (quoting *Alexander v Anthony Int'l LP* 341 F 3d 256 263 (3d Cir 2003)) [T]his presumption in favor of arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties *Id* (quoting *Fleetwood Enters Inc v Gaskamp* 280 F 3d 1069 1073 (5th Cir 2002))

The interpretation and construction of arbitration agreements are determined by reference to federal substantive law *Harris* 183 F 3d at 179 (citing *Moses H Cone* 460 U S at 25 n 32) However pursuant to section two of the FAA federal courts may apply state law if that law arose to govern issues concerning the validity revocability and enforceability of contracts generally *Doctor's Associates Inc v Casarotto* 517 U S 681 685 116 S Ct 1652 134 L Ed 2d 902 (1996) *Harris* 183 F 3d at 179 (citing 9 U S C § 2) Thus a court may

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turn to ordinary state-law principles that govern the formation of contracts when determining whether the parties agreed to arbitrate *Kirleis* 560 F 3d at 160 (quoting *First Options of Chicago Inc v Kaplan* 514 U S 938 944 115 S Ct 1920 131 L Ed 2d 985 (1995) and citing *Blair v Scott Specialty Gases* 283 F 3d 595 603 (3d Cir 2002)) In addition state law is applicable where a party raises contract defenses to invalidate arbitration agreements such as fraud duress or unconscionability *Doctor's Assoc* 517 U S at 687 see also *Harris* 183 F 3d at 179 (citing *Doctor's Assoc* 517 U S at 687 *Perry v Thomas* 482 U S 483 492 107 S Ct 2520 96 L Ed 2d 426 (1987))

1 Validity and Scope of Arbitration Provision

*5 As a threshold matter the FAA requires the court to make the following determinations before ordering arbitration (1) whether the parties entered into a valid arbitration agreement and (2) whether the specific dispute falls within the scope of that agreement *Olick* 151 F 3d at 136 (explaining that a district court need only engage in a limited review to ensure that the dispute is arbitrable) DFS contends that these requirements have been satisfied here As to the first requirement DFS submits that Plaintiff's Cardmember Agreement and transactions with Discover Bank clearly involve interstate commerce In addition DFS points out that the arbitration clause contains an express provision to this effect and states that it shall be governed by the FAA Plaintiff does not contest this point

As to whether a valid and enforceable agreement to arbitrate exists between Plaintiff and itself DFS contends that Ms Black received the written Cardmember Agreement when she applied for and opened her credit card account with Discover Bank and used her card By doing so she agreed to the arbitration provision In addition DFS submits that Plaintiff was notified in writing of her right to reject the arbitration provision and the procedure for doing so but she did not elect to reject the arbitration provision^{FN7}

FN7 DFS as parent corporation of Dis

cover Bank is entitled to enforce the arbitration provision based on the provision entitled Other Beneficiaries of this Provision contained in the Cardmember Agreement

In response Plaintiff argues that although Discover may have made a one-time offer to opt out of arbitration over seven years ago she does not recall receiving the offer and thus never actually agreed not to opt out By relying on silence instead of contacting her to discuss the terms Plaintiff submits that Discover Bank is simply exercising its superior strength in bargaining power to control the terms and avoid any meaningful negotiations regarding those terms Plaintiff's argument is unavailing for two reasons First her contention that she does not recall receiving the Notice of Rejection of Arbitration is unattested as it is set forth in her memorandum of law and not in an affidavit and therefore is legally insufficient Fed R Civ P 56(c)(1) Second even if Plaintiff had provided such statement in an affidavit merely asserting that she did not recall receiving the Notice does not lead to the conclusion that she never actually agreed to not opt out of the arbitration clause See e.g. *Tinder v Pinkerton Security* 305 F 3d 728 735-36 (7th Cir 2002) (holding that plaintiffs averment in her affidavit that she did not recall seeing or reviewing the arbitration program brochure that was allegedly included with her payroll check did not raise a genuine issue of fact as to whether the brochure was distributed to her where the record also contained uncontroverted affidavits from defendant indicating that the brochure was definitely sent and presumably received with her paycheck) (citations omitted) *Fisher v GE Med Sys* 276 F Supp 2d 891, 895 (M D Tenn 2003) (That [plaintiff] does not recall receiving a copy of [the arbitration agreement] does not invalidate the agreement)

*6 As to the second threshold requirement DFS maintains that Plaintiffs antitrust claims against DFS fall within the scope of the arbitration agreement given the broad and sweeping language

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of the arbitration provision and the strong presumption of arbitrability. In support, DFS argues that its alleged violations of the Sherman Act clearly relate to Plaintiffs Account and the relationships which resulted from [her] Account as that claim is premised on her allegation that DFS used its relationships with credit reporting bureaus and credit scoring companies to share her financial information with the other defendants thereby supposedly fixing the price that she paid for her credit from DFS and the other defendants (DFS's Mem. of Law at 10 ECF No. 28 (citing Compl. ¶ 67)). DFS further contends that the privacy provision of the Cardmember Agreement specifically contemplates and expressly permits the sharing of Plaintiffs account information with others. Therefore, DFS maintains that Plaintiffs claims relate directly to her account and Cardmember Agreement and thus, are subject to the agreement to arbitrate with Discover Bank and its parent corporation, DFS. Plaintiff does not appear to contest that her antitrust claims here fall within the scope of the arbitration provision in her Cardholder Agreement.

The Court finds that Plaintiff's antitrust claims against DFS clearly fall within the scope of the arbitration provision. A presumption of arbitrability guides the Court's inquiry as to whether Plaintiff's claims fall within the substantive scope of the arbitration provision in her Cardholder Agreement. *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990) (overruled by implication on other grounds by *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 85, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) as recognized by *Dean Witter Reynolds Inc. v. Druz*, 2003 U.S.App. LEXIS 15523 (3d Cir. Aug. 4, 2003)) (citing *AT & T Techs. v. Commc'n Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). In addition, [a]n order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Medtronic AVE Inc. v. Advanced Cardiovascular Sys. Inc.*, 247 F.3d 44, 55 (3d Cir. 2001) (quoting *United Steelworkers of Am.*

v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). Courts have determined that language of an arbitration provision providing that any controversy, claim or dispute arising out of or relating is of the broadest nature. *TGM Health Inc. v. UnitedHealth Group Inc.*, Civ. A. No. 07-115, 2007 WL 1258133 at *1 (E.D. Pa. Apr. 27, 2007) (citing *Medtronic AVE Inc. v. Cordis Corp.*, 100 F.Appx 865, 868-69 (3d Cir. 2004)). In the case at bar, the Court finds that the arbitration provision at issue here is broadly worded so as to encompass the antitrust claims asserted by Plaintiff as said claims arise out of or relate to matters covered in the Cardholder Agreement.

*7 Accordingly, the Court finds that the undisputed facts show (1) the parties entered into a valid arbitration agreement and (2) Plaintiff's antitrust claims against DFS fall within the scope of that agreement. As to whether the arbitration provision is actually enforceable, Plaintiff raises several defenses at law to the enforceability of contracts which are addressed below.

2 Enforceability of Arbitration Provision

Plaintiff's primary focus in opposing the motion to compel arbitration lies in two defenses at law to the enforceability of contracts: impossibility and unconscionability. For support, Plaintiff cites the Restatement (Second) of Contracts § 261 which provides: "Where after a contract is made a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."

a. Impossibility of Performance

Selection of Forum

First, Plaintiff submits that the arbitration provision is void as being impossible to perform according to its terms because neither of the forums specifically designated in the arbitration clause no longer accept consumer debt arbitrations. Accord

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ing to Plaintiff the *New York Times* reported that as of July 20 2009 the National Arbitration Forum (NAF) is not accepting consumer arbitration cases in accordance with its settlement agreement with the Minnesota Attorney General ^{FN8} In addition NAF's website indicates that it is currently not accepting consumer arbitrations ^{FN9} DFS concedes this point

FN8 See Associated Press *NY Times*
Firm Agrees to End Role in Arbitrating
Card Debt July 20 2009 as reported at
[http //](http://www.nytimes.com/2009/07/20/business/20credit.html)
[www.nytimes.com/2009/07/20/business/20](http://www.nytimes.com/2009/07/20/business/20credit.html)
[credit.html](http://www.nytimes.com/2009/07/20/business/20credit.html)

FN9 See [http //www.adrforum.com/faq.aspxfaq=884](http://www.adrforum.com/faq.aspxfaq=884)
(last visited 8/24/11)

Plaintiff further submits that the American Arbitration Association (AAA) similarly has stopped accepting consumer credit card debt arbitrations and adjudications of class action waivers The AAA recently issued the following notice regarding its previous moratorium on debt collection arbitrations

Notice on Consumer Debt Collection Arbitrations

On October 19 2010 the National Task Force on the Arbitration of Consumer Debt Collection Disputes released the Consumer Debt Collection Due Process Protocol Statement of Principles That Protocol sets forth a number of important principles that need to be addressed and incorporated into consumer debt collection arbitration programs to help ensure that a fair and adequate arbitration process is made available to the parties

However the American Arbitration Association's previously announced moratorium on debt collection arbitrations remains in effect That moratorium was instituted based on public discourse and an evaluation of the AAA's own experiences

Matters included in this moratorium are consumer debt collections programs or bulk filings and individual case filings in which the company is the filing party and the consumer has not agreed to arbitrate at the time of the dispute and the case involves a credit card bill or the case involves a telecom bill or the case involves a consumer finance matter

*8 The AAA will continue to administer all demands for arbitration filed by consumers against businesses and all other types of consumer arbitrations

See [http //www.adr.org/sp.asp?id=36427](http://www.adr.org/sp.asp?id=36427) (last visited 8/24/11) (hereinafter referred to as AAA Notice)

Black construes the language in the second paragraph of the AAA Notice following Matters included in this moratorium are in the disjunctive and thus argues that the terms telecom bills and consumer finance matters are clearly separate from the prior limitation regarding who is the filing party Therefore according to Black consumer finance matters (which is really what her case involves not debt collection) are included within the moratorium Based on the above Plaintiff argues that neither forum designated in the arbitration provision, AAA nor NAF will arbitrate disputes involving consumer debts similar to the one at issue here Consequently because an agreement to arbitrate before a particular forum is an integral term of an agreement to arbitrate where the forum selected by the parties declines to hear the matter the dispute is to be tried in court Accordingly plaintiff submits that the motion to compel arbitration should be denied

The Court disagrees with Plaintiff's construction of the language in the last sentence of the second paragraph in the AAA Notice as she ignores the use of the conjunctive and as well as the grammatical structure of that sentence As to the use of the conjunctive unless the context dictates otherwise the word and is presumed to be

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used in its ordinary sense *Reese Brothers Inc v United States* 447 F 3d 229, 235–36 (3d Cir 2006) (citations omitted) When the ordinary meaning of the word *and* is applied to the last sentence of paragraph two the AAA Notice sets forth three situations to which the moratorium applies (1) consumer debt collection programs[] (2) bulk filings[] *and* [(3)] individual case filings in *which* the company is the filing party *and* the consumer has not agreed to arbitrate at the time of the dispute *and* [(a)] the case involves a credit card bill or [(b)] the case involves a telecom bill or [(c)] the case involves a consumer finance matter (Emphasis added) The grammatical structure of the sentence supports this conclusion The words *and* and the consumer has not agreed to arbitrate at the time of the dispute *and* the case involves a credit card bill or a telecom bill or a consumer finance matter are actually clauses (i e contain a noun and a verb) as opposed to the matters set forth at the beginning— consumer debt collection programs and bulk filings—which are nouns Moreover the use of the relative pronoun *which* in the preceding clause individual case filings in *which* the company is the filing party indicates that the clauses that follow it are subordinate to it Indeed the very definition of a subordinate clause is that it depends on something else i e an independent clause for its meaning Finally the Court notes that the last subordinate clause which begins *and the case involves a credit card bill* actually includes the word *case* which appears to be referring to the individual *case* filings language in the independent clause Matters included in this moratorium are individual *case* filings in which the company is the filing party *and* (Emphasis added)

*9 In addition, this construction is in line with AAA's concerns in implementing the moratorium with ensuring a fair and adequate arbitration process for *consumer debt collection* arbitration programs The Court's construction of the moratorium is also logical given the AAA's repeated reference to *debt collection* arbitrations throughout the No-

tice and the fact that debt collections are normally brought by the company/lender against the consumer None of these concerns are implicated here where Plaintiff's dispute with DFS does not involve a consumer debt collection arbitration^{FN10} At least two other district courts have agreed with this Court that AAA is available to arbitrate similar claims *See e g Clerk v ACE Cash Express Inc* No 09–05117 2010 WL 364450 at *10 (E D Pa Jan 29 2010) *Smith v Computertraining com Inc* No 2 10–cv–11490 2011 U S Dist LEXIS 16516 at *30–31 (S D Mich Feb 18 2011)

FN10 Nor does applying the ordinary meaning of the word *and* here lead to an absurd or anomalous result but rather is entirely consistent with the purpose of the moratorium

In light of this construction of the AAA Notice the Court finds that none of the situations subject to the AAA moratorium is present here The first situation is not implicated because as Plaintiff concedes the dispute here involves a consumer finance matter (price fixing) not a debt collection program Pl's Sur–Reply Br at 1 ECF No 73 Nor does this case involve a bulk filing and thus the second situation is likewise inapplicable As to the third situation all three conditions must be met in order for the matter to fall within the moratorium The only condition at issue here is the first one—whether DFS is the filing party Black argues that DFS is the filing party because DFS is the partying requesting arbitration The Court disagrees Just because DFS has moved to compel arbitration does not mean that it is the filing party Rather the filing party is the party pursuing the underlying claim which in this case is Black *See Ace Cash Express* 2010 WL 364450 at *10 *Estep v World Finance Corp of Ill* 735 F Supp 2d 1028 1033 (C D Ill 2010), *Jackson v The Payday Loan Store of Ill* 2010 U S Dist LEXIS 25266 at *6–7 (N D Ill Mar 17 2010)

Plaintiff attempts to distinguish these cases on the basis that the district courts in *Estep* and *Jack*

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son failed to analyze the moratorium in light of AAA's substantive concerns as stated in the Naimark Testimony. However, the moratorium's concerns were specifically directed to consumer debt collection arbitrations brought by lenders and thus would have no relevance to the decisions in *Estep* and *Jackson* or to the instant matter.

Moreover, the third paragraph of the AAA Notice makes clear that the moratorium does not apply to Plaintiffs' dispute with DFS. Black does not agree with this conclusion, again asserting that she is not the party demanding arbitration. This argument fails for the reason just stated—Plaintiff, who is pursuing an antitrust claim against DFS, would be the filing party in the arbitration. Thus, the third paragraph of the AAA Notice makes clear that Plaintiffs' claim is not subject to the current AAA moratorium on debt collection arbitrations.

*10 Finally, in a last ditch effort to show that arbitration before the AAA is impossible, Plaintiff posits that when the substantive concerns underlying the moratorium are taken into consideration, FN11 AAA will not administer the arbitration. According to Black, AAA's substantive concern of bias has nothing to do with which party files in arbitration. Plaintiffs' argument might have some merit if her dispute with DFS involved the arbitration of a debt collection matter and she was the one being sued. But, as she herself concedes, her dispute with DFS involves a consumer finance matter (price fixing) and she is the filing party.

FN11 As Black notes, one of the critical issues needing further consideration and improvement before arbitration of debt collection cases will resume is arbitrator neutrality, specifically that an appearance of bias might result from arbitrators hearing many cases involving the same business party. Testimony of Richard W. Naimark on behalf of AAA Before Domestic Policy Subcommittee Oversight and Government Reform Committee, July 22, 2009 (Naimark Testimony) at 6 re-

ported at <http://www.adr.org/s1.asp?id=5770> (last visited 8/24/2011) (ECF No. 73-1). However, a review of Mr. Naimark's testimony reveals that the AAA's overarching concern is with the fairness of *debt collection* arbitrations. In this regard, Naimark testified:

[I]t is the AAA's position that a series of important fairness and due process concerns must be addressed and resolved before we will proceed with the administration of any future *debt collection arbitrations*. Until such time, the AAA has placed a moratorium on the administration of any *consumer debt collection arbitration programs*.

Id. at 2 (emphasis added). Thus, the critical issues identified by AAA—notice (many consumers do not appear), arbitrator neutrality, pleading and evidentiary standards, and defenses and counterclaims—are particular to the consumer debt collection arbitrations and were identified based on the large number of cases filed by creditors and statistical evidence showing that 93.3% of the time defendants (consumers) did not appear, defendants are almost never represented by counsel, and that 80% of cases result in default judgments against the consumer without the requisite proof. *Id.* at 4 (citing *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*, available at http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf). None of these concerns is implicated in the case at bar.

In the alternative, Black requests leave of court under Rule 26(d)(1) to conduct discovery limited to determining whether the present dispute with Discover falls within AAA's moratorium. As the Court has determined that the moratorium does not apply

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to Plaintiffs dispute with DFS and even Plaintiffs own evidence Naimark's testimony supports this conclusion there is no need to conduct discovery to ascertain whether AAA would arbitrate the matter That issue has clearly been resolved

Accordingly because the AAA moratorium does not apply to Plaintiffs dispute with DFS enforcement of the arbitration provision is not impossible under the terms of the Cardholder Agreement

Class Action Waiver

Plaintiffs other impossibility argument can be summarized as follows because the arbitration provision in her Cardholder Agreement contains a class action waiver and AAA does not accept adjudications of class action waivers the arbitration provision is void as being impossible to perform according to its terms In support Black cites a document located on the AAA's website entitled

Consumer Debt Collection Due Process Protocol Statement of Principles (Principles) prepared by the National Task Force on the Arbitration of Consumer Debt Collection Disputes dated October 2010, from which she infers that AAA has stopped accepting adjudications of class action waivers (See Ex B attached to DFS's Reply Br ECF No 70)

In reply Discover argues that Black is completely wrong when she claims the AAA does not accept adjudications of class action waivers DFS submits that the document she cites in support the Principles does not contain any such statement More importantly DFS posits it is asking *this Court* not AAA to enforce the class action waiver The arbitration agreement specifically provides that only a court and not an arbitrator shall determine the validity and effect of the Class Action Waiver (Cardmember Agreement at 11 Ex 10 to Linian Decl)

The Court does not find any support for Black's position in the Principles document Rather review of the Principles reveals that the members of the

Task Force took strong but opposing views on the availability of class actions in arbitration and therefore the Principles declined to take a position on the issue of class actions See Ex B at 11-14 ECF No 70 ^{FN12} In any event Plaintiff's argument is undercut by the court of appeals decision in *Puleo v Chase Bank USA NA* 605 F 3d 172 (3d Cir 2010) In *Puleo* the court of appeals sitting *en banc* held that a plaintiff's challenge to an arbitration agreement's class action waiver presents a question of arbitrability that the court not the arbitrator should decide *Id* at 188 Therefore even if AAA is no longer accepting adjudications of class action waivers that does not make the arbitration provision impossible to perform since the Court not the arbitrator determines whether the class action waiver is enforceable

FN12 Although neither party brought this to the Court's attention the court of appeals in *Puleo* noted that the plaintiffs could not have brought that case as a class arbitration before the AAA because in a July 2005 policy the AAA stated that it does not accept demands for class arbitration where as in that case the underlying agreement prohibits class claims unless the parties obtain a court order requiring the parties to submit the class claims to arbitration 605 F 3d at 176 n 1

b Unconscionability of Class Action Waiver

*11 DFS submits that the class action waiver in the arbitration provision is valid and enforceable because Plaintiff agreed to the arbitration provision and she did not exercise her right to opt out of the class action waiver In particular DFS submits that under Delaware law the parties' designated choice of law the class action waiver is enforceable In response Plaintiff argues that because Pennsylvania policy interests are implicated here Pennsylvania law should be applied and under that law the class action waiver is unconscionable and therefore unenforceable DFS disagrees that Pennsylvania law should apply here but submits that even if the

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Court were to apply Pennsylvania law, Plaintiff has failed to show, as is her burden that the class action waiver is both procedurally and substantively unconscionable. DFS further submits that pursuant to the Supreme Court's recent decision in *AT & T Mobility LLC v. Concepcion* — U.S. — 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) the FAA preempts Pennsylvania law that holds class action waivers in consumer arbitration agreements unconscionable and thus unenforceable. For the reasons articulated below, the Court finds the class action waiver is enforceable.

As a preliminary matter, DFS submits that Black does not dispute, nor could she, that if this Court applies the Delaware choice-of-law provision in the Cardmember Agreement, the class action waiver is enforceable. In support, DFS cites *Venezia v. MBNA Am. Bank*, No. 05-1458, 2006 U.S. Dist. LEXIS 54014 (W.D. Pa. July 26, 2006) (Cercione, J.) (upholding Delaware choice of law provision in credit card agreement and enforcing class action waiver in a diversity jurisdiction case brought pursuant to TILA). *Lloyd v. MBNA Am. Bank NA*, 27 F. App'x 82, 85 (3d Cir. 2002) (finding right to bring class action under TILA was a procedural one and may be waived, and thus arbitration agreement barring class wide relief for TILA claims was not unconscionable); *Pick v. Discover Fin. Serv. Inc.*, C.A. No. 00-935-SLR, 2001 WL 1180278, *5 (D. Del. Sept. 28, 2001) (it is generally accepted that arbitration clauses are not unconscionable because they preclude class actions). In addition, DFS submits that the court of appeals for this circuit has repeatedly enforced class action waivers in arbitration agreements. See e.g., *Gay v. CreditInform*, 511 F.3d 369, 391-92 (3d Cir. 2007) (because plaintiff retained her substantive rights pursuant to the Credit Repair Organizations Act and Pennsylvania Credit Services Act, a provision in the arbitration agreement requiring plaintiff to arbitrate claims on an individual basis did not constitute an unconscionable bargain under Virginia law); *Johnson v. West Suburban Bank*, 225 F.3d 366, 371, 373-75 (3d Cir. 2000) (under federal

Truth-in-Lending Act, right to class action was a procedural one and may be waived, and thus arbitration agreement barring class wide relief for TILA claims was not unconscionable, reasoning that plaintiffs who signed valid arbitration agreements retained the full range of rights afforded under TILA in individual arbitration proceedings).

*12 A review of Delaware law reveals that the courts of that state have held class action waivers in consumer credit card agreements to be enforceable. See e.g., *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1260-61 (Del. Super. Ct. 2001) (holding that where the surrender of the class action right was clearly articulated in the arbitration agreement and plaintiff did not dispute the clarity of the language barring class actions in arbitration, the class action waiver was not unconscionable and therefore enforceable).^{FN13} *Pick*, 2001 WL 1180278, at *5 (it is generally accepted that arbitration clauses are not unconscionable because they preclude class actions) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (ADEA claims); *West Suburban Bank*, 225 F.3d at 377 (FILA claims)). Under Delaware law, more than a mere disparity in bargaining power is required to demonstrate that an arbitration provision is unconscionable. *Pick*, 2001 WL 1180278, at *5 (citing *Gilmer*, 500 U.S. at 33; *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 182-83 (3d Cir. 1999)). In setting forth the test for unconscionability, the Delaware Supreme Court opines:

FN13 In concluding that the class action waiver was not unconscionable, the *Edelist* court relied on several decisions by Delaware district courts involving unconscionability challenges to class action waivers in TILA cases. 790 A.2d at 1261. Although *Edelist* asserted state common law claims and an alleged violation of the Delaware Consumer Fraud Act, the superior court found the result in those TILA cases, i.e., the district court upheld the bar

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on class actions in arbitration agreements was equally applicable to plaintiff's putative right under Delaware law to bring a class action *Id*

there must be an absence of meaningful choice and contract terms unreasonably favorable to one of the parties Superior bargaining power alone without the element of unreasonableness does not permit a finding of unconscionability or unfairness The traditional test is this a contract is unconscionable if it is such as no man in his senses and not under delusion would make on the one hand and as no honest or fair man would accept on the other *Williams v Walker-Thomas Furniture Co* 121 U S App D C 315 320 350 F 2d 445 450, 18 A L R 3d 1297, 1301-3 (1965) It is generally held that the unconscionability test involves the question of whether the provision amounts to the taking of an unfair advantage by one party over the other *J A Jones Construction Co v City of Dover* Del Super , 372 A 2d 540 552 (1977) *appeal dismissed* Del Supr 377 A 2d 1 (1977) *Tulowitzki v Atlantic Richfield Co* 396 A 2d 956 960 (Del 1978)

In her written briefs Black has not provided any argument in opposition to DFS's argument that under Delaware law the class action waiver is not unconscionable Indeed at oral argument Plaintiff's counsel agreed with DFS that under Delaware law class action waivers in arbitration provisions are enforceable (Tr of Oral Arg at 80 ECF No 82) In light of the Delaware courts endorsement of the generally accepted view that arbitration clauses are not unconscionable because they preclude class actions and the absence of any evidence showing DFS had superior bargaining power over Plaintiff that was unreasonable^{FN14} the Court concludes that Delaware Supreme Court would find that the class action waiver in the arbitration provision agreed to by Plaintiff is enforceable

FN14 See discussion of this factor *infra* at 29-33 regarding Pennsylvania law on un

conscionability

Perhaps recognizing this Plaintiff attempts to circumvent the designation of Delaware law in the Cardmember Agreement by arguing that where a class action waiver is unconscionable as against public policy the policy interests of Pennsylvania override any choice of law clause Plaintiff's argument parallels at least partially a conflict of laws analysis under Pennsylvania law but is undeveloped See discussion *infra* at 23 The Court notes that neither party has advanced any argument as to which state's choice of laws rules should be applied here The general rule in diversity of citizenship cases is that the conflicts law of the forum applies *Klaxon v Stentor Elec Mfg Co* 313 U S 487 496 61 S Ct 1020 85 L Ed 1477 (1941) However whether this rule applies to federal question case such as this one where Plaintiff's claims against DFS are brought pursuant to a federal statute but the issue raised in the motion to compel arbitration involves a state law contract defense depends on the source of the source of the right or is sue being adjudicated See Charles Alan Wright Arthur R Miller & Edward H Cooper 19 *Fed Prac & Proc* § 4520 at 638 (2d ed 1996) (Once it is understood that the law to be applied in federal courts is not chosen by reference to the basis of subject matter jurisdiction the nature of the inquiry by which it is decided which law to apply in nondiversity cases is the same as that governing the choice in diversity cases In other words the choice of applicable law turns upon the source of the right or issue being adjudicated) (footnote omitted)

*13 The court of appeals decision in *System Operations Inc v Scientific Games Dev Corp* 555 F 2d 1131 (3d Cir 1977) is instructive here In that case the plaintiff brought a federal antitrust claim involving patents in a New Jersey federal court as well as various common law claims under New Jersey law *Id* at 1135 As a threshold matter the court of appeals addressed a choice of law issue with regard to one of the pendant state law claims The court held that although *Klaxon* was a diversity

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jurisdiction case the principle of *Klaxon* was equally applicable with regard to pendant jurisdiction claims *Id* at 1136 (citations omitted) Thus the court of appeals concluded that since plaintiff's common law product disparagement claim was predicated on state not federal law the determination of which state's rules of product disparagement law should have been governed by the choice of law rules of the forum state New Jersey *Id* at 1136–37 (citation omitted)

Similarly here this Court's subject matter jurisdiction is predicated on a federal statute—the Sherman Act Moreover the FAA governs the interpretation and construction of the arbitration agreement Section 2 of the FAA has been interpreted as endorsing the applicable state law where a party raises contract defenses such as unconscionability to invalidate arbitration agreements *Gay* 511 F 3d at 388 (citing *Harris* 183 F 3d at 179 *Doctor's Associates* 517 U S at 687) (other citations omitted) That is precisely what has happened here—Plaintiff has raised an unconscionability defense under Pennsylvania law to the enforcement of the class action waiver in the arbitration provision Therefore the Court finds that it is entirely reasonable to apply the choice of law rules of the forum state Pennsylvania to determine whether the parties designation of Delaware law as the governing law should be applied to Plaintiff's unconscionability argument See *Gay* 511 F 3d at 389 (applying Pennsylvania choice of law rules in a federal question case to determine which state's law governed an arbitration provision based on plaintiff's argument that Pennsylvania law governed the arbitration clause and the contract as a whole and the court of appeals observation that had jurisdiction been based on diversity of citizenship Pennsylvania's choice of law rules would apply under *Klaxon*)

In Pennsylvania courts generally honor the intent of the contracting parties and enforce choice of law provisions in contracts executed by them *Kruzits v Okuma Mach Tool Inc* 40 F 3d 52 55

(3d Cir 1994) In making this determination the Pennsylvania courts have adopted the approach taken in the Restatement (Second) of Conflicts § 187 which provides in relevant part

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue

*14 (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue

Kruzits 40 F 3d at 55 (citing *Smith v Commw Nat'l Bank* 384 Pa Super 65 557 A 2d 775 777 (Pa Super Ct 1989) *appeal denied* 524 Pa 610 569 A 2d 1369 (1990)) *Gay* 511 F 3d at 389 In the case at bar Plaintiff's unconscionability defense to the enforceability of the class action waiver can not be resolved by the terms of the Cardmember Agreement including the arbitration provision Thus § 187(1) does not apply Turning to § 187(2) it appears that Delaware has a substantial relationship to the parties as Discover Bank is chartered and incorporated in Delaware has its principal place of business in Delaware and operates a full service facility in that state Moreover both DFS and DFS Services LLC are incorporated in Delaware Thus the parties designation of Delaware law will be upheld unless Plaintiff can

demonstrate that the application of Delaware law would be contrary to a fundamental policy of Pennsylvania and Pennsylvania has a materially greater interest than Delaware in the determination of whether the class action waiver is unconscionable *Krutz* 40 F 3d at 56 (Pennsylvania courts will only ignore a contractual choice of law provision if that provision conflicts with strong public policy interests)

In arguing against the use of the Delaware choice of law provision in the Cardmember Agreement Plaintiff does not articulate the fundamental policy of Pennsylvania implicated here other than making the conclusory statement that class action waivers are unconscionable, and therefore violate Pennsylvania public policy^{FN15} Thus, she completely fails to engage in a comparison of the two state's public interests at issue here Instead Black simply posits that where a class action waiver is unconscionable as against public policy the policy interests of Pennsylvania override any choice of law clause In support of her argument Plaintiff cites *Lytle v CitiFinancial Serv Inc* 810 A 2d 643 (Pa Super Ct 2002)^{FN16} and *Kaneff v Delaware Title Loans Inc* 587 F 3d 616 (3d Cir 2009) Plaintiff fails to explain how either case supports a finding *in this case* that Pennsylvania has a fundamental policy interest that is materially greater than Delaware or even articulate what that policy interest is In fact neither of these cases support the application of Pennsylvania law under § 187(2)(b) of the Restatement (Second) of Conflicts

FN15 At oral argument Plaintiff's counsel described the public policy of Pennsylvania that is implicated here as we want to protect Pennsylvania residents and allow them to have full remedies against companies that self-create these waivers in their arbitration clause Tr of Oral Arg at 82 No further elaboration was provided as to how this so-called policy has been violated here or conflicts with Delaware law

FN16 The superior court's decision in

Lytle was subsequently abrogated by *Salley v Option One Mortgage Corp* 592 Pa 323 925 A 2d 115 (Pa 2007) on the issue of whether a financial institution's reservation of access to the courts for itself to the exclusion of the consumer in an arbitration clause creates a presumption of unconscionability The Pennsylvania Supreme Court in *Salley* concluded that while *Lytle* was well intentioned in its effort to guard against pernicious lending practices it swept too broadly Under Pennsylvania law the burden of establishing unconscionability lies with the party seeking to invalidate a contract including an arbitration agreement and there is no presumption of unconscionability associated with an arbitration agreement merely on the basis that the agreement reserves judicial remedies associated with foreclosure *Id* at 129

*15 For example in *Lytle* the arbitration clause in the mortgage loan agreement provided that the applicable law was that of the state where the borrowers' real property was located which in that case was Pennsylvania Thus the superior court was not faced with a choice of law analysis based on an implicated public policy concern Plaintiff's reliance on *Lytle* is even more perplexing given that the superior court did not find the class action waiver to be unconscionable 810 A 2d at 666 In so holding the superior court found instructive the court of appeals decision in *West Suburban Bank* 225 F 3d at 374 which rejected an identical challenge to the validity of an arbitration clause contained in a consumer loan contract which contained a class action waiver *Lytle* 810 A 2d at 666 In the case before it the *Lytle* court found that the record was devoid of any evidence that would establish that the damages claimed by the plaintiffs were insufficient to allow them to seek legal redress for their injuries in the absence of a class action *Id* Without such evidence the superior court held that plaintiffs' challenge to the class action waiver as vi-

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olating public policy failed *Id*

In *Kaneff* the court of appeals applied Pennsylvania's choice of law rules to determine whether Pennsylvania law instead of the Delaware choice-of law provision in a consumer loan agreement, should be applied to determine whether an arbitration clause which included a class action waiver^{FN17} was unconscionable 587 F 3d at 624. The court of appeals concluded that Pennsylvania had a materially greater interest than Delaware in the determination of whether the arbitration clause is unconscionable because Pennsylvania's interest in the dispute particularly its antipathy to high interest rates such as the 300.01 percent interest charged in the contract at issue implicated a fundamental policy as opposed to Delaware which has no usury law *Id*. Ultimately the *Kaneff* court concluded that the arbitration agreement would not be considered unconscionable under Pennsylvania law *Id*. By contrast here, the fundamental policy at issue is not the disfavor of usurious interest rates. Because the application of the Restatement test is fact specific and *Kaneff* differs factually in this important respect *Kaneff* does not provide support for Plaintiffs argument that the Pennsylvania policy in interest implicated here overrides any choice of law clause.

FN17 Without any discussion the court of appeals in *Kaneff* found the class action waiver provision was not unconscionable 587 F 3d at 624.

In addition to *Lytle* and *Kaneff* Plaintiff relies on a line of cases decided by the court of appeals for this circuit which she cites for the proposition that the policy interest of the forum can preclude application of arbitration where the class action waiver is found to be unconscionable. See e.g. *Gay* 511 F 3d at 394–95; *Homa v Am Express Co* 558 F 3d 225 (3d Cir 2009) abrogation recognized by *Litman v Celco P ship* No 08–4103 2011 U S App LEXIS 17649 at *11 (3d Cir Aug 24 2011)^{FN18}. In response DFS questions Plaintiffs reliance on *Gay* where the court of ap

peals upheld enforcement of the class action waiver and on *Homa* which involved New Jersey law and unlike the agreement here the arbitration agreement in *Homa* did not give the consumer an opt-out right. The Court finds that Plaintiffs reliance on *Gay* and *Homa* is misplaced as those cases are distinguishable factually from the case at bar but not for the reasons cited by DFS.

FN18 Plaintiff also cites the court of appeals' en banc decision in *Puleo* but only to point out that the en banc court clarified that the panel's discussion in *Gay* indicating that the FAA preempted Pennsylvania law finding that class action waivers were unconscionable was dicta as the panel had already determined that Virginia law governed the arbitration provision 605 F 3d at 176 (citing *Gay* 511 F 3d at 390–395).

*16 In *Gay* the court of appeals applied Pennsylvania's conflict rules to determine whether the parties' Virginia choice of law provision should be upheld. In weighing the interests of the two states the court of appeals opined:

Inasmuch as we see no reason to conclude that Pennsylvania has a materially greater interest in the enforceability of the arbitration agreement or that applying Virginia law to determine whether it should be enforced would be contrary to a fundamental policy of Pennsylvania under Pennsylvania's choice-of law rules we are satisfied that there is no reason not to honor the parties' choice of Virginia law in considering the unconscionability claim. Though it certainly is true that Pennsylvania has an interest in protecting its consumers we cannot say that Virginia has a lesser interest in protecting businesses located in it.

511 F 3d at 390. Unlike *Gay* the fundamental public policy at issue here is the availability of class actions in arbitrations. Thus the court of appeals decision in *Gay* provides no guidance to this Court on how to evaluate the competing public

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policy interests of Delaware and Pennsylvania for the purpose of determining which state's law should apply to the issue of whether the class action waiver is unconscionable

In conducting a choice-of-law analysis in *Homa*^{FN19} the court of appeals actually considered the competing policy interests of the designated state's law Utah and the law of the forum New Jersey vis a vis class action waivers in arbitration agreements. The court of appeals concluded that the waiver of class action arbitrations violated fundamental New Jersey public policy as applied to small sum cases 558 F 3d at 230. In determining which state NJ or Utah had the greater interest the court of appeals first determined that an actual conflict existed between the laws of those states as Utah statutory law explicitly provided that class action waivers in open-end consumer credit contracts were valid while NJ decisional law had declared unconscionable a class action arbitration waiver that would preclude relief under NJ's consumer fraud act *Id* at 232. After weighing the public interests at stake—Utah's law indicating a strong policy in favor of the enforcement of class action waivers as opposed to New Jersey's interest in protecting consumers' ability to effectively pursue their statutory rights under its consumer protection laws—the court of appeals concluded that New Jersey had a materially greater interest than Utah in the enforceability of a class action arbitration waiver that could operate to preclude a New Jersey consumer from relief under its consumer fraud act *Id* at 232–33. Clearly *Homa* is distinguishable because although the public interests involved were class action waivers in arbitration agreements the public interests were weighed under New Jersey and Utah law, not Pennsylvania and Delaware law. More importantly the continued viability of the conflicts analysis in *Homa* is questionable in light of the court of appeals holding in *Litman* that *Homa* has been abrogated by *Concepcion* and that *Muhammad* [New Jersey decisional law that had declared unconscionable a class action arbitration waiver that would preclude relief under NJ's con-

sumer fraud act] is preempted by the FAA 2011 U S App LEXIS 17649 at *11

FN19 In *Homa* the holder of an American Express credit card brought a putative class action in New Jersey District Court claiming that the card issuer and its parent company misrepresented the actual terms of a reward program and failed to reward him the promised amount of cash back in violation of the New Jersey Consumer Fraud Act 558 F 3d at 226–27

*17 While Plaintiff contends that the policy interests of Pennsylvania override any choice of law clause where the class action waiver is unconscionable and therefore against public policy^{FN20} she has failed to articulate any argument or facts to support her contention. As the party challenging the application of Delaware choice of law Plaintiff bears the burden to demonstrate that the Delaware choice of law provision should not be upheld. Because she has failed to meet her burden the Court finds the Delaware choice of law provision should be applied to the issue presented here. Under *Volt* when an arbitration agreement contains a choice of law provision that provision must be honored and a court interpreting the agreement must follow the law of the jurisdiction selected by the parties. *Howsam v Dean Witter Reynolds Inc* 537 U S 79 87 123 S Ct 588 154 L Ed 2d 491 (2002) (Thomas J concurring in judgment) (citing *Volt Info Sciences Inc v Bd of Trustees of Leland Stanford Jr Univ* 489 U S 468 478–79 109 S Ct 1248 103 L Ed 2d 488 (1989)). As the Supreme Court opined in *Volt* the FAA simply requires courts to enforce privately negotiated agreements to arbitrate like other contracts in accordance with their terms 489 U S at 478 (citation omitted). Thus the Supreme Court held that where parties agreed to abide by state rules of arbitration enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA *Id* at 479. In the case at bar the Cardholder Agreement which contains the arbitration provi-

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sion at issue here provides that the Agreement shall be governed by Delaware law and applicable federal laws Plaintiff has failed to proffer any facts or argument calling into question her agreement to the choice of-law provision in the Cardholder Agreement Thus pursuant to *Volt* the Court is required to follow the law of the jurisdiction selected by the parties i.e. Delaware and under that law the class action waiver is enforceable

FN20 The Court notes that Plaintiff appears to be putting the proverbial cart before the horse with this argument as her argument appears to be that because the class action waiver violates public policy it is unconscionable However the determination of whether the class action waiver is unconscionable is not made at this stage but only after the conflicts of law analysis has been completed

In the alternative DFS argues that even if this Court were to find that Pennsylvania law governs the determination as to whether the class action waiver is unconscionable the class action waiver would still be enforceable The doctrine of unconscionability in Pennsylvania has been explained by the Pennsylvania Supreme Court as follows

[W]e agree with the general formulation which has been applied fairly consistently in the intermediate appellate courts and which borrows from the statutory version and is largely consonant with the Second Restatement of Contracts See Restatement (Second) of Contracts § 208 (1981)

Under that formulation a contract or term is unconscionable and therefore avoidable where there was a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors the party asserting it See *Denlinger Inc [v Dendler* 415 Pa Super 164 177 608 A 2d 1061 1068 (1992)] (citing *Witmer v Exxon Corp* 495 Pa 540 551 434 A 2d 1222 1228 (1981)) The aspects entailing

lack of meaningful choice and unreasonableness have been termed procedural and substantive unconscionability respectively See generally 17A Am Jur 2d Contracts § 278 (2006) The burden of proof concerning both elements has been allocated to the party challenging the agreement and the ultimate determination of unconscionability is for the courts See *Bishop v Washington* 331 Pa Super 387 400 480 A 2d 1088 1094 (1984) accord 13 Pa C S § 2302

*18 *Sallie* 925 A 2d at 119–20 (footnote omitted) DFS submits that Plaintiff has failed to demonstrate the presence of either type of unconscionability with regard to the class action waiver

Procedural unconscionability refers specifically to the process by which an agreement is reached and the form of an agreement including the use therein of fine print and convoluted or unclear language *Zimmer v CooperNeff Advisors Inc* 523 F 3d 224 228 (3d Cir 2008) (citing *Har ris* 183 F 3d at 181) As the Pennsylvania Supreme Court has explained procedural unconscionability means the absence of meaningful choice on the part of one of the parties *Witmer v Exxon Corp* 495 Pa 540 434 A 2d 1222 1228 (Pa 1981) Procedural unconscionability exists generally where the agreement involved is a contract of adhesion that is the contract is prepared by a party with excessive bargaining power and presented to the other party on a take-it or leave it basis *Hopkins* 643 F Supp 2d at 716–17 (citing *Denlinger Inc v Dendler* 415 Pa Super 164 608 A 2d 1061 1068 (Pa Super Ct 1992)) The general test is whether the party challenging the agreement had any meaningful choice regarding the acceptance of its provisions *Id* at 717 (citing *Thibodeau v Comcast Corp* 912 A 2d 874 886 (Pa Super Ct 2006))

Plaintiff's argument in support of procedural unconscionability is that although DFS may have made a one time offer to opt out of arbitration over seven years ago she does not recall receiving the offer and thus never actually agreed not to opt out By relying on silence instead of contacting her to

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discuss the terms Plaintiff maintains that DFS is simply exercising its superior strength in bargaining power to control the terms and avoid any meaningful negotiations regarding those terms In response DFS submits that Black has failed to show that the arbitration agreement was procedurally unconscionable in that she was afforded the opportunity to opt-out of the arbitration agreement and her unattested claim that she does not recall receiving the opt-out offer is legally insufficient thus defeating any claim that it was a contract of adhesion The Court does not find any merit to Plaintiff's argument

Plaintiff's argument that she was denied any meaningful choice is belied by the uncontested evidence here which shows that in 2003 Plaintiff was given the explicit right to reject the entire arbitration provision without cancelling her account or affecting any of her other rights or privileges under the remainder of the Cardmember Agreement (Linian Decl ¶ 11 & Ex 4 attached thereto ECF No 28-3) The Notice of Right to Reject Arbitration was included with Plaintiff's monthly billing statement and indicated that she had the opportunity to reject the Arbitration of Disputes section effective April 1 2003 (Ex 4 to Linian Decl) In order to do so Plaintiff was required to send a written notice of rejection by March 25 2003 (*Id*) Plaintiff allegedly had thirty days to exercise her opt-out right and reject arbitration^{FN21} According to its records DFS did not receive any written notice from Plaintiff electing to exercise her right to reject the arbitration provision (Linian Decl ¶ 11)

FN21 At oral argument counsel for DFS stated that Plaintiff had 30 days if she wanted to walk away from arbitration[and s]he didn't exercise it Tr of Oral Arg at 84-85 Although this statement is not supported by any evidence in the record it stands unrefuted by Plaintiff

*19 On this point the Court finds instructive the district court's decision in *Fluke v Cashcall Inc* in which the court opined

An opt-out provision seriously undermines a consumer's contention that the arbitration agreement is unconscionable [Plaintiff] was given the option to say no to the arbitration provision and he was given a full 60 days to do so In that way he had complete control over the terms of the agreement and it cannot be said that the arbitration agreement was presented to him on a take-it-or-leave-it basis

Fluke v Cashcall Inc Civ A No 08-5776 2009 WL 1437593 at *8 (E D Pa May 21 2009) The *Fluke* court noted that although the Pennsylvania courts have not yet addressed whether a class action waiver that contains an opt-out clause is unconscionable and unenforceable the district court predicted that the Pennsylvania Supreme Court would find that such a provision is not unconscionable because such provisions are not unilaterally imposed but instead give the consumer a meaningful choice as to the terms of the agreement *Id* at *7-8

Similarly the district court in *Clerk v ACE Cash Express* rejected plaintiff's argument that she had no meaningful choice in accepting the terms of an arbitration provision due to the unequal bargaining power of the parties and her lack of sophistication 2010 WL 364450 at *8^{FN22} Relying on *Fluke* the court in *ACE Cash Express* found the opt out provision in the arbitration agreement and plaintiff's failure to exercise it precluded her argument that the arbitration agreement was presented on a take-it-or-leave-it basis *Id* at *8-9 Likewise in the case at bar Plaintiff was given an opt-out right and she failed to exercise it In these circumstances the Court cannot conclude that Plaintiff lacked a meaningful choice as to the terms of the Cardholder Agreement

FN22 Several other district courts have declined to find arbitration provisions with an opt out clause contained in the arbitration provision to be procedurally unconscionable *Clerk v First Bank of Delaware* 735 F Supp 2d 170 183

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(E D Pa 2010) (collecting cases) The district court in *First Bank of Delaware* declined to follow those cases however, because the facts in the case before it were distinguishable There the loan agreement contained terms which gave plaintiff the unilateral right to rescind the loan within one business day of execution of the loan agreement or to reject the arbitration provision by notice postmarked within seven days *Id* The court found the one day rescission option in a payday loan agreement was meaningless to an individual in plaintiff's position—in dire need of cash assistance and an inability to obtain such assistance elsewhere Because of the short time frame involved in the opt out clause the Court found that the opt out provision did not protect an otherwise adhesive consumer arbitration agreement from a finding of procedural unconscionability *Id* at 184 By contrast here the record is devoid of any evidence showing that Black needed cash/credit card and she had not other options Instead, the Court finds that Black's case is more similar to *ACE Cash Express* and *Fluke* and therefore elects to apply the reasoning in those cases to the case at bar

Plaintiff also advances the argument that the arbitration provision is procedurally unconscionable because she does not recall receiving the opt out notice and thus never actually agreed not to opt out This argument is equally unavailing As the Court opined above Plaintiff's contention that she does not recall receiving the Notice is unattested and thus insufficient to show lack of notice In addition the district court in *ACE Cash Express* rejected a similar argument in which the plaintiff argued that the arbitration agreement was procedurally unconscionable because she did not recall reading or did not actually read the agreement 2010 WL 364450 at *9 The district court found that the Pennsylvania Supreme Court has explicitly rejec-

ted such reasoning stating that failure to read [a contract] is an unavailing excuse or defense and cannot justify avoidance modification or nullification of [a] contract or any provision thereof *Id* (quoting *Standard Venetian Blind Co v Am Empire Ins Co* 503 Pa 300 469 A 2d 563, 566 (Pa 1983)) Black's argument that she *does not recall receiving* the opt-out notice from DFS is somewhat analogous to the plaintiff's argument in *Clerk* that she *did not recall reading* the agreement and thus fails for that additional reason Indeed a finding of no procedural unconscionability is even more compelling here because the 2003 Notice was sent in a separate document as opposed to contained within a loan or credit card agreement Accordingly the Court finds that Plaintiff has failed to demonstrate that the class action waiver provision is procedurally unconscionable under Pennsylvania law

*20 DFS further maintains that Plaintiff has failed to show that the class action waiver is substantively unconscionable Substantive unconscionability requires an inquiry into whether the arbitration provision unreasonably favors the party asserting it *Zimmer* 523 F 3d at 228 (quoting *Sal lie* 925 A 2d at 119) The courts have delineated several factors that may indicate that an arbitration provision is substantively unconscionable including

severe restrictions on discovery *Walker v Ryan's Family Steak Houses Inc* 400 F 3d 370 387–88 (6th Cir 2005) high arbitration costs borne by one party *Spinetti* 324 F 3d at 216–17 limitations on remedies *Morrison v Circuit City Stores Inc* 317 F 3d 646 670–71 (6th Cir 2003) and curtailed judicial review *Hooters of America Inc v Phillips* 39 F Supp 2d 582 614 (D S C 1998) Essentially an arbitration provision is substantively unconscionable if it create[s] an arbitration procedure that favors one party over another *Johnson v West Suburban Bank* 225 F 3d 366 378 n 5 (3d Cir 2000)

First Bank of Delaware 735 F Supp 2d at 181

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In determining the substantive unconscionability of class action waiver provisions in essence the critical issue is whether the particular class action waiver effectively ensures that a defendant will never face liability for wrongdoing *Cronin v CitiFinancial Servs Inc* 352 F App'x 630 635 (3d Cir 2009)

In support of her argument that the class action waiver is substantively unconscionable Black submits that the consumer's ability to pursue relief is effectively foreclosed by the class action waiver due to price fixing arrangements that only marginally increase the price thereby making the dispute uneconomical to arbitrate on an individual basis She thus contends that because the arbitration agreement is so one-sided she should be afforded an opportunity to brief the threshold factual issue of whether the class action waiver effectively ensures that a defendant will never face liability for wrongdoing ^{FN23} in accordance with *Cronin* 352 F App'x at 635 In order to do so, Plaintiff requests leave of court to conduct discovery as to the potential damages that she can individually obtain against DFS and the relative costs of litigation versus arbitration In response DFS disputes Plaintiff's argument that her ability to pursue relief is effectively foreclosed by the class action waiver arguing in support that Plaintiff ignores provisions in the Sherman Act that allow a prevailing plaintiff to recover treble damages and attorneys fees and the provision in the Cardmember Agreement which authorizes Plaintiff to require DFS to pay her arbitration fees and costs (Cardmember Agreement at 11–12 Ex 10 to Linian Decl) ^{FN24} Thus DFS contends there is no substantive unconscionability here

FN23 As far as Plaintiff's request for the opportunity to brief the threshold factual issue of whether the class action waiver effectively ensures that a defendant will never face liability for wrongdoing that opportunity has come and gone This argument is a legal one and does not require the

discovery of facts in order to be made

FN24 The Cardmember Agreement actually states that at the cardmember's request [Discover] will *advance* any arbitration filing administrative and hearing fees which [the cardmember] would be required to pay to pursue a claim or dispute as a result of [its] electing to arbitrate that claim or dispute The arbitrator will decide who will ultimately be responsible for paying those fees [The cardmember] will only be responsible for paying or reimbursing our arbitration filing administrative or hearing fees to the extent [the cardmember] would have been responsible for paying attorneys' fees and court or other collection costs had the action proceeded in court In no event will [the cardmember] be required to pay any fees or costs incurred by us in connection with an arbitration proceeding where such a payment or reimbursement is prohibited by applicable law (Emphasis added)

The Court agrees with DFS and finds that the class action waiver does not effectively foreclose Plaintiff's ability to pursue relief Plaintiff has failed to show that any of the factors indicative of substantive unconscionability are present here Plaintiff's argument focuses only on two of these factors—damages obtainable and costs of litigation versus arbitration—and thus the Court's discussion will be limited to those factors

*21 In the Complaint Black seeks monetary damages in the form of disgorgement restitution treble damages penalties and any other monetary relief allowed by law plus the costs of suit and reasonable attorneys' fees (Compl , Prayer for Relief) all of which are recoverable under the Sherman Act 15 U S C § 15(a) The arbitration provision at issue here authorizes the arbitrator to award all remedies permitted by the substantive laws that would apply if the action were pending in court Ex 4 to Linian Decl at 12 Thus the full range of

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remedies under the Sherman Act are potentially recoverable in arbitration *Cronin* 352 F App x at 636 (citing *West Suburban Bank* 225 F 3d at 373) Moreover Black's ability to recover attorneys' fees under the Sherman Act help to preserve an individual's ability to pursue claims even in those situations where the class forum has been foreclosed *Id* (citing *West Suburban Bank* 352 F App x at 374) (other citation omitted) Additionally where as in this case the claim involves an alleged violation of federal antitrust laws the ability to recover treble damages increases the value of the claim thus making it more attractive and one that is likely to be pursued on an individual basis Thus these factors do not support a finding that the class action waiver effectively ensures that DFS will never face liability for wrongdoing

Next Plaintiff argues that she should be allowed discovery as to the potential damages she can recover individually and as to the relative costs of litigation versus arbitration The Court finds that discovery is not warranted in this case The amount of potential damages Plaintiff can individually obtain from DFS is simply irrelevant to the substantive unconscionability inquiry See *AT & T Mobility LLC v Concepcion* — U S ——— 131 S Ct 1740 1753 179 L Ed 2d 742 (2011) (rejecting dissent's argument that class actions are necessary to bring small-dollar claims that might otherwise slip through the legal system finding any such requirement would be inconsistent with the FAA) *Litman* 2011 U S App LEXIS 17649 at *16 (noting that Supreme Court's holding in *Concepcion* applied regardless of whether class arbitration is desirable for unrelated reasons) (citing *Concepcion* 131 S Ct at 1753)

Likewise the costs of arbitration versus litigation are easily determined without the need for discovery The arbitration filing administrative and hearing fees are all a matter of public record See American Arbitration Association website <http://www.adr.org/sp.asp?id=29297> More importantly under the arbitration provision at issue here

Plaintiffs up-front costs to arbitrate are actually less than the costs of litigation Under the arbitration provision upon request DFS will advance the arbitration filing administrative and hearing fees (Ex 10 attached to Linian Decl at 11–12) Ultimately the arbitrator decides who will be responsible for paying these fees after a decision on the merits (*Id* at 12) However consumers will only be responsible for paying these fees to the extent they would have been responsible for paying attorneys' fees and court costs had the action proceeded in court (*Id*) Thus this factor actually provides an advantage to proceeding in the arbitral forum

*22 For all of these reasons the Court cannot conclude that class action waiver effectively ensures that DFS will never face liability for its alleged wrongdoing Consequently the class action waiver is not substantively unconscionable under Pennsylvania law As Plaintiff has failed to demonstrate that the class action waiver provision is both procedurally and substantively unconscionable under Pennsylvania law the Court finds that the class action waiver provision is enforceable

While this motion was pending the Supreme Court rendered its decision in *AT & T Mobility LLC v Concepcion* — U S ——— 131 S Ct 1740 179 L Ed 2d 742 (2011) which appears to foreclose Plaintiffs argument that the class action waivers in arbitration agreements are unconscionable under Pennsylvania law or that she needs discovery to determine the amount of her potential damages and the costs of arbitration versus litigation On May 2 2011, DFS filed a Notice of Subsequent Authority (ECF No 83) notifying this Court of the Supreme Court's decision in *Concepcion* and arguing that *Concepcion* is dispositive here with regard to Plaintiffs argument that the class action waiver is unconscionable under Pennsylvania law Thereafter on August 16 2011 DFS filed a second Notice of Subsequent Authority (ECF No 85) notifying the Court of Judge Shapiro's recent decision in *Alfeche v Cash Am Intl Inc* Civ A No 09–0953 2011 WL 3565078 *5 (E D Pa Aug 12

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2011) Plaintiff has not filed any response to either notice

On August 24 2011 the United States Court of Appeals for the Third Circuit issued its decision in *Litman v Celco Partnership* No 08-4103 2011 U S App LEXIS 17649 (3d Cir Aug 24 2011) on remand from the Supreme Court wherein it reconsidered its prior decision in light of the Supreme Court's recent decision in *Concepcion*. The question facing the court of appeals was whether the FAA preempts the New Jersey Supreme Court's ruling in *Muhammad v County Bank of Rehoboth Beach Del* 189 N J 1 912 A 2d 88 (N J 2006) which held that a class action waiver in a consumer contract of adhesion (payday loan agreement) was unconscionable and therefore unenforceable because it deprived the plaintiff of the mechanism of a classwide action whether in arbitration or in court litigation 912 A 2d at 101^{FN25}

FN25 In reaching this conclusion the *Muhammad* court considered the public interests implicated by the arbitration agreement 912 A 2d at 99. As the court of appeals noted in *Litman*

[The *Muhammad* court] noted that when found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages class waivers are problematic since rational consumers may decline to pursue individual consumer fraud lawsuits because it may not be worth the time spent prosecuting the suit even if competent counsel was willing to take the case. *Id* [at 99] (emphasis original). Thus the court opined such class action waivers functionally exculpate wrongful conduct. *Id* at 100. As a result the waivers compromise [t]he public interest at stake in consumers effectively pursu[ing] their statutory rights under [New Jersey's] consumer protec-

tion laws and that interest the court concluded overrides enforcement of the class arbitration bar in th[e] agreement[s]. *Id* at 101.

2011 U S App LEXIS 17649 at *5-6 n 2. Similarly here Pennsylvania law favors class action arbitrations and has held class action waivers in arbitration agreements that effectively foreclose pursuit of small dollar amount claims are unconscionable and unenforceable. See e.g. *Thibodeau* 912 A 2d at 881-85 (discussion cases). Thus given the similarities between New Jersey and Pennsylvania law the Court finds that the holding in *Concepcion* applies with equal force to the case at bar. *Alfeche* 2011 U S Dist LEXIS 90085 at *17 (concluding that the Pennsylvania Superior Court's decision in *Thibodeau* in its analysis of the circumstances under which class action waivers are procedurally and substantively unconscionable has the effect of requiring the availability of classwide arbitration[] which undermines the FAA's central purpose and is preempted by the FAA) (citing *Thibodeau* 912 A 2d at 885-86 *Concepcion* 131 S Ct at 1753).

In *Litman* plaintiffs brought a putative class action against a telecommunications provider under New Jersey common law and the New Jersey Consumer Fraud Act for allegedly charging fixed price customers improper service charges on their cell phone service. 2011 U S App LEXIS 17649 at *3. The service contract contained an arbitration provision precluding class actions. *Id* at *4. In its prior opinion *Litman v Celco Partnership* 381 F App'x 140 (3d Cir 2010) the panel held that pursuant to *Homa* the FAA did not preempt *Muhammad*. Upon reconsideration after the Supreme Court's decision in *Concepcion* the court of appeals held that *Homa* has been abrogated by *Concepcion* and that

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Muhammad is preempted by the FAA 2011 U S App LEXIS 17649 at 11 After analyzing *Concepcion* the court of appeals in *Litman* stated unequivocally [w]e understand the holding of *Concepcion* to be both broad and clear a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with and therefore preempted by the FAA irrespective of whether class arbitration is desirable for unrelated reasons *Id* at *16 (quoting *Concepcion* 131 S Ct at 1753) The last part of this holding irrespective of whether class arbitration is desirable for unrelated reasons refers to the Supreme Court's consideration and rejection of the argument that class actions are necessary to prosecute small dollar claims that might otherwise slip through the legal system *Concepcion* 131 S Ct at 1753 This part of the Supreme Court's opinion appears to be directed specifically to those factors indicating the substantive unconscionability of an arbitration provision As such Plaintiff's argument in support of substantive unconscionability is undercut by the Supreme Court's ruling in *Concepcion*

*23 Thus given the apparent broad sweep of the Supreme Court's holding in *Concepcion* as acknowledged in *Litman* the Court finds that to the extent Pennsylvania law holds that class action waivers in arbitration agreements are unconscionable and therefore unenforceable the FAA preempts Pennsylvania law Accordingly the arbitration provision at issue here must be enforced according to its terms which requires arbitration of individual claims and forecloses class actions

For the reasons set forth above the Court concludes that the arbitration clause is enforceable and therefore recommends that Discover Financial Service's motion to compel arbitration of Plaintiff's individual claims be granted Pursuant to Section 4 of the FAA this Court also recommends that the present action be stayed as to the claims against DFS and the case administratively closed

E Discover's Motion to Dismiss

Because this Court has determined that the arbitration clause at issue here is valid and enforceable this Court lacks jurisdiction to address the merits of DFS's motion to dismiss under Rule 12(b)(6) Where a dispute is subject to a binding arbitration agreement a district court [is] without jurisdiction to address the merits of the complaint *Trenton Metro Area Local of Am Postal Workers Union AFL-CIO v US Postal Serv* 636 F 3d 45 56 (3d Cir 2011) (quoting *Shaffer v Mitchell Transport Inc* 635 F 2d 261 264 (3d Cir 1980)) (footnote omitted) Accordingly the Court recommends that Plaintiff's Motion to Dismiss the Complaint against DFS (ECF No 28) be denied as moot

III CONCLUSION

For the reasons set forth above it is respectfully recommended that the Motion of Defendant Discover Financial Services to Compel Arbitration of Plaintiff's individual claims (ECF No 28) be granted and the Motion to Dismiss the Complaint be denied as moot It is further recommended that this case be stayed, only as to the claims against Defendant Discover Financial Services while Plaintiff submits her claim to arbitration and the case be administratively closed

In accordance with the Magistrate Judges Act 28 U S C § 636(b) (1)(B) and (C) and Rule 72 D 2 of the Local Rules of Court the parties shall have fourteen (14) days from the date of service of this Report and Recommendation to file written objections thereto Any party opposing such objections shall have fourteen (14) days from the date on which the objections are served to file its response A party's failure to file timely objections will constitute a waiver of that party's appellate rights

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Only the Westlaw citation is currently available

United States District Court
N D California
Steven CHAVEZ Plaintiff(s)
v
BANK OF AMERICA Defendant(s)

No C 10-653 JCS
Docket No 96
Oct 7 2011

Coby Marie Turner Jala Arlene Amsellem, Kevin Francis Ruf Glancy Binkow Goldberg LLP Los Angeles CA for Plaintiff(s)

Jennifer A Jackson Douglas Andrew Thompson Robert E Boone III Jed P White Bryan Cave LLP Santa Monica CA Steven E Bledsoe Paul Anthony Rigali Steven Alan Haskins, Arent Fox LLP Los Angeles CA for Defendant(s)

ORDER GRANTING IN PART DEFENDANT INTERSECTION INC 'S MOTION TO STAY LITIGATION PENDING ARBITRATION

JOSEPH C SPERO United States Magistrate Judge

I INTRODUCTION

*1 Plaintiffs Patricia Vanhorn Richard Albaugh and Patrick Mulcahy have filed this action alleging state and federal claims arising out of their enrollment in an identity theft protection program called Privacy Assist They have claim to have been enrolled and charged for this service without their consent Defendant Intersections Inc (Intersections) brings the present motion to stay litigation pending arbitration arguing that the Plaintiffs are bound by agreements with Defendants Bank of America N A (BANA) and FIA Card Services N A (FIA) and that Intersections, as a third party beneficiary to those agreements may enforce an arbitration agreement in this case Plaintiffs oppose motion The parties have consen-

ted to the jurisdiction of this court A hearing was held on September 30 2011 at 9 30 a m at which the parties appeared

The Court has reviewed the papers submitted and the arguments of counsel at the hearing For the reasons explained below the Motion is GRANTED IN PART with respect to Plaintiffs Patricia VanHorn and Patrick Mulcahy With respect to Plaintiff Richard Albaugh the Court concludes that there is a material factual dispute on the issue of consent to enter into a contract containing an arbitration provision Accordingly the Court will hold a one day bench trial on this issue which is scheduled for January 17 2012 at 8 30 a m

II BACKGROUND

A Procedural Background

On April 18 2011 Plaintiffs Patricia VanHorn Richard Albaugh and Patrick Mulcahy became lead Plaintiffs by filing a Third Amended Complaint (TAC) (see Docket No 85) in this matter See Docket No 77 With the TAC these above named Plaintiffs made their first appearance in the case Plaintiff Steven Chavez is no longer a Plaintiff in the case

The TAC alleges that the Defendants signed up Plaintiffs and Class Members for an identity theft program offered by Bank of America called Privacy Assist without their knowledge or permission As a result Plaintiffs allege that Defendants have violated California's Unfair Competition Law and the California Legal Remedies Act the federal Electronic Funds Transfer Act and the common law rules against unjust enrichment and conversion ¶¶ 66-105

Soon after the filing of the TAC Intersections informed Plaintiffs' counsel that based on the existence of arbitration agreements with each of the named parties Intersections would move to enforce those agreements On May 6 2011 at a case man-

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agement conference the Court vacated all scheduled dates in the lawsuit and ordered the parties to meet and confer and submit a proposed briefing schedule for the proposed arbitration motion. See Dkt No 92. This motion followed.

B Intersections' Motion to Stay

Pursuant to Section 3 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, Intersections moves to stay the present litigation pursuant to a written arbitration agreement.

*2 Intersections argues that each Plaintiff in this case agreed to enroll in Privacy Assist with Intersections—the service provider—as intended beneficiary in agreements between Plaintiffs and Defendants BANA and FIA. Intersections argues that the Terms of Use governing this service were mailed to each Plaintiff, including a notice that enrollment in the program would be construed as acceptance of the contract and that this notice further contained a notice that any disputes would be settled by an arbitrator through individual proceedings. Based upon this enforceable contract, Intersections argues the Court should stay the current litigation in favor of the parties' arbitration. Intersections further argues that if this Court itself decides the validity of the arbitration clause in this case, the controlling authority is *AT & T Mobility LLC v. Concepcion* — U.S. — 131 S.Ct. 1740, 1750, 179 L.Ed.2d 742, 180 L.Ed.2d 742 (2011), in which the Supreme Court overturned California's class-action waiver bar.

Intersections first argues that the arbitration clause is enforceable and that it, as intended third party beneficiary, may enforce the arbitration agreement in this case. Intersections next argues that any question as to the scope or validity of the arbitration in this case must be decided by the arbitrator, not this Court. If this Court decides the validity of the agreement is valid and enforceable under any applicable state law, whether the Court decides to apply California law, Delaware law (as Intersections argues it should), or Florida law,

Plaintiffs oppose the motion. Plaintiffs respond that they cannot be compelled to arbitrate when their claims are predicated on a lack of consent to the underlying contract that contains the arbitration provision. Plaintiffs next argue that the agreements between Privacy Assist customers and Bank of America are unenforceable under a settlement agreement entered into between BANA and its customers in unrelated litigation, *Ross et al. v. Bank of America NA et al.*, 05–CV–07116 (WHP) (S.D.N.Y.). See Docket No. 99–2 (*Ross Settlement Agreement*). Plaintiffs further argue that nothing in the Supreme Court's recent *Concepcion* decision compels a contrary result. Plaintiffs do not seek to invalidate the arbitration clause under the now disapproved California policy regarding the unconscionability of class action waivers, but rather seek to void it under general unconscionability standards. Plaintiffs argue that under any state standard that may be applied here—California, Delaware, or Florida—the arbitration clause is unconscionable. Plaintiffs further argue that Intersections is not a party to the contracts at issue and as such cannot enforce its terms. Finally, Plaintiffs argue that Intersections has waived its right to compel arbitration due to the fact that it has litigated this case for over a year.

III ANALYSIS

A Legal Standard—Federal Arbitration Act

Section 4 of the Federal Arbitration Act permits a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States District Court for an order directing that arbitration proceed in the manner provided for in [the arbitration] agreement. 9 U.S.C. § 4. Upon a showing that a party has failed to comply with a valid arbitration agreement, the district court must issue an order compelling arbitration. See *Cohen v. Wedbush Noble Cooke Inc.*, 841 F.2d 282, 285 (9th Cir. 1988).

*3 The FAA espouses a general policy favoring

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arbitration agreements. See *Moses H Cone Memorial Hosp v Mercury Constr Corp*, 460 U.S. 124–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). In determining whether to issue an order compelling arbitration, the Court may not review the merits of the dispute, but must limit its inquiry to: (1) whether the arbitration agreement is governed by Chapter One of the Federal Arbitration Act (rather than Chapter Two or Chapter Three); (2) whether the contract containing the arbitration agreement evidences a transaction involving interstate commerce; (3) whether there exists a valid agreement to arbitrate; and (4) whether the dispute falls within the scope of the agreement to arbitrate. 9 U.S.C. §§ 2202 and 302. See *Nicaragua v Standard Fruit Co*, 937 F.2d 469, 477–78 (9th Cir. 1991), cert. denied, 503 U.S. 919, 112 S.Ct. 1294, 117 L.Ed.2d 516 (1992) (citing *Prima Paint's* clear directive that courts disregard surrounding contract language and consider only issues relating to the making and performance of the agreement to arbitrate. *Prima Paint v Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). *Ecuador v Chevron Texaco Corp.*, 376 F.Supp.2d 334, 347 (S.D.N.Y. 2005) (noting the jurisdictional distinctions between Chapters One, Two, and Three of the FAA). If the answer to each of these questions is affirmative, then the Court must order the parties to arbitrate in accordance with the terms of their agreement. 9 U.S.C. § 4.

Although the FAA provides that arbitration agreements generally shall be valid, irrevocable, and enforceable, courts may decline to enforce them when grounds exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2.

Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening federal law. *Doctor's Assocs. Inc. v Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996). In interpreting the validity and scope of an arbitration agreement, the courts apply state law principles of contract formation and interpretation. See *Wolsey Ltd v Foodmaker Inc.*, 144

F.3d 1205, 1210 (9th Cir. 1998). Accordingly, the Court reviews the arbitration agreement here in light of the liberal federal policy favoring arbitration agreements. *Moses H Cone*, 460 U.S. at 24, and considers its enforceability according to California's laws of contract formation. See *First Options of Chicago, Inc. v Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

When evaluating a motion to compel arbitration, courts treat the facts as they would when ruling on a motion for summary judgment, construing all facts and reasonable inferences that can be drawn from those facts in a light most favorable to the non-moving party. See *Perez v Maid Brigade, Inc.*, 2007 WL 2990368 at *3 (N.D. Cal. Oct. 7, 2007) (Illston, J.).

B Application of the Law to the Facts of the Case

1 Whether the Court or the Arbitrator Decides the Threshold Issue of Consent to Arbitrate

*4 It is well settled that “[a]rbitration is a matter of contract and a party cannot be required to submit any dispute which he has not agreed so to submit.” *AT & T Tech, Inc. v Comm’n Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). Thus, when a party disputes the making of the arbitration agreement, the FAA requires that the court “[] proceed summarily to the trial thereof” before compelling arbitration under the agreement. See *Sanford v MemberWorks, Inc.*, 483 F.3d 956 (9th Cir. 2007) (citing 9 U.S.C. § 4). The court’s inquiry encompasses not only challenges to the arbitration clause itself, but also challenges to the making of the contract containing the arbitration clause. *Sanford*, 483 F.3d at 962 (citing *Three Valleys Mun. Water Dist v E.F. Hutton & Co.*, 925 F.2d 1136, 1140–41 (9th Cir. 1991)). As the Ninth Circuit clarified in *Sanford*, “[i]ssues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court.”

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prior to ordering arbitration *Id* at 962 (emphasis in original)

Here the parties disagree as to whether a contract was formed between Plaintiffs and Defendants. Plaintiffs contend that they were not aware that any contract had been formed. The Court finds that it not the arbitrator must decide this threshold issue.

2 Waiver

The next threshold issue for the Court to decide is whether as Plaintiffs argue Intersections has waived its right to pursue arbitration by litigating this case for over a year. The Court finds no waiver here.

The right to arbitration like any other contract right can be waived. *United States v Park Place Assocs* 563 F.3d 907, 921 (9th Cir. 2009). The Ninth Circuit has made it clear however that waiver of the right to arbitrate is disfavored because it is a contractual right and thus any party arguing waiver of arbitration bears a heavy burden of proof. *Id* (internal quotation marks and citations omitted). In order for Plaintiffs here to establish that Intersections has waived its right to arbitrate, they must show (1) knowledge of an existing right to compel arbitration, (2) acts inconsistent with that existing right, and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts. *Id*.

The Court finds that Plaintiffs have failed to satisfy the first requirement. The Ninth Circuit has held that there can be no existing right to arbitrate if it would have been futile to pursue arbitration under the then prevailing law in this circuit. *Letizia v Prudential Bache Secs Inc* 802 F.2d 1185, 1187 (9th Cir. 1986) *see also Kaltwasser v AT & T Mobility LLC* 2011 WL 4381748 (N.D. Cal. Sept. 20, 2011). As Judge Fogel explained in *Kaltwasser*, "Before the Supreme Court's recent decision in *Concepcion*, adhesive consumer contracts requiring bilateral agreement were generally held to be invalid under California's *Discover*

Bank rule." *Id* at *7. 30 Cal Rptr.3d 76, 113 P.3d 1100. Thus, as in *Kaltwasser*, the Court finds that it would have been futile for Intersections to pursue arbitration under the circumstances of this case. Because it is arguable that Intersections did not have a right to compel arbitration prior to *Concepcion* and then promptly moved to do so after the Supreme Court decided *Concepcion*, the Court finds that Intersections has not waived or abandoned its arbitration rights. *See Kaltwasser* 2011 WL 4381748 at *8.

*5 Plaintiffs argue that Intersections should be precluded from pursuing arbitration because it aggressively employed the litigation machinery and that it has participated in this litigation for more than a year. *Opp* at 18.

The Court is not persuaded by this argument. The named Plaintiffs only became part of this case with the filing of the Third Amended Complaint in April 2011. Thus, Plaintiffs' arguments as to Intersections' involvement in the litigation against a Plaintiff no longer named in the case, Steven Chavez, are not relevant. Only nine days after the filing of the Third Amended Complaint, the Supreme Court decided *Concepcion*, which significantly altered the legal landscape with respect to California policies regarding class action waivers and arbitration. Soon thereafter, Intersections notified Plaintiffs of its intent to pursue its arbitration rights. No trial date has been set. The Court finds no waiver of Intersections' right to attempt to pursue its right to arbitrate in this case.

3 Whether the *Ross v Bank of America Settlement* Precludes Intersections From Enforcing the Arbitration Provision

Plaintiffs argue that a settlement agreement in an unrelated case against BANA and FIA precludes Intersections' motion to compel arbitration. There, Defendants BANA and FIA agreed with their cardholders not to enforce the arbitration provisions contained in cardholder agreements with their customers. *See* Docket No. 99-2. Plaintiffs point to no specific provision in the settlement agreement that

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would extend to the present situation—a separate contract between customers and BANA FIA for a service. The *Ross* settlement agreement specifically refers to preexisting or then existing Cardholder Agreements. *Id.* at ¶ 2. Plaintiffs fail to explain how a separate contract for additional services—Privacy Assist—can be construed under this contract to constitute a Cardholder Agreement. Accordingly, the Court concludes that Intersections is not precluded from pursuing arbitration on the basis of the *Ross* settlement agreement between BANA FIA and its cardholders.

4 Whether Intersections, as a Non-Party May Enforce the Terms of the Agreements

Plaintiffs argue that Intersections is not a party to the Privacy Assist Terms of Use agreements between BANA FIA and its customers. *Opp.* at 6. As such, Plaintiffs argue that Intersections is precluded from seeking to enforce any of the contract provisions including arbitration.

Plaintiffs' argument is unpersuasive. As Plaintiffs concede in their opposition brief, a contract may bind non-parties such as an intended third party beneficiary. *Id.* (citing *Comedy Club Inc. v Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009), *cert. denied* — U.S. —, 130 S.Ct. 145, 175 L.Ed.2d 36 (U.S. 2009) (internal quotations omitted)). Plaintiffs nevertheless argue that in the absence of such extraordinary relationships, arbitration clauses generally do not bind third parties and that no such relationship exists here. Plaintiffs are incorrect. The Terms of Use explicitly references Intersections as a third party beneficiary under the contract and identifies Intersections as the provider of the service being offered to BANA's customers. *See* Docket No. 96–5 (Master Policy Holder means Intersections Inc. and This Policy shall be for the sole use and benefit of the Insured Persons and the Master Policy Holder).

*6 Accordingly, the Court concludes that Intersections may seek to enforce the contract's terms including the arbitration provision. *See Comer v Micor Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006).

([N]onsignatories can enforce arbitration agreements as third party beneficiaries)

5 Whether there Exists an Enforceable Agreement to Arbitrate—Lack of Consent

Plaintiffs argue that they cannot be compelled to arbitrate absent an agreement between the parties to arbitrate. Plaintiffs contend that their defense of lack of consent to the underlying contract in this case precludes Intersections's attempt to compel arbitration. Plaintiffs also contend that even if there was consent to some contract, it did not include the arbitration provision. Intersections argues that Plaintiffs agreed to enroll in Privacy Assist over the telephone and then accepted the terms of the service agreement that were mailed to them when they failed to cancel their 30-day trial period of the Privacy Assist service. By continuing to accept the services without canceling, Intersections argues that Plaintiffs agreed to the terms and conditions contained in the Terms of Use, including the arbitration clause.

As an initial matter, the Court rejects any suggestion that Plaintiffs are not bound by the arbitration clause or the Terms of Use based purely on the fact that the Plaintiffs did not read the contract or its terms. The law is clear that a party entering a contract has responsibility for learning its terms and that each and every term need not be explained orally to a party. *Higgs v Automotive Warranty Corp. of America*, 134 F. Appx. 828, 831 (6th Cir. 2005); *see also Murphy v DirecTV Inc.*, 2011 WL 3319574 (C.D. Cal. Aug. 2, 2011) (finding plaintiff bound by contract based on plaintiff's manifestation of consent by acceptance of Customer Agreement containing arbitration provision even where plaintiff did not read the document).

Intersections invokes the common law mailbox rule, which raises a presumption of mail receipt unless the intended recipients can rebut the presumption by producing credible probative evidence of non receipt. *See Schikore v BankAmerica Supp. Ret. Plan*, 269 F.3d 956, 961 (9th Cir. 2001). (We have held a sworn statement is credible evid

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ence of non receipt to rebut the presumption) FN1
However the presumption is weaker in a case such
as this one where delivery is made by regular mail
as opposed to certified mail *See e.g. Salta v*
INS 314 F 3d 1076 1079 (9th Cir 2002)

FN1 Intersections argues that the pre
sumption may only be overcome by clear
and convincing evidence that the mailing
was not in fact accomplished *See* Def's
Reply at 4 (citing *In re Bucknum* 951 F 2d
204 206–207 (9th Cir 1991) (The pre
sumption can only be overcome by clear
and convincing evidence that the mailing
was not in fact accomplished) Defend
ant's reliance on *Bucknum* and other cases
in the bankruptcy context is unavailing as
those cases address the Bankruptcy Code
and Rules related to bankruptcy filings and
the Ninth Circuit has stated that the clear
and convincing standard is applicable in
that context *See Schikore supra* at 961

Plaintiffs argue that they have denied receipt of
the Terms of Use and that once a plaintiff denies re
ceipt the mail box rule presumption bubble
bursts *See* Pl's Opp at 7 (citing *Nunley v City of*
Los Angeles 52 F 3d 792 792–93 (9th Cir 1995)
and *McCarnes v Dexter* 549 F Supp 2d 1204 1207
(C D Cal 2008) Plaintiffs cite *Nunley* for the pro
position that a specific factual denial of receipt
by the addressee is sufficient to rebut the presump
tion of receipt The rule articulated in *Nunley* does
not apply beyond its procedural and factual setting
In *Nunley* the court held that a specific factual
denial of receipt was sufficient to rebut the mailbox
rule's presumption in the context of an addressee's
motion for an extension of time to file an appeal
made under Federal Rule of Appellate Procedure
Rule 4(a)(6) *See Schikore supra* at 961 Plaintiff's
reliance on *Nunley* *McCarnes* and other cases in
the context of FRAP 4(a)(6) is unavailing As the
above authorities make clear in the ordinary com
mon law context when there is evidence of mail
ing it can only be rebutted by actual evidence of

non receipt

*7 The Court will address the evidence
proffered by each party regarding (1) consent to a
contract and (2) the question of their purported re
ceipt of the contract containing the arbitration pro
vision by mail

a Patricia VanHorn

Defendant has submitted evidence in the form
of a wav file containing a recording of a telephone
conversation between the Privacy Assist sales caller
and Plaintiff Patricia VanHorn as well as a tran
script prepared by Defendant of this recording *See*
Declaration of Allen John Fischer (Fischer Decl)
at ¶ 4 During this telephone conversation Plaintiff
VanHorn agrees to enroll in Privacy Assist De
fendant also has submitted evidence that the Terms
of Use contract containing the arbitration provision
was mailed to Plaintiff VanHorn in the ordinary
course of the Privacy Assist enrollment process
and that it was not returned as undeliverable De
claration of Andrew Gerry (Gerry Decl) at ¶¶
7–16

Plaintiff Vanhorn states that she has never seen
or received any documentation from Privacy Assist
including any Terms of Use (Terms) *See* Declar
ation of Patricia VanHorn (VanHorn Decl) at ¶
5 Upon discovering the Privacy Assist charges
Ms Vanhorn states that she called to cancel and re
quested a refund of all unauthorized Privacy Assist
charges to no avail *Id* at ¶¶ 7–9 Plaintiff Van
Horn states that she was informed that she could
either obtain a refund for only one month of the
charges or wait 6–8 weeks to get the voice recorded
authorization for her enrollment *Id* at ¶ 7 Al
though she denies having agreed Ms VanHorn has
no recollection of the call or of any mail from Pri
vacy Assist She states in her declaration that she
does not recall ever receiving any telephone calls
or mail from Privacy Assist and that she has
never seen the terms of Use for Privacy Assist
VanHorn Decl at ¶ 5 Plaintiff VanHorn con
cludes that she did not sign up for or consent to be
charged monthly for the Privacy Assist Service nor

would [she] have agreed to such a service *Id* at ¶ 6

b Richard Albaugh

Defendant has submitted evidence that on August 13 2009 Plaintiff Albaugh called Bank of America in order to change the address associated with his credit card and in so doing agreed to enroll in Privacy Assist over the telephone *See* Declaration of Andrew Reilly (Reilly Decl) Further defendant has submitted evidence that the Terms of Use contract containing the arbitration provision was mailed to Plaintiff Albaugh in the ordinary course of the Privacy Assist enrollment process and that it was not returned as undeliverable *See* Declaration of Andrew Gerry (Gerry Decl) at ¶¶ 7–16

In response Plaintiff Richard Albaugh has submitted a declaration in support of the argument that he never consented to enroll in Privacy Assist Unlike Ms VanHorn's declaration Plaintiff Albaugh's declaration is unequivocal on the issue of lack whether he received the contract Plaintiff Albaugh states I never received any mail from Privacy Assist until after I had already called to cancel the service Declaration of Richard Albaugh (Albaugh Decl) at ¶ 7 Plaintiff Albaugh states that despite having requested a refund for the unauthorized Privacy Assist charges he has not been granted one *Id* at ¶ 9

c Patrick Mulcahy

*8 Defendant has submitted evidence that Plaintiff Mulcahy had agreed to enroll in Privacy Assist on three separate occasions *See* Gerry Decl ¶¶ 13–15 As with Plaintiffs VanHorn and Albaugh Defendant has submitted evidence that the Terms of Use contract containing the arbitration provision was mailed to Plaintiff Mulcahy in the ordinary course of the Privacy Assist enrollment process and that it was not returned as undeliverable Declaration of Andrew Gerry (Gerry Decl) at ¶ 16

Plaintiff Mulcahy has not submitted a declaration in opposition to the motion As such there is no

evidence to dispute the evidence proffered by the Defendant that Mr Mulcahy did in fact consent to and enroll in Privacy Assist including the agreement to arbitrate

d Analysis—Consent

There is no disputed issue of material fact with respect to whether Plaintiffs VanHorn and Mulcahy consented to a contract with Defendants by phone Defendant has submitted evidence showing consent Plaintiff Mulcahy has submitted no evidence in opposition Plaintiff VanHorn while she states in a conclusory fashion that she did not so consent admits that she has no recollection regarding any call with Defendants Her lack of recollection is not sufficient to raise an issue of material fact where the recording and transcript of the phone call demonstrate both that the call occurred and that she agreed to enroll in the program

The Court also finds that Plaintiffs VanHorn and Mulcahy have not satisfied their burden of producing sufficient evidence of non-receipt in order to rebut the presumption that arises from the mailing of the contract terms in this case First Mulcahy has not offered any declaration and therefore Defendant's evidence is un rebutted Second with respect to Plaintiff VanHorn there is no denial of receipt Rather Ms VanHorn states that she does not recall receiving anything in the mail regarding Privacy Assist This is not the sort of reliable evidence necessary to defeat the presumption of receipt by mail even under the lower standard advocated by Plaintiffs here *See e.g. Perez* 2007 WL 2990368 (N D Cal Oct 11 2007) (finding that plaintiff had not met her burden to prove that she did not sign the agreement including arbitration provision where [p]laintiff does not unequivocally deny signing the document by stating that she did not recall signing these documents) *see also Murphy v DirecTV* 2011 WL 3319574 at *1 (C D Cal Aug 2 2011) (finding defendants' proof of mailing sufficient to defeat plaintiffs' claims of never having seen let alone signed the Customer Agreement that contain[ed] the Arbitration Provi-

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sion) *FEC v Toledano* 317 F 3d 939 950 (9th Cir 2002) ([F]ailure to remember and lack of knowledge are not sufficient to create a genuine dispute)

As a result of their consent to the contract and the receipt of the terms VanHorn and Mulcahy are bound by the arbitration provision

*9 Plaintiff Albaugh presents a closer case because his declaration contains unequivocal denials of consent and of receipt Mr Albaugh states that he did not consent and did not receive anything in the mail regarding Privacy Assist until he called to cancel the service Albaugh Decl at ¶ 7 It is not clear that this evidence standing alone would be sufficient The mailbox rule requires more than a mere statement of denial See *Schikore* 269 F 3d at 961 (noting that the mailbox rule is intended to avoid swearing contests between parties on the question of receipt by mail distinguishing case law in unrelated context where mere denial of receipt was held sufficient) In the present case however there is additional evidence beyond Mr Albaugh's mere denial of receipt Mr Albaugh states that when he did in fact reach Privacy Assist to complain about the unauthorized charges he was told on the telephone that his address was incorrect Albaugh Decl at ¶ 6 (When I called to cancel Privacy Assist I was informed by the customer service representative that they had been trying to reach me by mail for some time The representative confirmed that Privacy Assist was sending mail to an address that had been out of date for over two years However the correct current address was listed for the credit card that was being charged for the service)

Although a close question the Court finds that this evidence ^{FN2} is sufficient to create a material issue of fact on whether (1) Albaugh agreed to the contract in the first place and (2) whether that contract contained an arbitration provision

FN2 The Court is not persuaded by Intersections objection that this evidence is

inadmissible hearsay See Def's Reply at 5 It constitutes a party admission

Accordingly the Court concludes that there is a material dispute of fact as to Plaintiff Albaugh and that VanHorn and Mulcahy consented to the contract which contained an arbitration clause

6 Enforceability of the Arbitration Clause—Unconscionability

The next question is whether the arbitration agreement that is contained in the contract is unenforceable because it is unconscionable

Ordinarily where there is a conflict of laws the court must determine which state's law should be applied to decide the question of unconscionability Intersections argues that Delaware law must be applied to this question because of the choice-of-law provision in the alleged contract and Plaintiffs argue that California law must apply because for two of the three Plaintiffs Albaugh and Mulcahy California is the forum state for the alleged contract (Plaintiffs argue that in the case of Plaintiff VanHorn Florida law should apply, which according to Plaintiffs produces the same result) See Pl's Opp at 11 Further Plaintiffs argue California has the most significant relationship to the transaction and the parties *Id* at 12 If a contract is unconscionable under California law courts may refuse to enforce it *Ingle v Circuit City Stores Inc* 328 F 3d 1165 1170 (9th Cir 2003) To be unenforceable the arbitration clause must be both procedurally and substantively unconscionable but not necessarily to the same degree *Roberts v Synergistic Int'l LLC* 676 F Supp 2d 934 (E D Cal Oct 30 2009) (citing *Ting v AT & T* 319 F 3d 1126 1148 (9th Cir 2003))

*10 The Court concludes that it need not decide this issue for under any of the pertinent state laws—California Florida or Delaware—Plaintiffs fail to establish that the arbitration provision is unconscionable For the sake of this discussion the Court will apply California law

The Court first addresses Plaintiffs' arguments that can best be characterized as grounded in California public policy. Specifically, Plaintiffs argue that claims such as those in the present case where the potential monetary recovery is small make compelled arbitration provisions substantively unconscionable. While this argument certainly has appeal in a case such as this one—where the arbitration fees may exceed the potential recovery—the argument has been rejected by the Supreme Court. *AT & T v. Concepcion* — U.S. — 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). In *Concepcion*, the Supreme Court addressed the validity of a rule articulated by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005). In *Discover Bank*, the California Supreme Court held that an arbitration agreement that is part of a consumer contract of adhesion and that contains a class-action waiver is, as a general matter, unconscionable and should not be enforced. *Id.* at 162–63, 30 Cal.Rptr.3d 76, 113 P.3d 1100. In *Concepcion*, the Supreme Court addressed the issue of whether the FAA preempted California's *Discover Bank* rule. See *Concepcion*, 131 S.Ct. at 1746. The Court concluded that the rule was preempted because [r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA. *Id.* at 1748. In particular,

First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. *Id.* at 1751.

Second, class arbitration requires procedural formality. If procedures are too informal, absent class members would not be bound by the arbitration. *Id.* at 1751.

Third, class arbitration greatly increases risks to defendants. Defendants are willing to accept the costs of [uncorrected] errors in arbitration

since their impact is limited to the size of individual disputes and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.

Id. at 1752.

Plaintiffs argue that the arbitration provision is procedurally unconscionable because it is contained within a standard contract of adhesion. Opp. at 13. Specifically, the provision is part of a standard contract drafted by BANA, who enjoys a superior bargaining position, and it was presented to Plaintiffs on a take-it-or-leave-it basis after they were enrolled in Privacy Assist. *Id.* Further, the arbitration provision was not clearly marked in the materials that were allegedly mailed to Plaintiffs but instead were buried in the middle of a paragraph entitled "Miscellaneous Provisions." *Id.* Plaintiffs argue that this procedural unconscionability or surprise is exacerbated by BANA's failure to provide Plaintiffs with a copy of the AAA rules. *Id.* (citing *Fitz v. NCR Corp.*, 118 Cal.App.4th 702, 721, 13 Cal.Rptr.3d 88 (2004)). (Failure to attach arbitration rules adds to procedural unconscionability.) Plaintiffs further argue that the failure to provide the AAA rules means that Plaintiffs were not apprised of crucial information about arbitrations, including the delegation provision, AAA filing fees, and administrative fees. Opp. at 13–14. Plaintiffs point out that the fees for commercial arbitration are so high that they are prohibitive and that Plaintiffs cannot be said to have expected an arbitration process which has prohibitively expensive fees built into it. *Id.* at 14, 13 Cal.Rptr.3d 88. Finally, Plaintiffs argue that the Washington D.C. venue selection provision is unconscionable.

*11 Intersections responds that the forum selection provision is enforceable under California law. Reply at 12 (citing *Intershop Communications*

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(Cite as 2011 WL 4712204 (N D Cal))

AG v Superior Court 104 Cal App 4th 191 198 127 Cal Rptr 2d 847 (2002) (holding that forum selection clause is presumed valid and will be enforced unless the plaintiff shows that enforcement of the clause would be unreasonable under the circumstances of the case) Intersections also argues that Plaintiffs' argument is premised upon a fundamental misunderstanding about how commercial arbitration works in the consumer context Intersections points out that there are special rules that complement the AAA's standard commercial arbitration rules in consumer arbitration See Def's Reply at 15 (citing Rigali Decl Ex 2 at 30) These rules provide a separate fee schedule, which makes arbitration costs more reasonable for consumers As such Intersections argues that Plaintiffs offer no reliable evidence that these fees are unconscionable particularly when compared with the \$350 filing fee that is required to file a federal complaint *Id*

Plaintiffs also argue that the arbitration provision is substantively unconscionable Substantive unconscionability focuses on whether the terms of an agreement are so one-sided as to shock the conscience *Soltani v Western & Southern Life Ins Co* 258 F 3d 1038 1043 (9th Cir 2001) Plaintiffs argue that here the Washington D C venue requirement itself is enough to find the arbitration agreement unconscionable Opp at 14 In support of their argument Plaintiffs cite *Aral v Earthlink Inc* 134 Cal App 4th 544 558-562 36 Cal Rptr 3d 229 (2005) There the court invalidated an analogous arbitration provision stating We believe that a forum selection clause that requires a consumer to travel 2 000 miles to recover a small sum is not reasonable The Plaintiffs point out that in the present case the two California Plaintiffs would be required to travel farther than that and would also be required to pay a filing fee of over \$700^{FN3} in order to recover at most a few hundred dollars Plaintiffs argue that the forum clause coupled with the filing fee of over \$700 is unconscionably one-sided such that it shocks the conscience Opp at 14 (citing *Armendariz* 24 Cal 4th at 107 99 Cal Rptr 2d 745 6 P 3d 669 (finding fees of \$500

and up unconscionable)

FN3 As stated above from Intersections reply it is not clear that the Plaintiffs are correct as to the filing fee in this context

The problem with Plaintiff's unconscionability position however is that there is no evidence of *substantive* unconscionability In order to find this agreement substantively unconscionable the Court would have to conclude that the Terms of Use are so one-sided as to shock the conscience Other than the forum selection clause on these facts the Court cannot so find However the Court can in these circumstances find the forum selection provision invalid and the remainder of the arbitration clause valid The Court so finds and severs the forum selection clause The need to travel to Washington D C to litigate a claim of at most a couple of hundred dollars shocks the conscience However the rest of the arbitration clause is valid

IV CONCLUSION

*12 For the foregoing reasons the Defendant's Motion to Stay Litigation and Compel Arbitration is GRANTED IN PART Because there exists a material factual dispute as to whether Plaintiff Richard Albaugh in fact consented to enter into a contract with Defendants the Court will hold a bench trial in accordance with the parties' agreement at oral argument on the Motion

IT IS SO ORDERED

N D Cal 2011
Chavez v Bank of America
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(Cite as 2011 WL 3740579 (E D Pa))

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Only the Westlaw citation is currently available

United States District Court
E D Pennsylvania
Yulon CLERK on behalf of herself and all others
similarly situated Plaintiff
v
CASH AMERICA NET OF NEVADA LLC De
fendant

Civil Action No 09-2245
Aug 25 2011

Michael Miller Miller & Associates Alexandria
VA Michael Joseph Miller The Miller Firm LLC,
Bala Cynwyd, PA Mark E Burton Jr Nancy Her
sh Hersh & Hersh San Francisco CA for
Plaintiff

Mark J Levin Raymond A Quaglia Ballard Spahr
Andrews & Ingersoll Philadelphia PA for De
fendant

MEMORANDUM

NORMA L SHAPIRO District Judge

*1 Plaintiff Yulon Clerk filed a state class ac
tion complaint alleging that the financial lending
practices of fourteen defendants were illegal under
Pennsylvania law Defendants removed the action
to federal court We severed plaintiff's claim
against defendant Cash America Net of Nevada
LLC (Cash America of Nevada) from the claims
against the other thirteen defendants and severed
the claims against the other thirteen defendants
from each other We retained plaintiff's action
against defendant Cash America of Nevada on our
docket the other thirteen actions were reassigned
Before the court is defendant's motion to compel in
dividual arbitration and stay litigation For the rea
sons discussed below the motion will be granted

I Factual Background

Plaintiff a Pennsylvania citizen brings a putat

ive class action on behalf of herself and all others
similarly situated against defendant Cash America
of Nevada Plaintiff alleges that defendant engaged
in illegal unfair and deceptive lending practices, in
violation of Pennsylvania's Loan Interest Protection
Law (LIPL) 41 P S §§ 101 502 *et seq* Con
sumer Discount Company Act (CDCA) 7 P S §
6201 *et seq* and Unfair Trade Practices and Con
sumer Protection Law (UTPCPL) 73 P S §
201-1 *et seq* Plaintiff also brings a claim for unjust
enrichment Plaintiff requests actual and statutory
damages treble damages under the LIPL restitu
tion of excess interest and charges collected by de
fendant a declaration that the loan agreements
signed by plaintiff are void and unenforceable in
junctive relief as the court deems proper and attor
ney's fees and costs

Defendant Cash America of Nevada operated a
website www CashNetUSA com, to provide short
term loan contracts also called payday loans ^{FN1}
to individuals Defendant Cash America of Nevada
a limited liability company is a wholly owned sub
sidiary of Cash America International Inc , a Texas
corporation with its principal place of business in
Texas A limited liability company is a citizen of
each state of which its members are citizens *Zam
belli Fireworks Mfg Co Inc v Wood* 592 F 3d
412 420 (3d Cir 2010) Defendant Cash America of
Nevada is a Texas citizen We have subject matter
jurisdiction under the Class Action Fairness Act be
cause there is diversity of citizenship between the
parties and the aggregate amount in controversy
from all putative class members exceeds \$5 million
See 28 U S C § 1332(d)(2)

FN1 Payday loans are short term high
interest or-fee loans that are generally se
cured by a post-dated check or a debit au
thorization executed by the borrower and
subsequently presented by the lender after
a predetermined period usually set at two
weeks to coincide with the borrower's pay
day *Pa Dep't of Banking v NCAS of*

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(Cite as 2011 WL 3740579 (E D Pa))

Del LLC 596 Pa 638 948 A 2d 752 754
(Pa 2008)

Plaintiff alleges defendant negotiated or made short-term loans of less than \$25 000 with interest rates greatly exceeding the ceilings allowed under the Pennsylvania usury and small loan laws. Pennsylvania has a general usury ceiling of six per cent (6%) but licensed small loan lenders can make consumer loans for amounts less than \$25 000 at interest rates as high as twenty four per cent (24%) APR. *See* 41 Pa Cons Stat Ann § 201 7 Pa Con Stat Ann § 6203. Plaintiff alleges that defendant who was not licensed as a small loan lender charged Pennsylvania customers illegal interest rates exceeding Pennsylvania's six percent (6%) usury ceiling. The Commonwealth Court of Pennsylvania has held and the Pennsylvania Supreme Court recently affirmed that defendant's lending practices were unlawful under the CDCA because defendant was not licensed by the Pennsylvania Department of Banking. *Cash Am Net of Nev LLC v Pa Dep't of Banking* 978 A 2d 1028 1038 (Pa Commw Ct 2009) *aff'd* 607 Pa 432 8 A 3d 282 (Pa 2010). The Pennsylvania Department of Banking is enforcing the Commonwealth Court's order prospectively only. *Cash Am* 607 Pa 432 8 A 3d at 298–99. Plaintiff's claims in the class action complaint are not the subject of an enforcement action because her claims arose before the Commonwealth Court held defendant's lending practices unlawful.

*2 Between June and August 2007 plaintiff entered into three short term loan agreements over the internet with defendant Cash America of Nevada. The loan agreements signed by plaintiff by clicking a link on defendant's website each state: "This Customer Agreement will be governed by the laws of the State of Nevada except that the arbitration provision is governed by the Federal Arbitration Act (FAA)." Def's Mot to Compel Arbitration & Stay Ex 1 attached to Ex A. Each loan agreement contains a Waiver of Jury Trial and Arbitration Provision stating that a borrower must

raise all claims against the lender in an arbitration proceeding on an individual basis.^{FN2} *Id* ¶¶ 1–3. A borrower waives the right to file a lawsuit in court except in a small claims tribunal. *Id* ¶ 2. A borrower also waives the right to seek relief on a class or representative basis. *Id* ¶ 3.

FN2 The arbitration provision states in pertinent part:

WAIVER OF JURY TRIAL AND ARBITRATION PROVISION Arbitration is a process in which persons with a dispute (a) waive their rights to file a lawsuit and proceed in court and to have a jury trial to resolve their disputes and (b) agree instead to submit their disputes to a neutral third person (an arbitrator) for a decision. Each party to the dispute has an opportunity to present some evidence to the arbitrator. Pre-arbitration discovery may be limited. Arbitration proceedings are private and less formal than court trials. The arbitrator will issue a final and binding decision resolving the dispute which may be enforced as a court judgment. A court rarely overturns an arbitrator's decision. **THEREFORE, YOU ACKNOWLEDGE AND AGREE AS FOLLOWS**

1 For purposes of this Waiver of Jury Trial and Arbitration Provision (hereinafter the Arbitration Provision) the words dispute and disputes are given the broadest possible meaning.

2 You acknowledge and agree that by entering into this Arbitration Provision

(a) YOU ARE GIVING UP YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES,

(b) YOU ARE GIVING UP YOUR RIGHT TO HAVE A COURT, OTHER THAN A SMALL CLAIMS TRIBUNAL, RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES, and

(c) YOU ARE GIVING UP YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAW SUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES

3 Except as provided in Paragraph 6 below all disputes including any Representative Claims against us and/or related third parties shall be resolved by binding arbitration only on an individual basis with you **THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION**

6 All parties including related third parties shall retain the right to seek adjudication in a small claims tribunal for disputes within the scope of such tribunal's jurisdiction Any dispute which cannot be adjudicated within the jurisdiction of a small claims tribunal shall be resolved by binding arbitration Any appeal of a judgment from a small claims tribunal shall be resolved by binding arbitration

Id ¶¶ 1–3 6 (emphasis in original)

The arbitration provision permits a borrower to select the American Arbitration Association the National Arbitration Forum or a local arbitrator who is an attorney retired judge or an arbitrator registered and in good standing with an arbitration as

sociation *Id* ¶ 4 The arbitrator is to apply applicable substantive law (consistent with the FAA) may award statutory damages and/or reasonable attorneys fees allowed by applicable law and may decide any motion that is substantially similar to a motion to dismiss for failure to state a claim or a motion for summary judgment *Id* ¶ 5 However the arbitrator may not apply federal or state rules of civil procedure or evidence *Id* Regardless of who demands arbitration the lender will advance the borrower's portion of arbitration expenses but the parties bear their own attorneys fees and costs such as witness and expert fees *Id* If the arbitrator's award is in favor of the borrower the borrower need not reimburse the lender for the expenses advanced and the lender will reimburse the borrower for any arbitration expenses previously paid if the award is in favor of the lender the borrower is required to reimburse the expenses advanced not to exceed the amount of court costs incurred for a small claims filing less any arbitration expenses the borrower has already paid *Id*

II Discussion

Defendant moves based on the plain language of the arbitration provision contained in each loan agreement to compel individual arbitration and stay litigation pending completion of arbitration Plaintiff responds that the arbitration provision in particular its class action waiver is procedurally and substantively unconscionable and unenforceable under Pennsylvania law

A court not an arbitrator decides issues of arbitrability *i.e.* whether the parties have submitted a particular dispute to arbitration by a valid arbitration agreement *Green Tree Fin Corp v Bazzle* 539 U.S. 444 452 123 S.Ct. 2402 156 L.Ed.2d 414 (2003) *Harris v Green Tree Fin Corp* 183 F.3d 173 179 (3d Cir.1999) A motion to compel arbitration is granted if there are no genuine disputes of material fact that (1) a valid agreement to arbitrate was entered by the parties and (2) the parties' particular claims are within the scope of the arbitration agreement *Kaneff v Del Title Loans*

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(Cite as 2011 WL 3740579 (E D Pa))

587 F 3d 616 620 (3d Cir 2009) *Trippe Mfg Co v Niles Audio Corp* 401 F 3d 529 532 (3d Cir 2005)

*3 There are no disputes of material fact on the issues before the court. There were three agreements to arbitrate evidenced by signed loan agreements each containing an arbitration provision. See Defs' Mot to Compel Arbitration & Stay Ex 1 attached to Ex A. Plaintiff's claims are within the scope of the arbitration provisions each loan agreement states that all federal and state law claims disputes or controversies arising from or directly relating to this Agreement and all claims based upon a violation of any state or federal constitution statute or regulation are subject to arbitration. *Id* ¶ 1. The only issue is the validity of the arbitration agreements.

The Federal Arbitration Act (FAA) 9 U S C § 1 *et seq* establishes a strong federal policy in favor of the resolution of disputes through arbitration. *Alexander v Anthony Intl LP* 341 F 3d 256 263 (3d Cir 2003). The FAA creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate. *Moses H Cone Mem l Hosp v Mercury Constr Corp* 460 U S 1 25 n 32 103 S Ct 927 74 L Ed 2d 765 (1983). The FAA provides that a written provision in a contract evidencing a transaction involving commerce ^{FN3} to settle by arbitration a controversy thereafter arising out of such contract or transaction 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 (emphasis added). This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses such as fraud duress or unconscionability but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *AT & T Mobility LLC v Concepcion* —U S ——— 131 S Ct 1740 1746 179 L Ed 2d 742 (2011) (citations omitted).

FN3 Whether the loan agreements evidence a transaction involving interstate commerce is not disputed. The loans in this action were entered into over the internet by parties from different states the loan agreements evidence transactions involving interstate commerce.

Plaintiff argues that the arbitration provision is unenforceable because it contains a class action waiver that is unconscionable under Pennsylvania law. It is not necessary to consider whether or not Pennsylvania law applies to determine the validity of the arbitration provision and whether or not the arbitration provision would be unconscionable under Pennsylvania law under the Supreme Court's recent decision in *AT & T Mobility LLC v Concepcion* —U S ——— 131 S Ct 1740 179 L Ed 2d 742 (2011) the FAA preempts Pennsylvania unconscionability law set forth in *Thibodeau v Comcast Corp* 912 A 2d 874 885–86 (Pa Super Ct 2006).

In *Concepcion* the Supreme Court held that the FAA preempted California unconscionability law set forth in *Discover Bank v Superior Court* 36 Cal 4th 148 30 Cal Rptr 3d 76 113 P 3d 1100 (Cal 2005)) 131 S Ct at 1753. The plaintiffs in *Concepcion* each entered into a cell phone agreement with defendant AT & T Mobility LLC (AT & T) *Id* at 1744. AT & T advertised that purchase of its cell phone service entitled plaintiffs to free phones. *Id*. Plaintiffs received free phones but were charged \$30.22 in sales tax based on the phones' retail value. *Id*. Plaintiffs filed a complaint against AT & T in federal court their complaint was later consolidated with a putative class action alleging among other things that charging sales tax on phones advertised as free constituted false advertising and fraud. *Id*.

*4 AT & T moved to compel individual arbitration under the terms of its standard cell phone agreement containing an arbitration clause and class action waiver. *Id* at 1745. Plaintiffs argued that the motion to compel individual arbitration should be denied because the class action waiver in

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the arbitration clause was unconscionable *Id* Relying on the California Supreme Court decision in *Discover Bank* the district court and court of appeals held that the class action waiver in the arbitration clause was procedurally and substantively unconscionable and unenforceable *Id* see also *Discover Bank* 30 Cal Rptr 3d 76 113 P 3d at 1110 (class action waivers in arbitration agreements are unconscionable when the waiver is found in a contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages)

The Supreme Court reversed The Court held that the FAA preempted California unconscionability law and under the FAA the arbitration clause and its class action waiver were valid and enforceable *Concepcion* 131 S Ct at 1746–53 The Court acknowledged that Section 2 of the FAA contains a savings clause permitting generally applicable contract defenses such as fraud duress or unconscionability to invalidate an arbitration agreement but decided that even generally applicable defenses may be preempted by the FAA if they are applied in a fashion that disfavors arbitration because they undermine the FAA's central purpose *Id* at 1746–49 The Court stated that classwide arbitration undermines the central purpose of the FAA by sacrific[ing] the principal advantage of arbitration—its informality for a procedure that is slower more costly and more likely to generate procedural morass than final judgment *Id* at 1750–51 The Court concluded that the FAA preempts California unconscionability law because the state law in effect requires the availability of classwide arbitration and classwide arbitration undermines the central purpose of the FAA *Id* at 1753

Even if plaintiffs are correct that Pennsylvania law applies the analysis of California unconscionability law in *Concepcion* applies with equal force to Pennsylvania unconscionability law In *Thibodeau v Comcast Corp* the Pennsylvania Superior Court held that an arbitration clause with a class action waiver contained in a Comcast cable

television agreement was unconscionable under Pennsylvania law 912 A 2d 874 885–86 (Pa Super Ct 2006) The court determined the class action waiver was procedurally unconscionable because plaintiff was forced to accept every word of all 10 pages of the mass-delivered Comcast [C]ustomer [A]greement or have no cable television service whatsoever since Comcast holds a government-authorized geographic monopoly *Id* at 885 The court determined the class action waiver was substantively unconscionable because plaintiff's damages a \$9 60 per month overcharge were so small that individual arbitration was economically unfeasible and without an available class action defendants were effectively immunized from liability *Id* at 885–86

*5 Like the California Supreme Court decision in *Discover Bank* the Pennsylvania Superior Court decision in *Thibodeau* in its analysis of the circumstances under which class action waivers are procedurally and substantively unconscionable effectively requires the availability of classwide arbitration See *id* Under *Concepcion* the FAA preempts Pennsylvania's unconscionability law with regard to a class action waiver in an arbitration agreement FN4 The instant arbitration clause containing a class action waiver is valid and enforceable under Section 2 of the FAA

FN4 The case for FAA preemption may be even stronger with *Thibodeau* compared to *Discover Bank* In addition to its unconscionability analysis the Pennsylvania Superior Court notes in *Thibodeau* that a class action waiver in an arbitration clause is unenforceable as against Pennsylvania public policy because Pennsylvania encourages class action arbitration and has a longstanding policy favoring classwide arbitration *Thibodeau* 912 A 2d at 881 A policy favoring classwide arbitration is what the Supreme Court has identified as undermining FAA objectives See *Concepcion* 131 S Ct at 1748–53

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(Cite as 2011 WL 3740579 (E D Pa))

III Conclusion

The arbitration clause is valid and enforceable under the FAA. The motion to compel arbitration and stay litigation will be granted. An appropriate order follows.

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Clerk v. Cash America Net of Nevada, LLC
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(Cite as 2011 WL 3739549 (E D Pa))

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Only the Westlaw citation is currently available

United States District Court,
E D Pennsylvania
Yulon CLERK on behalf of herself and all others
similarly situated Plaintiff,
v
CASH CENTRAL OF UTAH LLC d/b/a Cash
Central of Pennsylvania LLC Defendant

Civil Action No 09-4964
Aug 25 2011

Michael Miller Miller & Associates Alexandria
VA for Plaintiff

Ryan E Borneman Shannon Hampton Sutherland,
Duane Morris LLP Philadelphia PA for Defend
ant

MEMORANDUM

NORMA L SHAPIRO, District Judge

*1 Plaintiff Yulon Clerk filed a state class action complaint alleging that the financial lending practices of fourteen defendants were illegal under Pennsylvania law Defendants removed the action to federal court We severed plaintiff's claim against defendant Cash America Net of Nevada LLC (Cash America of Nevada) from the claims against the other thirteen defendants and severed the claims against the other thirteen defendants from each other We retained plaintiff's action against defendant Cash America of Nevada on our docket the other thirteen actions were reassigned This action against defendant Cash Central of Utah LLC (Cash Central of Utah) was reassigned to our docket Before the court is defendant's motion to dismiss plaintiff's complaint in favor of or to compel arbitration For the reasons discussed below the motion will be granted

I Factual Background

Plaintiff a Pennsylvania citizen brings a putat

ive class action on behalf of herself and all others similarly situated against defendant Cash Central of Utah a Utah citizen Plaintiff's amended complaint alleges that defendant engaged in illegal unfair, and deceptive lending practices, in violation of Pennsylvania's Loan Interest Protection Law (LIPL) 41 P S §§ 101, 502 *et seq* Consumer Discount Company Act (CDCA) 7 P S § 6201 *et seq* and Unfair Trade Practices and Consumer Protection Law (UTPCPL) 73 P S § 201-1 *et seq* Plaintiff also brings claims for unjust enrichment and contractual unconscionability under Pennsylvania law Plaintiff requests actual and statutory damages treble damages under the LIPL restitution of excess interest and charges collected by defendant a declaration that the loan agreements signed by plaintiff are void and unenforceable injunctive relief as the court deems proper and attorney's fees and costs

Defendant Cash Central of Utah operated a website to provide short term loan contracts also called payday loans ^{FN1} to individuals Plaintiff alleges defendant negotiated or made short term loans of less than \$25 000 with interest rates greatly exceeding the ceilings allowed under the Pennsylvania usury and small-loan laws Pennsylvania has a general usury ceiling of six per cent (6%) but licensed small loan lenders can make consumer loans for amounts less than \$25 000 at interest rates as high as twenty four per cent (24%) APR See 41 Pa Cons Stat Ann § 201 7 Pa Con Stat Ann § 6203 Plaintiffs allege that defendant who was not licensed as a small loan lender charged Pennsylvania customers illegal interest rates exceeding Pennsylvania's six percent (6%) usury ceiling

FN1 Payday loans are short-term high interest-or fee loans that are generally secured by a post-dated check or a debit authorization executed by the borrower and subsequently presented by the lender after a predetermined period usually set at two

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weeks to coincide with the borrower's pay day *Pa Dep't of Banking v NCAS of Del LLC* 596 Pa 638 948 A 2d 752 754 (Pa 2008)

Between June and August 2007 plaintiff entered into seven loan agreements over the internet with defendant Cash Central of Utah Each loan agreement signed by plaintiff by clicking a link on defendant's website, contains an identical arbitration clause and class action waiver See Def's Mot to Dismiss or Compel Arbitration Ex A The arbitration clause and class action waiver state in pertinent part

***2 AGREEMENT TO ARBITRATE ALL DISPUTES** You and We agree that any and all claims disputes or controversies between You and Us shall be resolved by binding individual (and not class consolidated or representative) arbitration by and under the Code of Procedure of the National Arbitration Forum (NAF) in effect at the time the claim is filed This agreement to arbitrate all disputes shall apply no matter by whom or against whom the claim is filed Rules and forms of the NAF may be obtained and all claims may be filed at any NAF office on the World Wide Web at www.arbforum.com by telephone at 800-474-2371 or at National Arbitration forum [sic] P O Box 50191, Minneapolis Minnesota 55405 Your arbitration fees may be waived by the NAF or paid by Us in the event you cannot afford to pay them The cost of any participatory documentary or telephone hearing if one is held at Your or Our request will be paid for solely by Us as provided in the NAF rules and if a participatory hearing is requested it will take place at a location near Your residence This Agreement shall be governed by the Federal Arbitration Act 9 U S C Sections 1-16 **Notice YOU AND WE WOULD HAVE HAD AN OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND HAVE A JUDGE OR JURY DECIDE THE DISPUTES BUT HAVE AGREED INSTEAD**

TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION YOU ACKNOWLEDGE AND AGREE THAT BY ENTERING INTO THIS AGREEMENT TO ARBITRATE ALL DISPUTES YOU ARE GIVING UP YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE OR TO HAVE A COURT RESOLVE ANY AND ALL CLAIMS, DISPUTES OR CONTROVERSIES ALLEGED AGAINST US OR RELATED THIRD PARTIES

AGREEMENT NOT TO BRING, JOIN OR PARTICIPATE IN CLASS ACTIONS To the extent permitted by law, by signing below You agree that You will not bring, join, or participate in any class action claim, dispute or controversy You may have against Us or Our agents, directors, officers, and employees You agree to the entry to injunctive relief to stop such a lawsuit You agree to pay costs We incur, including Our costs and attorneys fees in seeking such relief This agreement is not a waiver of any of Your rights and remedies to pursue and claim individually and as a class action in binding arbitration as provided above

Id

We have subject matter jurisdiction under the Class Action Fairness Act because there is diversity of citizenship between the parties and the aggregate amount in controversy from all putative class members exceeds \$5 million See 28 U S C § 1332(d)(2)

II Discussion

Defendant moves based on the plain language of the identical arbitration clauses contained in each loan agreement to dismiss plaintiff's complaint in favor of or to compel arbitration Plaintiff responds first that the arbitration clause in particular its class action waiver is procedurally and substantively unconscionable, so it is unenforceable under Pennsylvania law Second plaintiff argues

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that the arbitration clause is unenforceable because the National Arbitration Forum (NAF) is designated as the exclusive arbitral forum but the NAF ceased administering arbitrations between consumers and businesses in July 2009 so it is no longer available as an arbitral forum

*3 A court not an arbitrator decides issues of arbitrability *i.e.* whether the parties have submitted a particular dispute to arbitration by a valid arbitration clause *Green Tree Fin Corp v Bazzle* 539 U S 444 452 123 S Ct 2402 156 L Ed 2d 414 (2003) *Harris v Green Tree Fin Corp* 183 F 3d 173 179 (3d Cir 1999) A motion to compel arbitration is granted if there are no genuine disputes of material fact that (1) a valid agreement to arbitrate was entered by the parties, and (2) the parties claims are within the scope of the arbitration agreement *Kaneff v Del Title Loans* 587 F 3d 616 620 (3d Cir 2009) *Trippe Mfg Co v Niles Audio Corp* 401 F 3d 529 532 (3d Cir 2005)

There are no disputes of material fact on the issues before the court There were seven agreements to arbitrate evidenced by signed loan agreements each containing an identical arbitration clause *See* Def s Mot to Dismiss or Compel Arbitration Ex A Plaintiff's claims are within the scope of the arbitration clause the clause states that all claims disputes or controversies between You and Us shall be resolved by binding individual (and not class consolidated or representative) arbitration *Id* The only issue is the validity of the arbitration clause

The FAA establishes a strong federal policy in favor of the resolution of disputes through arbitration *Alexander v Anthony Int'l LP* 341 F 3d 256 263 (3d Cir 2003) The FAA creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate *Moses H Cone Mem'l Hosp v Mercury Constr Corp* 460 U S 1 25 n 32 103 S Ct 927 74 L Ed 2d 765 (1983) Section 2 of the FAA provides that a written provision in a contract evidencing a transaction involving commerce ^{FN2} to settle by

arbitration a controversy thereafter arising out of such contract or transaction *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 (emphasis added) This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud duress or unconscionability but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue *AT & T Mobility LLC v Concepcion* — U S ——— 131 S Ct 1740 1746 179 L Ed 2d 742 (2011)

FN2 Whether the loan agreements evidence a transaction involving interstate commerce is not disputed The loans in this action were entered into over the internet by parties from different states the loan agreements evidence transactions involving interstate commerce

A Unconscionability

Plaintiff argues the arbitration clause is unenforceable because it contains a class action waiver that is unconscionable under Pennsylvania law It is not necessary to consider whether or not Pennsylvania law applies to determine the validity of the arbitration clause and whether or not the arbitration clause would be unconscionable under Pennsylvania law under the Supreme Court's recent decision in *AT & T Mobility LLC v Concepcion* — U S ——— 131 S Ct 1740 179 L Ed 2d 742 (2011) the FAA preempts Pennsylvania unconscionability law as stated in *Thibodeau v Comcast Corp* 912 A 2d 874 885–86 (Pa Super Ct 2006)

*4 In *Concepcion* the Supreme Court held that the FAA preempted California unconscionability law set forth in *Discover Bank v Superior Court* 36 Cal 4th 148 30 Cal Rptr 3d 76 113 P 3d 1100 (Cal 2005)) 131 S Ct at 1753 The plaintiffs in *Concepcion* each entered into a cell phone agreement with defendant AT & T Mobility LLC (AT & T) *Id* at 1744 AT & T advertised that purchase of its cell phone service entitled plaintiffs to free

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phones *Id* Plaintiffs received free phones but were charged \$30.22 in sales tax based on the phones' retail value. *Id* Plaintiffs filed a complaint against AT & T in federal court; their complaint was later consolidated with a putative class action alleging, among other things, that charging sales tax on phones advertised as free constituted false advertising and fraud. *Id*

AT & T moved to compel individual arbitration under the terms of its standard cell phone agreement containing an arbitration clause and class action waiver. *Id* at 1745. Plaintiffs argued that the motion to compel individual arbitration should be denied because the class action waiver in the arbitration clause was unconscionable. *Id*. Relying on the California Supreme Court *Discover Bank* decision, the district court and court of appeals held that the class action waiver in the arbitration clause was procedurally and substantively unconscionable and unenforceable. *Id*. *see also Discover Bank*, 30 Cal Rptr 3d 76, 113 P 3d at 1110 (class action waivers in arbitration agreements are unconscionable when the waiver is found in a contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages).

The Supreme Court reversed. The Court held that the FAA preempted California unconscionability law, and under the FAA the arbitration clause and its class action waiver were valid and enforceable. *Concepcion*, 131 S Ct at 1746–53. The Court acknowledged that Section 2 of the FAA contains a savings clause permitting generally applicable contract defenses, such as fraud, duress, or unconscionability, to invalidate an arbitration agreement, but decided that even generally applicable defenses may be preempted by the FAA if they are applied in a fashion that disfavors arbitration and undermine the FAA's central purpose. *Id* at 1746–49. The Court stated that classwide arbitration undermines the central purpose of the FAA by sacrific[ing] the principal advantage of arbitration—its informality—for a procedure that is

slower, more costly, and more likely to generate procedural morass than final judgment. *Id* at 1750–51. The Court held that the FAA preempts California unconscionability law because the state law in effect requires the availability of classwide arbitration, and classwide arbitration undermines the central purpose of the FAA. *Id* at 1753.

The analysis of California unconscionability law in *Concepcion* applies with equal force to Pennsylvania unconscionability law. In *Thibodeau v. Comcast Corp.*, 912 A 2d 874, 885–86 (Pa Super Ct 2006), the Pennsylvania Superior Court held that an arbitration clause with a class action waiver, contained in a Comcast cable television agreement, was unconscionable under Pennsylvania law. The court determined the class action waiver was procedurally unconscionable because plaintiff was forced to accept every word of all 10 pages of the mass-delivered Comcast [C]ustomer [A]greement or have no cable television service whatsoever, since Comcast holds a government-authorized geographic monopoly. *Id* at 885. The court determined the class action waiver was substantively unconscionable because plaintiff's damages, a \$9.60 per month overcharge, were so small that individual arbitration was economically unfeasible, and without an available class action, defendants were effectively immunized from liability. *Id* at 885–86.

*5 The Pennsylvania Superior Court decision in *Thibodeau* does not differ materially from the California Supreme Court decision in *Discover Bank*. Under *Concepcion*, state law requiring the availability of classwide arbitration undermines the FAA's central purpose and is preempted by the FAA. *See* 131 S Ct at 1753. The FAA preempts Pennsylvania's unconscionability law as to a class action waiver in an arbitration agreement.^{FN3} The instant arbitration clause containing a class action waiver is valid under Section 2 of the FAA.

FN3 The case for FAA preemption may be even stronger with *Thibodeau* compared to *Discover Bank*. In addition to its uncon-

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scionability analysis the Pennsylvania Superior Court notes in *Thibodeau* that a class action waiver in an arbitration clause is unenforceable as against Pennsylvania public policy because Pennsylvania encourages class action arbitration and has a longstanding policy favoring class-wide arbitration. *Thibodeau* 912 A 2d at 881. A policy favoring classwide arbitration is what the Supreme Court has identified as undermining FAA objectives. See *Concepcion* 131 S Ct at 1748–53.

B Unavailability of NAF

Plaintiff also argues that the arbitration provision is invalid and unenforceable because it selects the NAF as the exclusive arbitral forum, but the NAF is no longer available to administer arbitration. If a designated arbitrator is unavailable, Section 5 of the FAA^{FN4} permits a court to appoint a substitute arbitrator in certain circumstances. Our court of appeals has not addressed the precise set of circumstances in which a court may appoint a substitute arbitrator, but other federal courts have held that Section 5 of the FAA generally permits a court to appoint a substitute arbitrator where the chosen arbitrator is unavailable, unless the selection of an arbitrator is integral to the arbitration agreement, as opposed to an ancillary logistical concern. See *Reddam v KPMG LLP* 457 F 3d 1054, 1060 (9th Cir 2006) (abrogated on other grounds by *Atlantic Nat'l Trust LLC v Mt Hawley Ins Co* 621 F 3d 931 (9th Cir 2010)); *Brown v ITT Cons Fin Corp* 211 F 3d 1217, 1222 (11th Cir 2000).

FN4 Section 5 of the FAA provides in pertinent part:

If in the agreement provision be made for a method or naming or appointing an arbitrator, such method shall be followed, but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the nam-

ing of an arbitrator, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator.

9 U S C § 5

An arbitral forum is an integral part of an arbitration agreement if the agreement includes an express statement designating a particular arbitral forum to administer arbitration. See *In re Salomon Inc S'holders Derivative Litig*, 68 F 3d 554, 556–61 (2d Cir 1995); *Carideo v Dell Inc*, No. 06–1772, 2009 WL 3485933, at *4 (W D Wash. Oct. 26, 2009). In *Solomon*, the parties' arbitration agreement provided that all disputes were to be arbitrated by the NYSE and only the NYSE in accordance with the NYSE Constitution and rules. 68 F 3d at 557. A dispute arose between the parties, but the NYSE Board declined to serve as an arbitrator. *Id.* at 556. Because the parties had contractually agreed that only the NYSE could arbitrate any disputes between them, and the NYSE refused to administer the arbitration, the court held the arbitration agreement unenforceable and did not appoint a substitute arbitrator. *Id.* at 559.

Similarly, in *Carideo*, the parties' arbitration agreement provided that disputes shall be resolved exclusively and finally by binding arbitration administered by the National Arbitration Forum (NAF) under its Code of Procedure then in effect. 2009 WL 3485933, at *4. The court determined that the NAF was an integral part of the arbitration agreement because the agreement expressly selected NAF as the exclusive arbitral forum. *Id.* at *4–5. Appointing a substitute arbitrator would constitute a wholesale revision of the arbitration clause. *Id.* at *6. NAF's unavailability to administer arbitration rendered the arbitration clause unenforceable. *Id.* see also *Khan v Dell Inc*, No. 09–3703, 2010 WL 328529, at *1–4 (D N J Aug. 18, 2010) (in an arbitration clause with identical language, NAF was an integral part of the parties' agreement to arbitrate, so that the arbitration clause was rendered unenforceable by NAF's unavailabil-

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ity)

*6 If an arbitration clause requires application of the rules of a particular arbitral forum but does not require that arbitration occur in any particular forum then the arbitral forum is an ancillary logistical concern rather than an integral part of the arbitration clause and the arbitration clause remains enforceable despite the unavailability of the designated arbitral forum *See Reddam* 457 F 3d at 1060

In *Reddam* the arbitration clause stated that [a]ny arbitration under this agreement shall be determined pursuant to the rules then in effect of the National Association of Securities Dealers Inc *Id* at 1059 Because the arbitration clause required application of the rules of the National Association of Securities Dealers Inc (NASD) but did not require that the NASD itself administer the arbitration, the court determined that the NASD was not an integral part of the arbitration clause any other arbitral forum could administer arbitration and simply apply NASD's rules *Id* at 1059–60 NASD's unavailability to administer the arbitration did not render the arbitration clause unenforceable *Id* at 1060–61

The instant arbitration clause states that all disputes shall be resolved by binding individual (and not class consolidated or representative) arbitration by and under the Code of Procedure of the National Arbitration Forum (NAF) in effect at the time the claim is filed Def's Mot to Dismiss or Compel Arbitration Ex A Unlike the arbitration clauses in *In re Solomon* and *Carideo* the arbitration clause in each of Clerk's loan agreements does not contain an express statement designating NAF as the exclusive arbitral forum and requiring it to administer arbitration *Cf In re Solomon* 68 F 3d at 557 *Carideo* 2009 WL 3485933 at *4 The instant arbitration clause only requires application of the NAF's rules similar to the arbitration clause in *Reddam* *See* 457 F 3d at 1059 The language of the instant arbitration clause is permissive it does not require that a party file a claim with the NAF, but instead states that claims *may* be filed at an NAF office or with the

NAF through the internet telephone or U S mail Def's Mot to Dismiss or Compel Arbitration Ex A (emphasis added) The notice provision at the end of the arbitration clause states that the parties agree to binding arbitration and waive their right to file a lawsuit in court, but it does not specify any arbitral forum

The plain language of the arbitration clause makes it clear that the parties agreed to arbitrate it is not clear that the parties agreed to arbitrate only if a certain forum were available Because there is no language evidencing a clear intent to designate the NAF as the exclusive arbitral forum appointing a substitute arbitrator would not contravene the parties intent The availability of NAF is not integral to the arbitration clause The arbitration clause remains valid and enforceable despite the unavailability of the NAF to administer arbitration The court will appoint a substitute arbitrator under Section 5 of the FAA

III Conclusion

*7 The arbitration clause is valid and enforceable under Section 2 of the FAA The motion to dismiss in favor of or to compel arbitration will be granted Because the NAF is no longer available to administer arbitration the court will under Section 5 of the FAA appoint a substitute arbitrator to administer arbitration pursuant to NAF rules An appropriate order follows

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Only the Westlaw citation is currently available

United States District Court
C D California
Kevin FERGUSON
v
CORINTHIAN COLLEGES et al
Sandra L Muñiz
v
Corinthian Colleges et al
Nos SACV 11-0127 DOC (AJWx) SACV
11-0259 DOC (AJWx)
Oct 6 2011

Douglas J Brown Edward D Chapin Francis A Bottini Jr Chapin Fitzgerald Sullivan & Bottini LLP Shawn E Fields, Johnson Bottini LLP San Diego CA for Kevin Ferguson

Raagini Shah Reed Smith LLP, Los Angeles CA Kevin P Jacobs Herron Jacobs Ortiz PA Peter W Homer, Homer Bonner P A Miami FL for Defendants

PROCEEDING (IN CHAMBERS) ORDER
GRANTING IN PART AND DENYING IN PART
DEFENDANTS MOTIONS TO COMPEL INDIVIDUAL ARBITRATIONS

The Honorable DAVID O CARTER District Judge

*1 Julie Barrera Courtroom Clerk

Before the Court are Defendants Motions to Compel Individual Arbitration and to Dismiss or Stay Proceedings Pending Arbitration in the consolidated cases *Kevin Ferguson et al v Corinthian Colleges et al* (Doc No 38) and *Sandra L Muniz et al v Corinthian Colleges et al* (Doc No 21) ^{FN1} The Court finds this matter appropriate for decision without oral argument Fed R Civ P 78 Local Rule 7-15 After considering the moving opposing and replying papers the Court hereby

GRANTS IN PART AND DENIES IN PART both Motions

FN1 Defendants' Motions are nearly identical Because the substantive issues are the same and because Plaintiffs filed a single Opposition to the Motions the Court considers the Motions together

I Background

Plaintiff Kevin Ferguson (Ferguson) brings his action (SACV 11-127) (Ferguson action) on behalf of himself and two classes consisting of persons who enrolled in and/or attended class at one of Defendant Corinthian Colleges (Corinthian) academic institutions The Everest Class consists of those who attended Everest College Everest Institute Everest University Everest University Online or Everest College of Business Technology and Healthcare (collectively Everest) from January 24 2005 to present and the Heald Class consists of those who attended Heald College LLC (Heald) from January 24 2009 to present On April 15 2011 the Court consolidated the Ferguson action with Plaintiff Sandra Muñiz's (Muñiz) action Muñiz also brings her action on behalf of herself as well as an Everest Subclass and a Heald Subclass

Plaintiffs allege that students enroll in Corinthian institutions believing they are receiving a quality education at an affordable price when in fact they pay some of the highest tuition rates in the country incur crippling student loans, and graduate with a degree that never qualifies nor prepares them for any job placement other than low-wage low skill employment Based on these allegations Plaintiffs bring the following claims against Defendants Corinthian Everest Heald and Heald Capital LLC (collectively Defendants) (1) breach of implied contract (2) breach of the implied covenant of good faith and fair dealing (3) violation of Cal Bus & Prof Code § 17200 (4) violation of Cal Bus & Prof Code § 17500 (5) viol-

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ation of the Consumer Legal Remedies Act (6) negligent misrepresentation and (6) fraud^{FN2} Plaintiffs each seek restitution punitive damages, disgorgement of profits and a permanent injunction

FN2 These claims appear in a different order in the Muñiz complaint

II Legal Standard

The Federal Arbitration Act (FAA) provides that 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 shall be valid irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract 9 U S C § 2 The Supreme Court has recognized this provision reflects both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract *AT & T Mobility LLC v Concepcion* — U S ——— 131 S Ct 1740 1745 179 L Ed 2d 742 (2011) (internal citations and quotation marks omitted) Under the FAA as a matter of federal law any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration *Chiron Corp v Ortho Diagnostic Sys Inc* 207 F 3d 1126 1130 (9th Cir 2000) (citing *Moses H Cone Mem'l Hosp v Mercury Const* 460 U S 1 24 103 S Ct 927 74 L Ed 2d 765 (1983)) The scope of an arbitration agreement is governed by federal substantive law *Tracer Research Corp v Nat'l Envtl Servs Co* 42 F 3d 1292 1294 (9th Cir 1994) *Simula Inc v Autoliv Inc* 175 F 3d 716 719 (9th Cir 1999)

*2 The Supreme Court has cautioned that arbitration agreements must be placed on equal footing with other contracts which are enforced according to their terms *Concepcion* 131 S Ct at 1745 Similarly like other contracts arbitration agreements may be declared unenforceable upon any legal or equitable grounds that exist for revocation of contracts generally (e g fraud duress unconscionability) *Id*

The question whether the parties have submitted a particular dispute to arbitration i e, the question of arbitrability is an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise *Howsam v Dean Witter Reynolds Inc* 537 U S 79 83 123 S Ct 588 154 L Ed 2d 491 (2002) (alteration in original)

III Discussion

As an initial matter Defendants submit evidence suggesting that under the relevant arbitration agreements the parties agreed that the arbitrator to whom the case is submitted shall have the power to rule on his or her own jurisdiction including any objections with respect to the existence scope or validity of the arbitration agreement (Reply at 5–6 n 4 (citing Rule R–7(a) of the AAA Commercial Rules applicable by agreement of the parties)) Plaintiffs do not address this point in their sur-reply While the Court sees no basis to question the applicability of these rules since they are adopted by the relevant agreements because Defendants raise this argument for the first time in reply the Court will determine whether Plaintiffs' claims are subject to arbitration

A Validity of Agreement

Defendants argue they have carried their burden to demonstrate the arbitration agreements entered by each Plaintiff with Defendants are valid and Plaintiffs have not carried their burden to demonstrate a defense to the enforcement of the relevant agreements (Motions at 6)

Plaintiffs do not argue the agreements are invalid or unenforceable by raising any contractual defenses such as fraud duress or unconscionability Therefore, the Court presumes the agreements are valid

B Applicability of Agreements to Disputes

1 Relevant Provisions

Plaintiff Ferguson's enrollment agreement con-

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tains the following Acknowledgment of Waiver of Jury Trial and Availability of AAA Rules ^{FN3}

FN3 This Acknowledgment appears again in the Enrollment Agreement Addendum & Disclosures Rhoten Decl Ex B at 16

By my signature I acknowledge that I understand that both I and The School are irrevocably waiving rights to a trial by jury and are selecting instead to submit *any and all claims* to the decision of an arbitrator instead of a court I understand that the award of the arbitrator will be binding, and not merely advisory I also acknowledge that I may at any time before or after my admission obtain a copy of the Rules of the American Arbitration Association at no cost from The School President
Rhoten Decl Ex A at 7 (emphasis added)

In addition the Enrollment Agreement Addendum & Disclosures signed by Plaintiff Ferguson contain the following Agreement to Binding Arbitration and Waiver of Jury Trial

*3 I agree that any dispute *arising from my enrollment* no matter how described pleaded or styled shall be resolved by binding arbitration under the Federal Arbitration Act conducted by the American Arbitration Association (AAA) under its Consumer Rules

Terms of Arbitration

1 Both I and the School irrevocably agree that *any dispute between us* shall be submitted to Arbitration

4 I agree not to combine or consolidate any Claims with those of other students such as in a class or mass action

Rhoten Decl Ex B at 15–16 (emphasis added)

Plaintiff Muñiz's enrollment agreements contain the following relevant provisions

Any dispute *arising from enrollment* at Heald College no matter how described pleaded or styled shall be resolved by binding arbitration by a single neutral arbitrator under the Federal Arbitration Act conducted by the American Arbitration Association (AAA) at Davis CA (student's city state) under its Commercial Rules I acknowledge that I understand that both Heald College and I are waiving our rights to a trial by jury

Adams Decl Ex A at 2 (emphasis added)

Plaintiff Muñiz also signed an Agreement to Binding Arbitration and Waiver of Jury Trial that reiterates the above language and states that Both Student and the College irrevocably agree that *any dispute between them* shall be submitted to Arbitration *Id* Ex B at 1 (emphasis added) It also contains the Acknowledgment of Waiver of Jury Trial and Availability of AAA Rules found in Plaintiff Ferguson's enrollment agreement ^{FN4} *Id*

FN4 Plaintiff Muñiz signed enrollment agreements for each of the different programs in which she enrolled Those documents contain language identical to the provisions regarding any dispute cited above Gerard Decl Ex A at 2 Ex B at 2 Ex C at 2

2 Asserted Claims

Plaintiffs bring their claims on behalf of themselves and other similarly situated, with the putative class defined as persons who enrolled in or attended classes offered by Defendants (Compl ¶ 20) ^{FN5} Plaintiffs allege that Defendants use fraudulent misrepresentations to entice prospective students to enroll (*Id* ¶ 31) Specifically through Defendants' various websites Plaintiffs claim they are deceived about federal financial aid the true cost of attending Defendants' programs the value of Defendants' accreditations and the employment prospects and career placement services Plaintiffs can expect (*Id*

¶ 32)

FN5 As Plaintiffs do in opposition because the Ferguson and Muñiz complaints make substantially the same allegations (Opp'n at 2 n. 2) the Court cites only to the Muñiz complaint

Defendants use enrollment advisors to aggressively recruit students (*Id.* ¶ 33) Defendants enrollment advisors dispense false and misleading information to secure enrollments (*Id.*) These practices drive [Defendants'] enrollment practices

(*Id.* ¶ 34) The enrollment advisors pressure prospective students to enroll in a degree program before completing their applications for federally funded student loans. This allows [Defendants] to demand repayment immediately upon enrollment and prevents students from being able to defer payment until after graduation (*Id.* ¶ 36) The enrollment advisors continue to make false and misleading statements about the quality of education and Plaintiffs' job prospects while the students are enrolled (*Id.* ¶ 78) The career placement offices do not help students and graduates in their job search (*Id.* ¶¶ 92-94, 124)

*4 Currently enrolled students face the risk of not being able to apply for future federal student loans if Defendants lose eligibility for Title IV funding based on their improper enrollment and lending practices (*Id.* ¶ 43) If Plaintiffs knew that students attending Defendants' institutions defaulted on their student loans at alarming rates, they would not have enrolled in the first place (*Id.* ¶ 48)

In addition to fraudulent financial aid practices, Plaintiffs allege that Defendants misrepresent the total cost of attending their institutions (*Id.* ¶¶ 51-53) Students are harmed by this because they end up paying some of the highest tuition rates in the country (*Id.* ¶¶ 54-55) Plaintiffs allege further misrepresentations about Defendants' accreditations and quality of programs, as well as misleading tactics used to recruit veterans

3 Scope of Agreement

Defendants argue that because Plaintiffs' purported claims fall squarely within the relevant arbitration agreements, each Plaintiff's case must be compelled to individual arbitration (Muñiz Mot. at 6-7; Ferguson Mot. at 7-8) Specifically, Defendants argue that Plaintiffs' individual claims, alleging that enrollment was in violation of California law, fall within the scope of the agreements, which cover any dispute arising from [my] enrollment (*Id.*)

Plaintiffs agree that the arbitration agreements cover any dispute arising from enrollment (Opp'n at 2) However, Plaintiffs point out that all of their claims center around Defendants' deceptive marketing practices and representations made to prospective students in order to induce their enrollment (*Id.* at 6-7) Because this marketing scheme was executed well before Plaintiffs signed their enrollment agreements, the dispute cannot be said to arise from enrollment (Opp'n at 2) Thus, Plaintiffs conclude that Defendants' reading of the arbitration agreements to include claims preceding enrollment, exceeds the scope of the agreements (*Id.*)

The Court begins its analysis by acknowledging the liberal federal policy favoring arbitration. *Concepcion*, 131 S.Ct. at 1745. Pursuant to this policy, any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration. *Chiron Corp.*, 207 F.3d at 1130; *French v. Merrill Lynch*, 784 F.2d 902, 908 (9th Cir. 1986) (if the purported agreement is susceptible of an interpretation that would allow arbitration, any doubts should be resolved in favor of arbitration)

Reading the enrollment agreements in their entirety, the Court finds that the language bringing any and all claims, any dispute, any dispute between us, and any dispute between [the student and the School], under the purview of the agreements to arbitrate, is sufficiently broad to encompass the claims asserted in Plaintiffs' complaints.

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FN6 The Supreme Court has held that to require arbitration a plaintiff's factual allegations need only touch matters covered by the contract containing the arbitration clause with all doubts resolved in favor of arbitrability *Simula Inc v Autoliv Inc* 175 F 3d 716 720 (9th Cir 1999) (citing *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 U S 614 624 n 13 105 S Ct 3346 87 L Ed 2d 444 (1985)) Here Plaintiffs claims can easily be found to touch upon matters covered by the enrollment agreement because the allegations pertain to all aspects of Plaintiffs relationship with Defendants including recruitment enrollment and graduation The clear language of the enrollment agreements governs any dispute between Plaintiffs and Defendants is to be submitted to arbitration See *Bischoff v DirecTV Inc* 180 F Supp 2d 1097 1106 (C D Cal 2002) (finding scope of arbitration agreement to be sufficiently broad to cover asserted claims based on language extending to any Claim either of us asserts)

FN6 Plaintiffs attempts to limit the scope of the agreements by asking the Court not to read them in their entirety is unavailing (Sur-Reply at 1-3) None of the phrases cited by the Court enlarge the scope of the agreements Rather the plain language of the agreements read in their entirety demonstrates the broad scope agreed to by the parties *Brobeck Phleger & Harrison v Telex Corp* 602 F 2d 866 872 (9th Cir 1976) cited by Plaintiffs recognizes this principal the meaning of words contained in a contract is to be determined not from a consideration of the words alone but from a reading of the entire contract

*5 Plaintiffs argument that their claims fall outside the scope of the agreements because the claims arise before enrollment is unavailing While some of the claims such as fraudulent inducement rely, in part on factual allegations occurring before Plaintiffs signed the agreements paid tuition or attended their first class the claims involve more

than just the interaction Plaintiffs had with Defendants prior to their formal enrollment Plaintiffs allegations make clear that the act of enrollment not only what occurred earlier is central to their claims For example as cited extensively above enrollment advisors pressure students to enroll and direct that financial aid paperwork be completed so loans come due immediately In addition the enrollment advisors continue to make false statements about financial aid and career prospects after students are enrolled In order to claim an injury from these practices students must have enrolled at one of Defendants' institutions This point is implicitly admitted by Plaintiffs who define their putative classes as encompassing only those individuals who enrolled or attended a class with Defendants

4 Broad or Narrow Construction

In order to escape this result Plaintiffs argue that arbitration clauses are narrow which means arbitration should be compelled only to disputes relating to the interpretation and performance of the contract itself (Opp'n at 9 (quoting *Tracer Research Corp v Nat'l Envtl Servs Co* 42 F 3d 1292 1295 (9th Cir 1994)) Plaintiffs further contend that an arbitration clause using narrow arising out of language covers only contractual disputes where a clause covering disputes arising from or relating to the agreement would also cover related tort claims (Opp'n at 9)

In reply Defendants contend that the authority cited by Plaintiffs has been discredited by nearly every circuit and has been distinguished by the Ninth Circuit (Reply at 4) Defendants argue that the Court should not read the arising from language in the agreements in isolation from the rest of the agreements including their applicability to any dispute and any and all claims between the parties (*Id* at 4 7)

In *Tracer Research* the Ninth Circuit found that arising out of language in an arbitration agreement is limited in scope such that it requires arbitration only of those claims relating to interpretation of the contract at issue i e the contract con

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taining the arbitration clause 42 F 3d at 1295 In reaching this conclusion the court relied on its earlier decision *Mediterranean Enterprises Inc v Ssangyong Corp* 708 F 2d 1458 (9th Cir 1983) which held that arising under language did not require disputes relating to an agreement to go to arbitration

Recently the Ninth Circuit confirmed that when an arbitration agreement uses the same arising under the agreement language discussed in *Tracer Research* and *Mediterranean* the provision should be narrowly construed and only those disputes relating to interpretation of the agreement are arbitrable *Cape Flattery Limited v Titan Maritime LLC* 647 F 3d 914 (9th Cir 2011) The court summarized the cases as follows

*6 *Mediterranean* established that under an arbitration agreement covering disputes arising under the agreement only those disputes relating to the interpretation and performance of the contract itself are arbitrable *Tracer* similarly held that when a tort claim constitutes an independent wrong from any breach of the contract it does not require interpretation of the contract and is not arbitrable *Tracer* further clarified that a tort claim is not arbitrable just because it would not have arisen but for the parties' agreement

Id at 924 (citations omitted)

In *Cape Flattery* the court construed the relevant agreement narrowly because the agreement's language mirrored that in *Mediterranean* and *Tracer* Specifically the agreement stated that [a]ny dispute arising under this Agreement is arbitrable *Id* at 921 The Court finds this line of cases inapplicable to the present case because the relevant language here is not limited to disputes arising under the agreement Instead the contracts use broader language such as any dispute arising from my enrollment If the agreements to arbitrate were limited to only those disputes arising under the relevant enrollment agreements rather from the

students enrollment generally then *Cape Flattery's* reasoning would apply However here the relevant provisions are not limited to disputes arising hereunder arising under and/or arising out of the agreements *Id* at 922 Instead they include expansive language such as any and all claims any dispute any dispute between us and any dispute between [the student and the School] without reference to the agreements^{FN7}

FN7 Plaintiffs' claims lend support to the interpretation that enrollment is a period of time in which students are enrolled in school as opposed to enrollment agreements which is a reference the contracts themselves

Because the instant language is not limited to disputes arising under the relevant agreements the narrow rule of construction applied in *Mediterranean* and *Tracer* does not apply here Construing these provisions liberally mindful of the strong federal policy favoring arbitration the Court concludes that each Plaintiff's claims must be submitted to individual arbitration with the exception of the claims discussed below

C California Consumer Statutes

Plaintiffs argue they will be unable to vindicate their statutory rights as private attorneys general if they are forced to arbitrate their Unfair Competition (UCL) False Advertising (FAL) and Consumer Legal Remedies Act (CLRA) claims (Opp'n at 12) Plaintiffs assert that the injunctive relief sought under these statutes by Plaintiffs on behalf of the general public cannot be sent to arbitration (*Id* at 14) Plaintiffs cite to *Broughton v Cigna Healthplans of California* 21 Cal 4th 1066 90 Cal Rptr 2d 334 988 P 2d 67 78-79 (Cal 2003) for the proposition that public injunction actions brought under the CLRA are not arbitrable (*Id*) Plaintiffs contend this rule was extended to FAL and UCL claims by *Cruz v Pacifiware Health Sys Inc* 30 Cal 4th 303 133 Cal Rptr 2d 58 66 P 3d 1157 (Cal 2003) Because Plaintiffs seek an injunction on behalf of the public and the public has not

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entered into an arbitration agreement with Defendants. Plaintiffs reason that the obligation to arbitrate cannot be imposed here (*Id* at 16 133 Cal Rptr 2d 58 66 P 3d 1157)

*7 In reply Defendants argue that *Concepcion* leads to the conclusion that the FAA preempts California's rule exempting public injunctive relief claims from arbitration (Reply at 12 (*citing Arellano v T-Mobile USA Inc* No C 10-05663 WHA 2011 WL 1842712 *2 (N D Cal May 16 2011))

The Northern District of California recently considered this question in *Nelson v AT & T Mobility LLC* No C10-4802 TEH 2011 WL 3651153 (N D Cal Aug 18 2011) In *Nelson* the plaintiff sought only injunctive relief under the UCL and CLRA *Id* at *1 Defendant moved to compel arbitration and plaintiff argued that requests for public injunctive relief are nonarbitrable just as Plaintiffs do here After considering *Broughton* and *Cruz* the Court concluded that the state law rules set forth in those cases are the type of state laws *Concepcion* concludes are preempted by the FAA *Id* at *2 Following *Arellano* as well as numerous other district court decisions by other judges of this Court as well as the Northern District of California the court concluded that the Supreme Court has made clear that a state cannot require a procedure that is inconsistent with the FAA regardless of how desirable that procedure may be *Id* at *4 (*quoting Concepcion* 131 S Ct at 1753) See also *Kaltwasser v AT & T Mobility LLC* —F Supp 2d — No C 07-00411 2011 WL 4381748 *7 (N D Cal Sept 20 2011) (compelling arbitration of UCL, FAL and CLRA claims) *In re Gateway LX6810 Computer Prods Litig* No SACV 10-1563-JST (JEMx) 2011 WL 3099862, *3 (C D Cal July 21 2011) (not reported) (ordering injunctive relief claims under the CLRA and UCL to arbitration)

The Court disagrees with this line of cases The California Legislature's decision to allow citizens to bring injunctive relief claims under the CLRA

UCL and FAL *on behalf of the public* is not inconsistent with the FAA Notwithstanding *Concepcion's* mandate that state law cannot prohibit arbitration of certain types of claims the Supreme Court previously acknowledged that not all controversies implicating statutory rights are suitable for arbitration *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 U S 614 627 105 S Ct 3346 87 L Ed 2d 444 (1985) In *Mitsubishi Motors* the Court found that the antitrust claims at issue were covered by the arbitration agreement and no external constraints foreclosed the arbitration of those claims The Court approved of the lower court's two step approach to 1) determine whether the statutory issues were covered by the arbitration agreement and 2) consider whether legal constraints external to the parties' agreement foreclose[] the arbitration of those claims *Id* at 628 The Court explained

Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable By agreeing to arbitrate a statutory claim a party does not forgo the substantive rights afforded by the statute it only submits to their resolution in an arbitral rather than a judicial forum It trades the procedures and opportunity for review of the courtroom for the simplicity informality and expedition of arbitration We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history Having made the bargain to arbitrate the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue

*8 *Id* at 627-28

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Whether certain statutory claims were intended to be kept out of arbitration depends on a statute's text the legislative history or an inherent conflict between arbitration and the statute's underlying purpose *Gilmer v Interstate/Johnson Lane Corp* 500 U S 20 26 111 S Ct 1647, 114 L Ed 2d 26 (1991) Throughout such an inquiry it should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration *Id* (quoting *Moses H Cone* 460 U S at 24)

The Supreme Court has also addressed to some extent the role the public interest has in the arbitrability of certain statutory claims Where the public benefit of statutory actions is merely incidental to the pursuit of a private remedy the Supreme Court has found the claims arbitrable *See Mitsubishi Motors* 473 U S at 627 (statutory antitrust claims arbitrable) *Shearson/American Express Inc v McMahon* 482 U S 220 241–42 107 S Ct 2332 96 L Ed 2d 185 (1987) (The private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff and does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute)

In *Broughton* the California Supreme Court interpreted the Supreme Court decisions regarding the public interest to mean when the primary purpose and effect of a statutory remedy is not to compensate for an individual wrong but to prohibit and enjoin conduct injurious to the general public i e when the plaintiff is acting authentically as a private attorney general such a remedy may be inherently incompatible with arbitration *Broughton* 21 Cal 4th at 1077 90 Cal Rptr 2d 334 988 P 2d 67

Without deciding whether arbitrators may ever issue a permanent injunction the *Broughton* court focused on the fact that the plaintiff was functioning as a private attorney general enjoining future deceptive practices on behalf of the general public *Id* at 1079–80 90 Cal Rptr 2d 334 988 P 2d 67 Under such circumstances the court found that ar-

bitration was not a suitable forum and the California Legislature did not intend for the injunctive relief sought by the plaintiff to be arbitrated *Id* at 1080, 90 Cal Rptr 2d 334, 988 P 2d 67 While the purpose of arbitration is to voluntarily resolve private disputes, the purpose of the injunctive relief provision of the CLRA is to remedy a public wrong *Id* The court went on to say

Whatever the individual motive of the party requesting injunctive relief the benefits of granting injunctive relief by and large do not accrue to that party but to the general public in danger of being victimized by the same deceptive practices as the plaintiff suffered In this important respect the injunctive relief at issue in this case differs from the antitrust treble damages remedy considered in *Mitsubishi Motors* in which any public benefit was merely incidental to private compensation In other words the plaintiff in a CLRA damages action is playing the role of a bona fide private attorney general

*9 *Id* (citations omitted)

The court concluded that this holding did not contravene the FAA because, although the [Supreme Court] has stated generally that the capacity to withdraw statutory rights from the scope of arbitration agreements is the prerogative solely of Congress not state courts or legislatures it has never directly decided whether a legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests *Id* at 1083 90 Cal Rptr 2d 334 988 P 2d 67 Moreover nothing in the FAA's legislative history suggest[s] that Congress contemplated public injunction arbitration within the universe of arbitration agreements it was attempting to enforce *Id* Although both California and federal law recognize the important policy of enforcing arbitration agreements, it would be perverse to extend the policy so far as to preclude states from passing legislation the purposes of which make it incompatible with arbitration or to compel states to permit the vitiation through arbit-

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ration of the substantive rights afforded by such legislation *Id*

The Court agrees with *Broughton* that the Supreme Court has implicitly recognized where enforcement of a public right as opposed to resolution of a private dispute is the primary purpose of a statute an inherent conflict with arbitration may arise. The claims at issue here are distinguishable from the arbitrable antitrust and RICO claims addressed in *Mitsubishi Motors* and *McMahon* respectively because the primary purpose of an injunctive relief action under the CLRA, UCL and FAL is to protect the public. While state law cannot prohibit outright the arbitration of a particular type of claim under *Concepcion*, *Broughton* and *Cruz* do not prohibit arbitration of all injunctive relief claims. Instead they provide a framework for analyzing whether injunctive relief claims are arbitrable. *See In re DirectTV Early Cancellation Fee Marketing and Sales Practices Litigation* — F Supp 2d —, No. ML 09–2093 AG (ANx) 2011 WL 4090774 *9 (C D Cal Sept 6 2011) (denying motion to compel arbitration of UCL and CLRA injunctive relief claims).

The Court cannot jump to the conclusion that public injunctive relief claims under state law must go to arbitration due to the preemptive effects of the FAA. As an initial matter it is not clear that Congress intended the FAA to sweep public injunction arbitration within its purview. Accordingly declining to compel arbitration of these claims does not suggest a conflict with the FAA. Instead the Court finds the better approach to be applying the test from *Mitsubishi Motors*, 473 U.S. at 628. Having found that the relevant agreements encompass Plaintiffs' statutory injunctive relief claims the Court next asks whether legal constraints external to the parties' agreement[s] foreclose[] the arbitration of those claims. *Id*. Because Plaintiffs' injunctive relief claims seek to enforce a public right there is an inherent conflict with sending these claims to an arbitrator. *See Broughton*, 21 Cal 4th at 1080, 90 Cal Rptr 2d 334, 988 P 2d 67

(discussing compelling reasons why arbitration is not the proper forum for vindicating a public right). *See also In re DuacTV*, 2011 WL 4090774 at *9 (public injunctive relief component of UCL and CLRA claims not sent to arbitration where plaintiffs as private attorney generals sought to remedy defendant's practice of charging improper early cancellation fees to customers).

*10 Here Plaintiffs seek to prevent Defendants from deceiving vulnerable consumers such as former military service personnel and low-income individuals about what it means to enroll at one of Defendants' institutions, namely, the true cost of attendance, quality of education, nature of accreditations and job prospects upon graduation. Plaintiffs liken Defendants' alleged scheme to that of subprime mortgage lenders who recently triggered the most severe financial crisis in recent history. Similar to those lenders, Defendants have identified an easy source of credit in federal student loans including Title IV federal financial aid as well as military tuition assistance programs such as the Post-9/11 GI Bill. Defendants exploit a vulnerable consumer population by encouraging students to borrow amounts they will never be able to pay back, let alone ever discharge in bankruptcy, ruining the students' financial future for life. Defendants are able to tap into this easy source of credit, realize significant profits, and pass all of the downside credit risk on to the students. Not only are the students harmed, but since the loans are federally guaranteed, U.S. taxpayers subsidize this scheme at the expense of the students and for the benefit of Defendants' bottom line. Plaintiffs allege that in the past year, these practices have been investigated by the Department of Education, the Government Accountability Office, and the Higher Learning Commission, and they have also been considered by Congress. Plaintiffs' desire to obtain injunctive relief to protect the public, including protecting the interests of current and potential students, members of the military, and U.S. taxpayers, is clearly in the public interest. Legal constraints such as the inability of arbitrators to enter an injunction affecting

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nonparties as well as the inability to oversee injunctive remedies designed to protect the public as a whole create an inherent conflict and make arbitration unsuitable in this case

In conclusion because the statutory purpose of the injunctive relief provisions of the UCL, FAL and CLRA and the public interest concerns in this case cannot likely be met through arbitration because there is no apparent conflict with the FAA and because *Concepcion* does not take a position on the arbitrability of public injunction actions,^{FN8} the Court denies the motion as to the injunctive relief component of these three claims. To the extent California law prohibits arbitration of certain types of claims, these laws are overruled by *Concepcion*. However, to the extent these claims may be read as consistent with the FAA and falling under the limited public interest exception envisioned by *Mitsubishi Motors* and *McMahon*, the claims will not go to arbitration.

FN8 The California Court of Appeal recently noted that the Supreme Court has not addressed whether the FAA preempts California laws whereby a citizen sues as a proxy for enforcement of state laws. *Brown v. Ralphs Grocery Co.*, 197 Cal App 4th 489, 503, 128 Cal Rptr 3d 854 (2011) (noting that *Concepcion* did not address California's Private Attorney General Act of 2004, and continuing to follow what the court believes to be California law).

D Stay or Dismissal of Proceedings

Defendants move to have these cases dismissed or stayed pending the completion of arbitration (Muñiz Mot. at 9; Ferguson Mot. at 10). Because the Court is satisfied that most of the claims may be sent to arbitration, a stay as to those claims is appropriate under 9 U.S.C. § 3. Only Plaintiffs' public injunctive relief claims insofar as they seek to protect the public as opposed to Plaintiffs' individual interests may proceed before the Court.

IV Conclusion

*11 For the foregoing reasons, Defendants' motions to compel arbitration are granted in part and denied in part. Plaintiffs' public injunctive relief claims may proceed and the remaining claims are hereby stayed. As to each Plaintiff's stayed claims, Plaintiffs shall proceed to individual arbitration according to the terms of the parties' agreements.

The Clerk shall serve this minute order on all parties to the action.

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Only the Westlaw citation is currently available

United States District Court
S D California
Alex GRABOWSKI an individual on behalf of
himself and on behalf of all persons similarly situ-
ated Plaintiff
v
C H ROBINSON Company C H Robinson
Worldwide Inc Defendants
No 10cv1658-WQH-MDD
Sept 19 2011

Aparajit Bhowmik Kyle Nordrehaug Norman B
Blumenthal Blumenthal Nordrehaug & Bhowmik
La Jolla, CA for Plaintiff

Jack Steven Sholkoff Melissa Gayle Turai Ogle
tree Deakins Nash Smoak & Stewart P C Los
Angeles CA for Defendants

ORDER

HAYES District Judge

*1 The matters before the Court are (1) the Mo-
tion for an Order Directing Arbitration and Dis-
missing or in the Alternative Staying the Action
(Motion for an Order Directing Arbitration) filed
by Defendants (ECF No 34) and (2) the Request
for Full Discovery and a Jury Trial as to Disputed
Issues of Fact in Motion to Compel Arbitration
(Request for Full Discovery and a Jury Trial)
filed by Plaintiff (ECF No 43-1)

I Background

On August 9 2010 Plaintiff initiated this ac-
tion by filing a Complaint in this Court (ECF No
1)

On November 30 2010 Plaintiff filed the
Third Amended Complaint which is the operative
pleading (ECF No 14) Plaintiff who was em-
ployed by Defendants as an Account Manager

alleges that Defendants improperly classified him
(and other individuals employed by Defendants in
California) as an exempt employee from overtime
wages and therefore failed to pay him overtime
compensation although he regularly worked more
than eight (8) hours in a workday forty (40) hours
a workweek and/or seven (7) consecutive days
Id ¶ 4 Plaintiff alleges the following claims on
behalf of himself and all others similarly situated
(1) Unfair Competition in Violation of Cal Bus &
Prof Code §§ 17200 *et seq* (2) Failure to Pay
Overtime Compensation in Violation of California
Labor Code § § 510 515 5 551 552, 1194 & 1198
et seq (3) Failure to Provide Accurate Itemized
Statements in Violation of California Labor Code §
226 (4) Failure to Pay Overtime Compensation in
Violation of 29 U S C § § 201 *et seq* and (5)
Labor Code Private Attorney General Act Califor-
nia Labor Code § § 2698 *et seq* Plaintiff alleges a
class and collective action

On May 19 2011 Defendants filed the Motion
for an Order Directing Arbitration (ECF No 34)
Defendants move for an order directing the parties
to arbitration pursuant to an agreement which De-
fendants contend requires Plaintiff to submit all
employment related disputes to binding arbitration
and requires the parties to arbitrate all disputes on
an individual and not a class or collective basis

On June 20 2011 Plaintiff filed an opposition
to the Motion for an Order Directing Arbitration
and a Request for Full Discovery and a Jury Trial
(ECF Nos 43 & 43-1)

On June 27 2011 Defendants filed a reply in
support of the Motion for an Order Directing Arbit-
ration and an opposition to the Request for Full
Discovery and a Jury Trial (ECF Nos 45 & 46)

On June 29 2011 and July 5 2011 Plaintiff
filed a reply to Defendants' opposition to the Re-
quest for Full Discovery and a Jury Trial and a re-
sponse to the evidence submitted by Defendants in

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their reply in support of the Motion for an Order Directing Arbitration (ECF Nos 47 & 49)

On July 12 2011 Defendants filed a reply to Plaintiff's response (ECF No 50)

On July 15, 2011 Plaintiff filed a Notice of Statement of Recent Authority Relevant to Defendants' Motion for an Order Directing Arbitration (ECF No 52)

*2 On July 15 2011 Defendants filed a Notice of Statement of Recent Authority Relevant to Defendants' Motion for an Order Directing Arbitration (ECF No 54)

On August 31 2011 Plaintiff filed a second Notice of Statement of Recent Authority Relevant to Defendants Motion for an Order Directing Arbitration (ECF No 55)

II Facts

Plaintiff began working for Defendants on October 1 2007 (Arnold Decl ¶ 2, ECF No 34-2)

On December 13 2007 Plaintiff met with his supervisor Barry Cohen for approximately ten minutes and discussed the Defendants' Bonus Incentive Agreement (Grabowski Dep at 25 ECF No 45-1) At the end of the meeting Plaintiff and Cohen each signed the Bonus Incentive Agreement (Turai Decl Ex C at 51 ECF No 45-1) The Bonus Incentive Agreement provides that [i]n consideration for Your continued employment Your eligibility for a bonus incentive and the mutual promises set forth in this Agreement You and the Company hereby agree to the terms set forth in the Bonus Incentive Agreement *Id* at 47 The Bonus Incentive Agreement sets forth the terms of Plaintiff's compensation and eligibility for a bonus based upon the annual Gross Net Earnings of the San Diego office *Id* The Bonus Incentive Agreement contains a Dispute Resolution provision which states

You and the Company agree that except as provided below all Claims the Company might

bring against You and all claims You might bring against the Company and/or any of its officers directors or employees shall be deemed waived unless submitted to mediation then if mediation is unsuccessful to final and binding arbitration in accordance with the Employment Arbitration Rules and Mediation Procedures of the American Arbitration Association, modified as follows (1) any mediation or arbitration shall be governed by the Company's Employment Dispute Mediation/ Arbitration Procedure, which is available on the Company Intranet (2) dispositive motions shall be permissible and not disfavored in any arbitration and the standard for deciding such motions shall be the same as under Rule 56 of Federal Rules of Civil Procedure and (3) except as mutually agreed at the time between You and the Company neither You nor the Company may bring any Claim combined with or on behalf of any other person or entity whether on a collective representative, or class action basis or any other basis

Id The Dispute Resolution provision defines Claims to include all claims directly or indirectly related to Your recruitment employment compensation or benefits or termination of employment by the Company including but not limited to alleged violations of the Fair Labor Standards Act and any and all claims under federal state local laws or regulations (including all such laws and regulations pertaining to employment or prohibiting discrimination) *Id* at 48 The Dispute Resolution Provision concludes with the following statements

*3 YOU MAY WISH TO CONSULT AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT HOWEVER YOU WILL NOT BE ELIGIBLE TO RECEIVE ANY BONUS PAYMENTS OR ADVANCES UNTIL THIS AGREEMENT IS SIGNED AND RETURNED BY YOU PLEASE READ THESE PROVISIONS CAREFULLY BY SIGNING BELOW YOU ARE ATTESTING THAT YOU HAVE READ AND UNDERSTOOD THIS DOCU-

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MENT AND ARE KNOWINGLY AND VOLUNTARILY AGREEING TO ITS TERMS

The Effective Date of this Agreement is January 01 2008

Id

On December 17 2008 Plaintiff and Cohen each signed a second Bonus Incentive Agreement which contained the same terms as the December 13 2007 Bonus Incentive Agreement except it provided that [t]he Effective Date of this Agreement is January 01 2009 (Turai Decl Ex D at 54 ECF No 45-1)

On December 21, 2009, Plaintiff and Cohen each signed a third Bonus Incentive Agreement which contained the same terms as the prior two Bonus Incentive Agreements except it provided that [t]he Effective Date of this Agreement is January 01 2010 (Turai Decl Ex E at 58 ECF No 45-1)

In February of 2010 Plaintiff resigned from his employment with Defendants (Grabowski Dep at 18 ECF No 45-1)

III Contentions of the Parties

Defendants contend

The issue in this petition is simple plaintiff repeatedly entered into a clear and unambiguous agreement with his former employer to arbitrate all claims arising out of his employment on an individual basis. Notwithstanding this agreement plaintiff brought a class and collective action alleging five employment related causes of action in the United States District Court for the Southern District of California. Defendants did not move to compel arbitration at the outset of the litigation because plaintiff's agreement to arbitrate was unenforceable under then-current California law.

On April 27 2011 the United States Supreme Court overturned the entire landscape of existing

California law pertaining to arbitration agreements when it issued its decision in *AT & T Mobility LLC v Concepcion* — U S — 131 S Ct 1740 179 L Ed 2d 742 (2011)

In light of *AT & T* the Court must now enforce plaintiff's previously unenforceable agreement requiring plaintiff to arbitrate any claims relating to his employment on an individual and not a class basis. Accordingly Defendants seek an order compelling plaintiff's claims to arbitration and dismissing the action or in the alternative staying the instant proceedings until the arbitration is completed. Because the arbitration provisions executed by plaintiff are valid and enforceable agreements this petition should be granted in its entirety.

(ECF No 34-1 at 2)

Plaintiff contends

Defendant's arbitration provision violates Section 7 of the National Labor Relations Act by denying employees the right to bring collective class or representative actions. The arbitration provision is also unlawful and constitutes a criminal misdemeanor under California Labor Code Section 206.5 because Plaintiff was required to sign the agreement and release his right to bring a collective class or representative action in order to avoid forfeiture of earned wages. The arbitration agreement is also unenforceable because it was signed under duress because Plaintiff was required to sign it to avoid forfeiture of earned bonus wages. The arbitration provision is unconscionable under Cal Civil Code § 1670.5. *Concepcion v AT & T Mobility LLC* — U S — 131 S Ct 1740 179 L Ed 2d 742 (2011) is inapplicable to the facts of this case and Defendants have waived any right to seek arbitration by litigating this action in Court for 9 months before bringing this motion. For all these reasons Defendant's motion to compel must be denied.

*4 (ECF No 43 at 10 (citations omitted))

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IV Discussion

A Waiver

Plaintiff contends that Defendants have waived the right to seek to compel arbitration (ECF No 43 at 36)

In determining whether arbitration has been waived pursuant to California law a court may consider the following factors

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

Cox v Ocean View Hotel Corp 533 F 3d 1114 1124 (9th Cir 2008) (quoting *St Agnes Med Ctr v PacifiCare of Cal* 31 Cal 4th 1187 1196 8 Cal Rptr 3d 517 82 P 3d 727 (2003)) The waiver inquiry must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements *Id* at 1125 (quoting *Fisher v A G Becker Paribas Inc* 791 F 2d 691 694 (9th Cir 1986)) Because waiver of the right to arbitration is disfavored any party arguing waiver of arbitration bears a heavy burden of proof *Fisher* 791 F 2d at 694 (quotation omitted) *see also* *Sobremonte v Superior Court* 61 Cal App 4th 980 991 72 Cal Rptr 2d 43 (1998) (Since arbitration is a strongly favored means of resolving disputes courts must closely scrutinize any claims of waiver A party claiming that the right to arbitrate has been

waived has a heavy burden of proof) (quotation omitted)

The Court of Appeals for the Ninth Circuit has held that a party does not act inconsistently with the right to arbitrate by failing to seek to enforce an arbitration agreement that would be unenforceable under then-existing law *See Letizia v Prudential Bache Sec Inc* 802 F 2d 1185 1187 (9th Cir 1986) (It is undisputed that defendants did not seek arbitration until after the close of discovery nine months after their answer was filed [T]here could be no waiver here because there was no existing right to arbitration Defendants actively pursued their right to arbitrate as soon as they believed in good faith that they had such a right) *Fisher v A G Becker Paribas Inc* 791 F 2d 691 697 (9th Cir 1986) (Until the Supreme Court's decision in *Byrd* the arbitration agreement in this case was unenforceable Therefore the Fishers have failed to demonstrate that Becker acted inconsistently with a known existing right to compel arbitration) In this case Defendants reasonably could have believed that prior to *AT & T Mobility LLC v Concepcion* — U S — 131 S Ct 1740 179 L Ed 2d 742 (2011) California courts would have found the arbitration agreement to be unenforceable particularly with regard to Plaintiff's claims pursuant to California's Private Attorney General Act as discussed below Less than a month after *Concepcion* was decided Defendants filed the Motion for an Order Directing Arbitration Accordingly Plaintiff has failed to show that Defendants acted inconsistently with a known right to arbitrate *See Fisher* 791 F 2d at 697

*5 The eight-month delay between Defendants' initial Answer and the Motion for an Order Directing Arbitration is less than the three year delay in *Fisher* and the nine month delay in *Letizia* No dispositive motions have been filed no motion for class certification has been filed and no trial date has been set The Court finds that the second and third waiver factors (i.e. whether the litigation machinery has been substantially invoked and

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whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay) do not favor a finding of waiver *Cox* 533 F 3d at 1124 (quotation omitted) Defendants did not file a counterclaim and there is no showing that Defendants obtained discovery which would not have been available in arbitration *Cf id* (fourth and fifth waiver factors) Plaintiff contends that he has been prejudiced because [m]ore hundred of hours of legal work and research has been expended by Plaintiff's attorneys to litigate the action for the last eight months including responding to Defendant's discovery appearing for deposition conducting multiple depositions filing motions working out Rule 26 reports and schedules along with working out a schedule [for] class certification and performing all of the work necessary to move for class certification (ECF No 43 at 39) The Court finds that Plaintiff has failed to establish that the delay [in moving to compel arbitration] affected misled or prejudiced Plaintiff within the meaning of the relevant case-law *Cox* 533 F 3d at 1124 *cf Fisher* 791 F 2d at 698 ([T]he [plaintiff]s make the surprising contention that they have been prejudiced because they willingly incurred the substantial expense involved in this litigation in order to benefit from a full jury trial This wound was self-inflicted The [plaintiff]s were parties to an agreement making arbitration of disputes mandatory They violated that agreement by including their arbitrable claims in this action Any extra expense incurred as a result of the [plaintiffs]' deliberate choice of an improper forum in contravention of their contract cannot be charged to [defendant])

After considering the relevant factors the Court finds that Defendants have not waived the right to compel arbitration

B Federal Arbitration Act

The Federal Arbitration Act (FAA) was enacted in response to widespread judicial hostility to arbitration agreements *Concepcion* 131 S Ct at 1745 (citation omitted) Section 2 of the FAA

states A written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract 9 U S C § 2 The Supreme Court has described Section 2 as reflecting both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract *Concepcion* 131 S Ct at 1745 (quotations omitted) In line with these principles courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms *Id* at 1745–46 (citations omitted)

*6 The final phrase of § 2 permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue *Id* at 1746 (quotation omitted)

When state law prohibits outright the arbitration of a particular type of claim the analysis is straightforward The conflicting rule is displaced by the FAA *Id* at 1747 (citation omitted) But the inquiry becomes more complex when a doctrine normally thought to be generally applicable such as duress or unconscionability is alleged to have been applied in a fashion that disfavors arbitration *Id* (citation omitted) [A] court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state law holding that enforcement would be unconscionable for this would enable the court to effect what the state legislature cannot *Id* (quotation omitted)

Because the FAA mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed the FAA limits courts involvement to

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determining (1) whether a valid agreement to arbitrate exists and if it does (2) whether the agreement encompasses the dispute at issue *Cox v Ocean View Hotel Corp* 533 F 3d 1114 1119 (9th Cir 2008) (emphasis in original quotation omitted)

If the response is affirmative on both counts then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms *Chiron Corp v Ortho Diagnostic Sys Inc* 207 F 3d 1126, 1130 (9th Cir 2000)

The FAA states that [i]f the making of the arbitration agreement be in issue the [district] court shall proceed summarily to the trial thereof 9 U S C § 4 [T]o put such matters in issue it is not sufficient for the party opposing arbitration to utter general denials of the facts on which the right to arbitration depends If the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts the party opposing may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried *Oppenheimer & Co Inc v Neidhardt* 56 F 3d 352 358 (2d Cir 1995) (citations omitted) [T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration *Green Tree Fin Corp v Randolph* 531 U S 79 91–92 121 S Ct 513 148 L Ed 2d 373 (2000)

In this case it is undisputed that the parties arbitration agreement encompasses the dispute at issue Plaintiff contends that the arbitration provisions in the Bonus Incentive Agreements are not valid and enforceable for the following reasons (1) the arbitration provision violates Section 7 of the [National Labor Relations Act] (2) the arbitration provision violates [California Labor Code] § 206 5 (3) the arbitration provision is unenforceable because it was obtained by duress and (4) the arbitration provision is unconscionable under Cal Civil Code § 1670 5 (ECF No 43 at 10–11)

C National Labor Relations Act

*7 Plaintiff contends Section 7 of the National Labor Relations Act (NLRA) is violated by the

following provision in the Bonus Incentive Agreements except as mutually agreed at the time between You and the Company neither you nor the Company may bring any Claims combined with or on behalf of any other person or entity whether on a collective representative or class action basis or any other basis (Turai Decl Ex C at 47 ECF No 45–1 *see also* Turai Decl Ex D at 54 ECF No 45–1 Turai Decl Ex E at 58 ECF No 45–1) Plaintiff contends In the context of statutory claims by an employee, the restriction prohibiting combined claims on a collective representative or class action basis or any other basis' impairs employee statutory rights and is therefore unlawful by conflicting with Section 7 of the NLRA which guarantees employees the right to engage in concerted activities for the purpose of mutual aid and protection (ECF No 43 at 17)

Section 7 of the NLRA provides that [e]mployees shall have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection 29 U S C § 157 Courts have held that the mutual aid or protection clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause *Eastex Inc v Nat'l Labor Relations Bd* 437 U S 556 565–66 98 S Ct 2505 57 L Ed 2d 428 (1978)

Plaintiff fails to cite any authority stating that the enforcement of an arbitration agreement prohibiting class actions violates the NLRA The only case cited by either party which addresses a contention similar to Plaintiff's in an analogous situation is *Slawinski v Nephron Pharmaceutical Corp* No 10cv460 2010 WL 5186622 (N D Ga Dec 9 2010) The court stated

The only objection plaintiff makes to the agreements concerns the class action waiver provision Plaintiff argues that this provision violates the National Labor Relations Act because it pro

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hibits plaintiff and other employees from engaging in concerted action to advocate about the terms and conditions of their employment. Thus although plaintiff consents to arbitration, she asks the Court to invalidate the class action waiver and permit a collective or class action arbitration.

There is no legal authority to support plaintiff's position. The relevant provisions of the NLRA as well as the case law cited by plaintiff deal solely with an employee's right to participate in union organizing activities. That right is not implicated by the allegations in plaintiff's complaint. Indeed, it is apparent from the face of the complaint that plaintiff and the other opt-ins are not advocating regarding the terms and conditions of their employment. Rather, plaintiffs are pursuing FLSA claims in an attempt to collect allegedly unpaid overtime wages.

*8 *Id.* at *2 (quotations omitted)

The Court finds this reasoning persuasive. Plaintiff, who resigned from his employment with Defendants six months before filing suit, has failed to show that this suit implicates the mutual aid or protection clause or that he suffered retaliation by Defendants. The Court finds that the NLRA does not operate to invalidate or otherwise render unenforceable the arbitration provisions of the Bonus Incentive Agreements signed by Plaintiff.

D California Labor Code § 206.5

Plaintiff contends the arbitration agreement in this case violates [California Labor Code] § 206.5(a) because Plaintiff was required to release his right to bring collective class or representative actions in order to avoid forfeiture of earned wages. California law therefore precludes enforcement of this unlawful arbitration agreement (ECF No. 43 at 19).

Section 206.5 states

An employer shall not require the execution of a release of a claim or right on account of wages

due or to become due or made as an advance on wages to be earned unless payment of those wages has been made. A release required or executed in violation of the provisions of this section shall be null and void as between the employer and the employee. Violation of this section by the employer is a misdemeanor.

Cal Labor Code § 206.5(a). Labor Code section 206.5 simply prohibits employers from coercing settlements by withholding wages concededly due. In other words, wages are not considered due and unreleasable under Labor Code section 206.5 unless they are required to be paid under Labor Code section 206. When a bona fide dispute exists, the disputed amounts are not due. *Watkins v Wachovia Corp.*, 172 Cal App 4th 1576, 1587, 92 Cal Rptr 3d 409 (2009). *see also* Cal Labor Code § 206(a). (In case of a dispute over wages, the employer shall pay without condition all wages or parts thereof conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed.)

Each Bonus Incentive Agreement states that [t]he Effective Date of this Agreement is *after* the date Plaintiff signed the agreement. At the time Plaintiff signed his first Bonus Incentive Agreement on December 13, 2007, he was provided a Compensation Projection Summary which showed Plaintiff's Gross Net Bonus and Advance bonus to be \$0.00 (Turai Decl. Ex. C at 52, ECF No. 45-1). This evidence is sufficient to demonstrate that each Bonus Incentive Agreement concerned Plaintiff's eligibility for future bonuses rather than already earned bonuses.

Plaintiff submits a declaration which states: It was my understanding that signing the documents was a necessary step to receiving the bonuses I had earned over the prior year. (Grabowski Decl. ¶ 9, ECF No. 44). Plaintiff does not explain the basis for his understanding that the Bonus Incentive Agreements related to *earned* bonuses. Plaintiff does not submit evidence that Cohen or any representative of Defendants told him that the agreements

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related to earned bonuses Plaintiff testified in a deposition that Cohen did not explicitly say that Plaintiff had to sign the agreement in order to receive past earned bonus amounts (Grabowski Dep at 54 ECF No 45-1) Plaintiff testified that his understanding [was] based on the tone of the meeting and the fact that Cohen showed Plaintiff the company's financial results of the previous year and projections for the upcoming year which formed the basis for the bonus amounts *Id* As discussed above Plaintiff's understanding is contrary to the plain terms of the each agreement which state that the terms of this Agreement shall be effective from January first through December thirty first of the following year (Turai Decl Ex C at 47 ECF No 45-1 *see also* Turai Decl Ex D at 54 ECF No 45-1 Turai Decl Ex E at 58 ECF No 45-1) Even if Plaintiff's declaration and deposition were sufficient to create a genuine dispute as to whether the Bonus Incentive Agreements related to already earned bonuses (as opposed to future bonuses) [w]hen a bona fide dispute exists the disputed amounts are not due within the meaning of California Labor Code § 206.5 *Watkins* 172 Cal App 4th at 1587 92 Cal Rptr 3d 409 Plaintiff's declaration is insufficient to warrant a trial on the issue of whether the Bonus Incentive Agreements violate California Labor Code § 206.5(a)

*9 The Court finds that the Bonus Incentive Agreements do not violate California Labor Code § 206.5

E Duress

Plaintiff contends that his execution of the arbitration agreement was obtained as the result of duress and undue influence because he was required to sign the agreement in order to avoid a forfeiture of earned wages (ECF No 43 at 19) In support of this contention Plaintiff relies upon an unpublished California Court of Appeals case which held that an arbitration agreement was unenforceable due to duress when the trial court found that the employer violated California Labor Code §

206.5 *See Canales v Perf Team Triangle West* 2003 WL 361242 at *2 (Cal Ct App Feb 20 2003) (The record thus contains ample evidence to support the trial court's determinations of duress Canales's declaration indicates that she was asked to sign the agreement well after she began her employment and that appellants' improper threat to withhold her earned pay compelled her to execute the agreement which she had no reasonable opportunity to examine or understand) (citing *inter alia* Cal Labor Code § 206.5)

As discussed above Plaintiff has failed to introduce sufficient evidence for a fact finder to conclude that Plaintiff was required to sign the Bonus Incentive Agreements in order to avoid a forfeiture of wages due pursuant to California Labor Code § 206.5 Accordingly Plaintiff has failed to show that the Bonus Incentive Agreements were obtained by duress or undue influence

F Unconscionability

Plaintiff contends that the arbitration provisions in the Bonus Incentive Agreements are unconscionable

[I]n assessing whether an arbitration agreement or clause is enforceable the Court should apply ordinary state-law principles that govern the formation of contracts *Davis v O'Melveny & Myers* 485 F 3d 1066 1072 (9th Cir 2007) (quotation omitted) Under California law a contractual clause is unenforceable if it is both procedurally and substantively unconscionable *See id* (citing *inter alia Armendariz v Found Health Psychcare Servs Inc* 24 Cal 4th 83 114 99 Cal Rptr 2d 745 6 P 3d 669 (2000))^{FN1} Courts apply a sliding scale the more substantively oppressive the contract term the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable and vice versa *Id* (quoting *Armendariz* 24 Cal 4th at 114 99 Cal Rptr 2d 745 6 P 3d 669) Still both [must] be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability *Id* at 1072-73 99

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Cal Rptr 2d 745 6 P 3d 669 (quoting *Aimendariz* 24 Cal 4th at 114 99 Cal Rptr 2d 745 6 P 3d 669)

[T]he party opposing arbitration has the burden of proving the arbitration provision is unconscionable *Higgins v Superior Court* 140 Cal App 4th 1238 1249 45 Cal Rptr 3d 293 (2006) (quotation omitted)

A court determination that the arbitration agreement contains flawed provisions does not necessarily mean that the entire [arbitration agreement] is substantively unconscionable *Davis* 485 F 3d at 1084 The court next considers whether it is possible to sever the [unconscionable] provision *Id* (citation omitted)

1 Procedural Unconscionability

*10 The [p]rocedural unconscionability analysis focuses on oppression or surprise *Nagrampa v MailCoups Inc* 469 F 3d 1257 1280 (9th Cir 2006) (quoting *Flores v Transamerica HomeFirst Inc* 93 Cal App 4th 846 853 113 Cal Rptr 2d 376 (2001)) Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice while [s]urprise involves the extent to which the supposedly agreed upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them *Id* (quoting *Flores* 93 Cal App 4th at 853 113 Cal Rptr 2d 376)

Plaintiff contends

According to the face of the agreement there can be no dispute that the agreement is a procedurally unconscionable contract of adhesion presented to current employee by his employer on a take-it or leave it basis Further this agreement is even more procedurally unconscionable here because (1) earned bonus wages are being withheld until the agreement is signed (2) the employee is told to sign the agreement by his boss and (3) many of the rights waived by the agreement are not disclosed at the time the agreement is presented for signature

(ECF No 43 at 22)

Plaintiff has presented evidence that the agreements were presented on a take it or leave basis, with little or no option for the employee to negotiate In light of the Supreme Courts decision in *Conception* however the Court does not find that the adhesive nature of the agreement weighs strongly in favor of procedural unconscionability *Cf Conception* 131 S Ct at 1750 (holding that California's *Discover Bank* rule is preempted by the FAA in part because [t]he rule is limited to adhesion contracts but the times in which consumer contracts were anything other than adhesive are long past)

As discussed above the Court finds that Plaintiff has failed to adequately demonstrate that earned bonus wages are being withheld until the agreement is signed (ECF No 43 at 22)

The arbitration provision was not hidden in the contract it is the longest provision in the relatively short Bonus Incentive Agreement The Bonus Incentive Agreement signed on December 13 2007 contains two pages of text and the Bonus Incentive Agreements signed the following two years are each a single page However there is no evidence that Plaintiff was provided with a copy of the Company's Employment Dispute Mediation/Arbitration Procedure at the time he was asked to sign the agreement (Turai Decl Ex C at 47 ECF No 45-1) According to the Bonus Incentive Agreement the Company's Employment Dispute Mediation/Arbitration Procedure governs any mediation or arbitration pursuant to the agreement and is available on the Company Intranet *Id* By the time Plaintiff signed the second and third Bonus Incentive Agreements in December 2008 and December 2009 he would have had ample opportunity to review the Company's Employment Dispute Mediation/Arbitration Procedure but the failure of Defendants to supply Plaintiff with this document at the time he signed the agreements adds an element of surprise and therefore procedural unconscionability *See Nagrampa* 469 F 3d at 1280

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*11 The Court finds that the arbitration agreement contains elements of procedural unconscionability although the evidence of procedural unconscionability is not strong in light of *Conception*

2 Substantive Unconscionability

Substantive unconscionability relates to the effect of the contract or provision. A lack of mutuality is relevant in analyzing this prong. The term focuses on the terms of the agreement and whether those terms are so one-sided as to *shock the conscience*. *Davis*, 485 F.3d at 1075 (quotation omitted) (emphasis in original). A determination of substantive unconscionability involves whether the terms of the contract are unduly harsh or oppressive. *Id.* (quotation omitted).

Plaintiff contends that the arbitration agreement is substantively unconscionable because (a) the agreement is not bilateral, (b) the rules of the agreement are drafted and subject to unilateral revision by Defendant, (c) the agreement invokes a distant venue in Minnesota, (d) the agreement calls for application of Minnesota law, (e) the agreement unfairly limits discovery, (f) the agreement changes the burden of proof, (g) the agreement effectively imposes one-sided confidentiality, (h) the agreement imposes prohibitive arbitration expenses on employees, and (i) the agreement shifts liability for attorneys' fees. (ECF No. 43 at 24–33).

a “Carve Out” Provision

Plaintiff contends the agreement to arbitrate is not bilateral or mutual because the Defendant has carved out the claims commonly brought by employers and reserved these claims for judicial resolution, whereas the claims commonly brought by employees are forced into arbitration. (ECF No. 43 at 24–25).

The Bonus Incentive Agreement states

This Dispute Resolution Agreement shall not apply to any of the following: (1) Workers' Compensation claims; (2) claims related to unemploy-

ment insurance; and (3) any claims by the Company that includes a request for injunctive or equitable relief, including without limitation claims related to its enforcement of any restrictive covenants, non-competition obligations, non-solicitation obligations, and/or confidential information provisions contained in any Company policy and/or employment agreement(s) entered into between You and the Company and/or any claims to protect the Company's trade secrets, confidential or proprietary information, trademarks, copyrights, patents, or other intellectual property.

(Turai Decl. Ex. C at 48, ECF No. 45–1)

California law allows an employer to preserve a judicial remedy for itself if justified based upon a legitimate commercial need or business reality.

Davis, 485 F.3d at 1080 (quoting *inter alia Armendariz*, 24 Cal.4th at 117, 99 Cal. Rptr.2d 745, 6 P.3d 669 ([A] contract can provide a margin of safety that provides the party with superior bargaining strength, a type of extra protection for which it has a legitimate commercial need without being unconscionable)). However, the business realities that create the special need for such an advantage [must be] explained in the contract itself [or] it must be factually established. *Armendariz*, 24 Cal.4th at 117, 99 Cal. Rptr.2d 745, 6 P.3d 669 (quotation omitted). Absent such a showing [w]here the party with stronger bargaining power has restricted the weaker party to the arbitral forum but reserved for itself the ability to seek redress in either an arbitral or judicial forum, California courts have found a lack of mutuality supporting substantive unconscionability. *Nagrampa*, 469 F.3d at 1286 (citing *Armendariz*, 24 Cal.4th at 117, 99 Cal. Rptr.2d 745, 6 P.3d 669).

*12 In light of *Nagrampa*, the Court finds that the carve-out provision stating that the Dispute Resolution Agreement does not apply to any claims by the Company that includes a request for injunctive or equitable relief is substantively unconscionable under California law. *See id.* *see also*

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Davis 485 F 3d at 1081 ([T]he [dispute resolution provision]'s non mutual exception allowing it a judicial remedy to protect confidential information as written is one-sided and thus substantively unconscionable) (quotation omitted)

b Unilateral Revision of Arbitration Rules

Plaintiff contends that the agreement is substantively unconscionable because the agreement to arbitrate is controlled by rules created by the Defendant which rules the Defendant can change or revise to Defendant's advantage (ECF No 43 at 27) Plaintiff cites to *Ingle v Circuit City Stores Inc* 328 F 3d 1165 (9th Cir 2003) which conclude[d] that [a] provision affording [the employer] the unilateral power to terminate or modify the contract is substantively unconscionable *Id* at 1179

Plaintiff does not cite to any provision in the Bonus Incentive Agreement or the Employment Dispute Mediation/Arbitration Procedure which permits Defendants to unilaterally modify change or revise the procedures The Employment Dispute Mediation/Arbitration Procedure contains a provision entitled Revision of Employment Dispute Arbitration Procedure which states in its entirety

The Parties to a Dispute for which the Employment Dispute Arbitration Procedure has been initiated may agree in writing to vary the Employment Dispute Arbitration Procedure at any time before the Arbitrator gives copies of the Award to both Parties (Arnold Decl Ex B at 43 ECF No 34-2)

The Court finds that Plaintiff has failed to demonstrate that the arbitration agreement is substantively unconscionable because Defendants are permitted to unilaterally change the arbitration rules

c Minnesota Venue

Plaintiff contends [T]he venue of the arbitration proceeding is unfairly one-sided because the venue is Minnesota Minnesota is solely advantageous to Defendant which maintains headquarters in

Minnesota and is unfair to Plaintiff who worked in California has claims under California law and has no relationship with Minnesota (ECF No 43 at 27)

The Employment Dispute Mediation/Arbitration Procedure provides that [u]nless the Parties otherwise agree or the Arbitrator otherwise directs for good reason any hearing shall be conducted and deemed held in [Hennepin County Minnesota], at a place convenient to the Parties as so designated by the Arbitrator (Arnold Decl Ex B at 40 ECF No 34-2) In the briefing on the Motion to Compel Defendants agree that the arbitration hearing in the instant matter should be held in San Diego California (ECF No 45 at 16)

The Court finds that the clear terms of the Employment Dispute Mediation/Arbitration Procedure provide for a Minnesota venue only if the parties do not otherwise agree or the arbitrator does not otherwise direct By filing suit in this Court, Plaintiff has effectively chosen a San Diego venue as has Defendants According to the terms of the Employment Dispute Mediation/Arbitration Procedure, in this situation the venue of any arbitration would be San Diego and not Minnesota

***13** The Court finds that Plaintiff has failed to demonstrate that the arbitration agreement is substantively unconscionable because of the venue provision in the Employment Dispute Mediation/Arbitration Procedure

d Choice of Law

Plaintiff contends The agreement unfairly deprives Plaintiff of the protections of California law by making the governing law the law of the state of venue which is Minnesota (ECF No 43 at 29)

The Employment Dispute Mediation/Arbitration Procedure contains a provision entitled Applicable Law and Burden of Persuasion which states The principles of applicable substantive common decisional and statutory law shall control the disposition of each Dispute Each Party bears

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the burden of persuasion on any claim or counter claim raised by that Party in accordance with the principles of applicable common decisional and statutory law (Arnold Decl Ex B at 40 ECF No 34–2) The provision of the Employment Dispute Mediation/Arbitration Procedure quoted by Plaintiff states Any proceeding pursuant to the Employment Dispute Mediation/Arbitration Procedure is deemed to be an arbitration proceeding subject to the Federal Arbitration Act 9 U S C §§ 1–16 if applicable to the exclusion of any state law inconsistent therewith or if the FAA is not applicable, to the law of the state of venue *Id* at 42 As discussed above the state of venue in this case would be California

The Court finds that Plaintiff has failed to demonstrate that the arbitration agreement is substantively unconscionable because of the choice of law provision in the Employment Dispute Mediation/Arbitration Procedure

e Discovery

Plaintiff contends [D]iscovery is unfairly limited by the Defendant's rules The agreement and rules limit discovery to no written discovery and only one deposition Thus the agreement limits the amount of discovery from what would be available under the Fed Rules of Civil Procedure Moreover the Defendant is only required to produce documents which the Defendant deems relevant and material (ECF No 43 at 30)

The Employment Dispute Mediation/Arbitration Procedure contains only one provision related to discovery which states

Discovery shall be conducted in the most expeditious and cost effective manner practicable and shall be limited to that which is relevant and material to the Dispute and for which each Party has a substantial demonstrable need

Upon request the Employee shall be entitled at least thirty (30) days in advance of the commencement of the hearing to take *at least* one

deposition of a[] Company representative designated by the Employee Any disputes relative to discovery shall be presented to the Arbitrator for final and binding resolution The Arbitrator may grant upon good cause shown either Party's request for discovery in addition to or limiting that for which this paragraph expressly provides

***14** (Arnold Decl Ex B at 40 ECF No 34–2 (emphasis added)) The discovery provision of the Employment Dispute Mediation/Arbitration Procedure does not limit the employee to only one deposition and it names the Arbitrator as the decisionmaker on whether discovery should be granted or denied

The Court finds that Plaintiff has failed to demonstrate that the arbitration agreement is substantively unconscionable because of the discovery provision in the Employment Dispute Mediation/Arbitration Procedure

f Burden of Proof

Plaintiff contends that [u]nder California law and the Labor Code the employee is presumed to be non-exempt and the employer bears the burden of proving that the employee was exempt but under the Defendant's rules the burden of proof is unfairly switched to Plaintiff to prove his claim in this action that he was misclassified as exempt under the California Labor Code (ECF No 43 at 31–32)

As discussed above the Employment Dispute Mediation/Arbitration Procedure contains a provision entitled Applicable Law and Burden of Persuasion which states The principles of applicable substantive common decisional and statutory law shall control the disposition of each Dispute Each Party bears the burden of persuasion on any claim or counterclaim raised by that Party in accordance with the principles of applicable common decisional and statutory law (Arnold Decl Ex B at 40 ECF No 34–2) This provision places the burden of persuasion in accordance with the principles of applicable common decisional and stat

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utory law *Id*

The Court finds that Plaintiff has failed to demonstrate that the arbitration agreement is substantively unconscionable because of the burden of proof provision in the Employment Dispute Mediation/Arbitration Procedure

g Confidentiality

Plaintiff contends [T]he Defendant's rules impose confidentiality which unfairly favors Defendant. While arbitration normally is not open to the public, the Defendant's rules go much further. Defendant's rules require that the record of the proceedings be confidential under threat of a sanction order by the arbitrator. (ECF No. 43 at 32)

The Employment Dispute Mediation/Arbitration Procedure contains a provision entitled Confidentiality which states

All aspects of the arbitration including without limitation the record of the proceeding are confidential and shall not be open to the public except (a) to the extent both Parties agree otherwise in writing (b) as may be appropriate in any subsequent proceedings by the Parties or (c) as may otherwise be appropriate in response to a governmental agency or legal process provided that the Party upon whom such process is served shall give immediate notice of such process to the other Party and afford the other Party an appropriate opportunity to object to such process

At the request of a Party or upon his or her initiative the Arbitrator shall issue protective orders appropriate to the circumstances and shall enforce the confidentiality of the arbitration as set forth in this article

*15 (Arnold Decl. Ex. B at 41 ECF No. 34-2)

In *Davis*, the Court of Appeals for the Ninth Circuit stated that under California law [c]onfidentiality by itself is not substantively unconscionable but the employer's confidentiality

clause is written too broadly and unconscionably favors [the employer] when the clause at issue would prevent an employee from contacting other employees to assist in litigating (or arbitrating) an employee's case. *Davis*, 485 F.3d at 1078-79. (The clause precludes even mention to anyone not directly involved in the mediation or arbitration of the content of the pleadings, papers, orders, hearings, trials, or awards in the arbitration or even the existence of a controversy and the fact that there is a mediation or an arbitration proceeding.) In this case, the confidentiality provision in the Employment Dispute Mediation/Arbitration Procedure is broader than what the court in *Davis* indicated would be conscionable. *Cf. id.* at 1079 (noting that [t]he parties to any particular arbitration especially in an employment dispute can always agree to limit availability of sensitive employee information (e.g., social security numbers or other personal identifier information) or other issue-specific matters if necessary.)

The Court finds that the confidentiality provision in the arbitration agreement is substantively unconscionable under California law.

h Arbitration Expenses

Plaintiff contends that the agreement imposes prohibitive arbitration expenses on employees. (ECF No. 43 at 33)

The Employment Dispute Mediation/Arbitration Procedure contains an Expenses provision which states

Unless precluded by decisional or other law in the jurisdiction where venue lies for the Arbitration, the Employee shall bear a portion of the reasonable expenses of the arbitration up to the lesser of (a) one half of these expenses or (b) an amount equal to two (2) days of the Employee's gross annual cash compensation (including bonuses, commissions, and related cash compensation) during the twelve (12) months immediately preceding the notice of claim initiating the Employment Dispute Arbitration Procedure. The

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Company shall bear the remainder of these expenses

(Arnold Decl Ex B at 41 ECF No 34–2) Defendants submit undisputed evidence that Plaintiff earned approximately \$130 a day when he resigned (Turai Decl Ex E at 59 ECF No 45–1) Accordingly the Employment Dispute Mediation/ Arbitration Procedure provides that [u]nless precluded by California law the maximum amount Plaintiff would have to pay in arbitration expenses is \$260 *Id* This amount is less than the \$350 filing fee Plaintiff paid to initiate this judicial action (ECF No 1) Plaintiff presents no authority indicating that a requirement that an employee pay \$260 in arbitration expenses is substantively unconscionable under California law

The Court finds that Plaintiff has failed to demonstrate that the arbitration agreement is substantively unconscionable because of the expenses provision in the Employment Dispute Mediation/ Arbitration Procedure

1 Attorney's Fees

***16** Plaintiff contends

The Defendant's rules provide for one way awards of attorney's fees in favor of Defendant which would not be available in a judicial proceeding This is true because Plaintiff as an employee is statutorily entitled to attorneys' fees when prevailing on his misclassification claim whereas Defendant is not permitted to recover attorneys' fees under California law Moreover the award of attorneys' fees to the prevailing employee is relegated to the discretion of the arbitrator whereas under Labor Code § 1194 Plaintiff would have an absolute right to recover attorneys' fees Thus the unilateral right in favor of the Plaintiff has been abridged by the arbitration provision

(ECF No 43 at 33–34 (citations omitted))

The Employment Dispute Mediation/Arbitra

tion Procedure states

[T]he Arbitrator shall have the same power and authority as would a judge in a non-jury court trial to grant any relief that a court could grant as may be in conformance with applicable principles of common decisional and statutory law in the relevant jurisdiction The Award of any damages or relief is left to the discretion of the Arbitrator in accordance with applicable law and may be made in a bifurcated proceeding

The Arbitrator may award either Party its reasonable attorneys' fees and costs including reasonable expenses associated with production of witnesses or proof upon a finding that the claim or counter claim was frivolous or brought to harass the Employee, the Company or the Company's personnel

The Arbitrator may award either Party its reasonable attorneys' fees and costs including reasonable expenses associated with production of witnesses or proof, upon a finding that the other Party (a) engaged in unreasonable delay (b) failed to cooperate in discovery, or (c) failed to comply with requirements of confidentiality

(Arnold Decl Ex B at 41–42 ECF No 34–2)

Defendants concede that the arbitration agreement potentially offers Defendants attorneys' fees for which they might not otherwise be eligible under California law (ECF No 45 at 17) In light of this concession the Court finds that the attorneys' fee provision in the Employment Dispute Mediation/ Arbitration Procedure is substantively unconscionable under California law *Cf Armendariz* 24 Cal 4th at 110–11 99 Cal Rptr 2d 745 6 P 3d 669 ([W]e conclude that when 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) (emphasis in original) However

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the degree of unconscionability is low given the ability of a court to sanction a party in the amount of the opposing party's attorney's fees for frivolous harassing or unreasonable filings *Cf* 28 U S C § 1927 Fed R Civ P 11

3 Severability

*17 Defendants contend

Once Plaintiff's fabrications are removed, what remains is an agreement that carves out some potential employer claims imposes confidentiality on the parties and potentially offers Defendants attorneys fees for which they might not otherwise be eligible These terms fall far short of being so one sided that they 'shock the conscious' as required to invalidate the agreement Furthermore the latter two terms can be easily severed from the agreement

(ECF No 45 at 17) Plaintiff contends that [t]he unconscionability so permeates that agreement that severance is not an option (ECF No 43 at 35)

A court determination that the arbitration agreement contains flawed provisions does not necessarily mean that the entire [arbitration agreement] is substantively unconscionable *Davis* 485 F 3d at 1084 The court next considers whether it is possible to sever the [unconscionable] provision *Id* (citing Cal Civ Code § 1670 5(a) (If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract or it may enforce the remainder of the contract without the unconscionable clause or it may so limit the application of any unconscionable clause as to avoid any unconscionable result))

In *Armendariz* the California Supreme Court stated that the statute [i.e. Cal Civ Code § 1670 5] appears to give a trial court some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement But it also appears to contemplate the

latter course only when an agreement is permeated by unconscionability *Armendariz* 24 Cal 4th at 122 99 Cal Rptr 2d 745 6 P 3d 669 The court stated

Courts are to look to various purposes of the contract If the central purpose of the contract is tainted with illegality then the contract as a whole cannot be enforced If the illegality is collateral to the main purpose of the contract and the illegal provision can be extirpated from the contract by means of severance or restriction then such severance and restriction are appropriate

Id at 124 99 Cal Rptr 2d 745 6 P 3d 669 *see also Davis* 485 F 3d at 1084 (The question is whether the offending clause or clauses are merely collateral to the main purpose of the arbitration agreement or whether the [entire arbitration agreement] is permeated by unconscionability) (quoting *Armendariz* 24 Cal 4th at 124 99 Cal Rptr 2d 745 6 P 3d 669) In *Davis* the Court of Appeals for the Ninth Circuit decided that while the arbitration agreement under consideration had a lesser degree of unconscionability as those considered in *Ingle* or in *Circuit City Stores Inc v Adams* 279 F 3d 889 (2002) the agreement nonetheless could not be cured by severance when the agreement did not have a severability clause was procedurally unconscionable and contained four substantively unconscionable terms which cannot be stricken or excised without gutting the agreement *Id*

*18 In this case, unlike in *Davis* the Bonus Incentive Agreement contains a severability clause (Turai Decl Ex C at 48 ECF No 45-1 (If any portion of this dispute resolution provision is determined to be void or unenforceable then the remaining portions of this Agreement shall continue in full force and effect and this Agreement may be modified to the extent necessary consistent with its fundamental purpose and intent in order to make it enforceable)) As discussed above the arbitration agreement and the incorporated Employment Dispute Mediation/Arbitration Procedure have an ele

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ment of procedural unconscionability and contain three substantively unconscionable provisions (the carve out provision stating that the Dispute Resolution Agreement does not apply to any claims by the Company that includes a request for injunctive or equitable relief the confidentiality provision and the attorney's fees provision) Collectively the three substantively unconscionable provisions in this case have a lower degree of unconscionability than the four substantively unconscionable provisions at issue in *Davis* Cf *Davis* 485 F 3d at 1082 (holding that the four substantively unconscionable provisions included a carve out provision a confidentiality provision an all inclusive bar to administrative actions [which] is contrary to U S Supreme Court and California Supreme Court precedent and a notice provision which functioned as a substantively-unconscionable shortened statute of limitations) The Court finds that given the liberal federal policy favoring arbitration *Concepcion* 131 S Ct at 1745 the three substantively unconscionable provisions may be severed from the agreement and that the entire arbitration agreement is not permeated by unconscionability *Davis* 485 F 3d at 1084 (quotation omitted) The three substantively unconscionable provisions discussed above are severed from the arbitration agreement pursuant to California Civil Code § 1670.5 The Court finds that after the substantively unconscionable provisions are severed the arbitration agreement is enforceable

G California Private Attorney General Act Claims

After the conclusion of briefing on the pending motions each party filed a Notice of Statement of Recent Authority Relevant to Defendants' Motion for an Order Directing Arbitration (ECF Nos 52 54)

Plaintiff attached to his Notice *Brown v Ralphs Grocery Co* 197 Cal App 4th 489 128 Cal Rptr 3d 854 2011 WL 2685959 (2011) In *Brown* a divided panel of the California Court of Appeal held that a contractual waiver of an employee's right to pursue

a representative action under the Private Attorney General Act located in an arbitration agreement was unenforceable under California law The court stated that representative actions under the [Private Attorney General Act, Cal Labor Code § § 2698 *et seq*] do not conflict with the purposes of the FAA If the FAA preempted state law as to the unenforceability of the PAGA representative action waivers the benefits of private attorney general actions to enforce state labor laws would in large part be nullified 197 Cal App 4th 489 128 Cal Rptr 3d 854 2011 WL 2685959 at *6 The court stated that

*19 United States Supreme Court authority [including *Concepcion*] does not address a statute such as the PAGA which is a mechanism by which the state itself can enforce state labor laws for the employee suing under the PAGA does so as the proxy or agent of the state's labor law enforcement agencies And even if a PAGA claim is subject to arbitration it would not have the attributes of a class action that the [*Concepcion*] case said conflicted with arbitration such as class certification, notices and opt-outs Until the United States Supreme Court rules otherwise we continue to follow what we believe to be California law

Id at *7 128 Cal Rptr 3d 854

Defendants attached to their Notice *Quevedo v Macy's Inc* ---F Supp 2d --- No CV 09-1522 2011 WL 3135052 (C D Cal June 16 2011) In *Quevedo* the court held that *Concepcion* compelled enforcement of arbitration agreements even where the agreements barred an employee from bringing a representative Private Attorney General Act claim The court stated

[R]equiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA A claim brought on behalf of others would like class claims make for a slower more costly process In addition representative PAGA claims

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increase[] risks to defendants' by aggregating the claims of many employees. See [*Concepcion* 131 S Ct] at 1752. Defendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would go uncorrected given the absence of multilayered review. See *id*. Just as [a]rbitration is poorly suited to the higher stakes of class litigation, it is also poorly suited to the higher stakes of a collective PAGA action. See *id*. The California Court of Appeals decision in *Franco* [which was relied on by *Brown* 2011 WL 2685959 at *4-*5] shows only that a state might reasonably wish to require arbitration agreements to allow for collective PAGA actions. See *Franco v Athens Disposal Co*, 171 Cal App 4th 1277, 90 Cal Rptr 3d 539 (2009). *AT & T v Concepcion* makes clear, however, that the state cannot impose such a requirement because it would be inconsistent with the FAA. See *Concepcion*, 131 S Ct at 1753.

For these reasons, the Court concludes that Quevedo's PAGA claim is arbitrable, and that the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable.

Id at * 17

Plaintiff's Third Amended Complaint alleges a representative action pursuant to the California Private Attorney General Act. To the extent Plaintiff has raised the arguments made by the California Court of Appeal in *Brown*, the Court finds the reasoning of *Quevedo* to be more persuasive. See *Nelson v AT & T Mobility LLC*, No C10-4802, 2011 WL 3651153 at *4 (N D Cal Aug 18, 2011) (same). The United States Supreme Court has stated that a state cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons, *Concepcion*, 131 S Ct at 1753, nor can a state prohibit[] outright the arbitration of a particular type of claim. *Id* at 1747. Court finds that Plaintiff's California Private Attorney General Act claim is arbitrable, and that the arbitration agreement's provision bar-

ring him from bringing that claim on behalf of other employees is enforceable.

*20 The Motion for an Order Directing Arbitration is granted, as discussed above.

H Motion for Discovery and Jury Trial

When Plaintiff filed his opposition to the Motion for an Order Directing Arbitration, Plaintiff also filed the Motion for Discovery and Jury Trial (ECF No. 43-1). Plaintiff contends Plaintiff should be able to discover the Defendant's processes and procedures for presenting the [Bonus Incentive Agreement]s to all of the putative class members, including whether anyone [was] able to negotiate the terms of the dispute resolution provision, whether anyone attempted to refuse signing the agreement along with corresponding repercussions, and the extent to which anyone suffered the forfeiture of bonus wages due to their refusal to sign the BIA. (ECF No. 47 at 5).

Pursuant to California law, [t]o determine whether [an] arbitration agreement is procedurally unconscionable, the court must examine the manner in which the contract was negotiated and the circumstances of the parties at that time. *Ingle*, 328 F 3d at 1171 (quotation omitted). On June 2, 2011, the Court granted Plaintiff an extension of time to oppose the Motion for an Order Directing Arbitration to allow Plaintiff to conduct limited discovery as to the facts concerning the negotiation of the arbitration contract and the circumstances of the parties at the time the contract was signed. (ECF No. 37 at 2). Plaintiff has not shown that Defendants failed to adequately respond to Plaintiff's discovery requests regarding the manner in which the contract was negotiated and the circumstances of the parties at that time. *Ingle*, 328 F 3d at 1171. The parties filed excerpts from the depositions of Cohen and Plaintiff, who each testified regarding the circumstances surrounding the signing of the Bonus Incentive Agreements. As discussed above, based upon the evidence submitted by the parties (including the depositions of Cohen and Plaintiff and Plaintiff's Declaration), the Court has not found

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that there exists a genuine issue of material fact which would warrant a trial regarding the enforceability of the arbitration agreements signed by Plaintiff To the extent that Plaintiff requests discovery related to the execution of arbitration agreements by *persons other than Plaintiff* the Court finds that such discovery is not relevant to the issues to be decided in the motion for an order directing *Plaintiff* to arbitration *Cf Flores v Transamerica HomeFirst Inc* 93 Cal App 4th 846 852 113 Cal Rptr 2d 376 (2001) (holding that there is no collateral estoppel regarding virtually identical arbitration agreements because they were signed by different parties under different circumstances)

The Motion for Discovery and Jury Trial is denied

V Conclusion

IT IS HEREBY ORDERED that the Motion for an Order Directing Arbitration is GRANTED as discussed above (ECF No 34) The Motion for Discovery and Jury Trial is DENIED (ECF No 43-1)

*21 The Clerk of the Court shall administratively close this case without prejudice to any party moving to have the case reopened for good cause

FN1 Defendants contend that Plaintiff improperly relies on *Armendariz* and other California decisions that specifically address the unconscionability of arbitration agreements as opposed to non-arbitration contracts Yet judicially-created obstacles to enforcement of the parties' arbitration agreement identified in *Armendariz* and numerous other California decisions do not survive the Supreme Court's decision in *AT & T [Mobility v Conception]* (ECF No 45 at 11) The Court does not find that *Conception* implicitly overruled all California and Ninth Circuit cases applying California unconscionability law to employer employee arbitration agreements However the Court finds that pre-*Concep*

tion cases applying California unconscionability law must be read in light of *Conception* as discussed below

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H

United States Court of Appeals
Eighth Circuit
Mack GREEN Robynne Barber Michael Kennedy
Leon Gilmer Michael A Robertson David
Thomas, Eddie L Oliver Andre T Shipp and all
others similarly situated, Appellants
v
SUPERSHUTTLE INTERNATIONAL INC Su-
perShuttle Franchise Corporation SuperShuttle of
Minnesota Inc Appellees

No 10-3310
Submitted May 11 2011
Filed Sept 6 2011

Background Current and former shuttle bus drivers brought state court suit against shuttle bus company under Minnesota Fair Labor Standards Act (MFLSA) alleging that they were misclassified as franchisees rather than employees Company removed action to federal court The United States District Court for the District of Minnesota Ann D Montgomery J 2010 WL 3702592 granted company's motion to compel arbitration held that drivers were required to submit their claims to arbitrator on individual basis rather than as class and dismissed suit without prejudice Drivers appealed

Holdings The Court of Appeals By Circuit Judge held that

- (1) District Court could compel arbitration despite transportation exemption of Federal Arbitration Act (FAA)
- (2) drivers' claim that District Court violated Minnesota law in enforcing class action waivers in unit franchise agreements was preempted by FAA and
- (3) District Court abused its discretion in dismissing action rather than staying it

Affirmed in part reversed in part and remanded

Shepherd Circuit Judge filed opinion concurring in part and continuing in result

West Headnotes

[1] Alternative Dispute Resolution 25T 213(5)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance Breach Enforcement and Contest

25Tk204 Remedies and Proceedings for Enforcement in General

25Tk213 Review

25Tk213(5) k Scope and standards of review Most Cited Cases

Court of Appeals reviews a district court's order granting a motion to compel arbitration de novo

[2] Alternative Dispute Resolution 25T 200

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance Breach Enforcement and Contest

25Tk197 Matters to Be Determined by Court

25Tk200 k Arbitrability of dispute Most Cited Cases

District court could compel arbitration of shuttle bus drivers' claims against bus company under Minnesota Fair Labor Standards Act (MFLSA) despite transportation exemption of Federal Arbitration Act (FAA) where parties incorporated into their contract arbitration association rules providing that arbitrator had power to determine his or her own jurisdiction over controversy between parties thus agreeing to have arbitrator decide as threshold question of arbitrability whether transportation worker exemption applied 9 U S C A § 1 M S A § 177 21 et seq

[3] Alternative Dispute Resolution 25T 200

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25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance Breach Enforcement and Contest

25Tk197 Matters to Be Determined by Court

25Tk200 k Arbitrability of dispute Most Cited Cases

Parties can agree to have arbitrators decide threshold questions of arbitrability

[4] Alternative Dispute Resolution 25T 117

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk117 k Preemption Most Cited Cases

States 360 18 15

360 States

360I Political Status and Relations

360I(B) Federal Supremacy Preemption

360k18 15 k Particular cases preemption or supersession Most Cited Cases

Shuttle bus drivers' claim that district court violated Minnesota law in enforcing class action waivers in unit franchise agreements and directing drivers to submit their Minnesota Fair Labor Standards Act (MFLSA) claims to arbitrator individually rather than as a class was preempted by Federal Arbitration Act (FAA) 9 U S C A § 1 M S A § 177 21 et seq

[5] Alternative Dispute Resolution 25T 196

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance Breach Enforcement and Contest

25Tk190 Stay of Proceedings Pending Arbitration

25Tk196 k Particular cases Most Cited Cases

District court abused its discretion in dismissing without prejudice shuttle bus drivers' action

against bus company under Minnesota Fair Labor Standards Act (MFLSA) rather than staying it upon granting company's motion to compel arbitration where it was not clear that all contested issues would be resolved by arbitration and if arbitrator were to determine that transportation worker exemption to Federal Arbitration Act (FAA) applied, drivers might be prejudiced by dismissal due to statute of limitations having run 9 U S C A § 1 et seq M S A § 177 21 et seq

[6] Alternative Dispute Resolution 25T 213(5)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance Breach Enforcement and Contest

25Tk204 Remedies and Proceedings for Enforcement in General

25Tk213 Review

25Tk213(5) k Scope and standards of review Most Cited Cases

A district court's dismissal of an action in favor of arbitration as opposed to a stay of the action should be reviewed for an abuse of discretion

*767 Daniel W Schermer argued and on the brief Judith Kahn Schermer Mark Alan Greenman on the brief Minneapolis MN for appellant

Sari M Alamuddin argued and on the brief Minneapolis MN Stephanie L Sweitzer Chicago IL Nicole Haaning Jessie Collings Minneapolis MN Rebecca Eisen San Francisco CA on the brief for appellee

Before WOLLMAN BYE and SHEPHERD Circuit Judges

BYE Circuit Judge

Mack Green and other current or former shuttle bus drivers at the Minneapolis–St Paul International Airport (collectively Green) brought suit against SuperShuttle International Inc SuperShuttle Fran-

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chise Corporation, and SuperShuttle of Minnesota Inc (collectively SuperShuttle) in Minnesota state court alleging violations of the Minnesota Fair Labor Standards Act (MFLSA) arising from SuperShuttle's alleged misclassification of its drivers as franchisees rather than employees. After SuperShuttle removed the action to federal court, the district court granted SuperShuttle's motion to compel arbitration, held the drivers must submit their claims to the arbitrator on an individual basis rather than as a class because of class action waivers in their contracts, and dismissed the suit without prejudice.

Green appealed, claiming the district court (1) erred in granting the motion to compel arbitration because the drivers are exempt from arbitration as transportation workers; (2) erred in enforcing the class action waiver clauses in the drivers' contracts because they are unenforceable under Minnesota law; and (3) erred in dismissing the federal action instead of staying it pending arbitration. We affirm in part and reverse in part.

I

SuperShuttle owns a shared ride shuttle service which operates at the airport. SuperShuttle classified its shuttle bus drivers as franchisees and required them to sign Unit Franchise Agreements (UFAs) specifying the rights and obligations of the parties. Green, along with several other current and former shuttle bus drivers, believed he should be characterized as an *768 employee rather than a franchisee. Green sued SuperShuttle in Minnesota state court, alleging violations of the MFLSA. Green sought to recover lost wages, employment benefits, and restitution of franchise fees.

SuperShuttle removed the action to federal court, asserting jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(2). Green moved to remand the case to state court. The district court denied the motion to remand. Green appealed, and we summarily affirmed. *See Green v SuperShuttle Int'l Inc*, No. 10-1564 (8th Cir. May 26, 2010). SuperShuttle then moved the district

court to compel Green to submit to arbitration, relying upon an arbitration clause in the UFAs. The arbitration clause provided:

[A]ny controversy arising out of this Agreement shall be submitted to the American Arbitration Association for final and binding arbitration in accordance with its commercial rules and procedures that are in effect at the time the arbitration is filed. Nothing in this Agreement shall be construed as limiting or precluding either party from bringing any action in any court of competent jurisdiction for injunctive or other extraordinary relief.

Green argued he is exempt from arbitration under the Federal Arbitration Act (FAA) because he is a transportation worker. *See* 9 U.S.C. § 1 (indicating the FAA shall not apply to contracts of employment of any class of workers engaged in interstate commerce); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115-19, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (explaining the phrase "workers engaged in interstate commerce" refers to transportation workers and holding Section 1 exempts from the FAA "contracts of employment of transportation workers"). The district court determined it did not need to decide whether Section 1 of the FAA exempted Green from arbitration because his UFA assigned the threshold question of arbitrability to the arbitrator. As a result, the district court granted SuperShuttle's motion to compel arbitration, leaving to the arbitrator the question whether Green was exempt from arbitration as a transportation worker.

The district court also determined the drivers were required to submit their claims to the arbitrator individually rather than as a class. The district court relied upon a class action waiver provision in the UFAs which provided: "Any arbitration suit, action, or other legal proceeding shall be conducted and resolved on an individual basis only and not on a class-wide, multiple plaintiff, consolidated, or similar basis." The district court then dismissed the federal action without prejudice.

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Green filed a timely appeal. On appeal, Green contends the district court lacked subject matter jurisdiction to compel arbitration because the FAA exempts transportation workers from its provisions. Green also contends he could not waive his right to a class action under Minnesota law, and therefore the district court erred by enforcing the class action waivers and directing him and the other drivers to submit their claims to the arbitrator on an individual basis. Green also argues the district court should have let the arbitrator decide whether the class action waivers were enforceable. Finally, Green argues the district court erred when it dismissed the federal action without prejudice rather than staying it pending the completion of the arbitration.

II

[1] We review the district court's order granting the motion to compel arbitration de novo. *PRM Energy Sys. Inc. v. Primenergy LLC*, 592 F.3d 830, 833 (8th Cir. 2010).

*769 [2][3] Green argues the district court lacked jurisdiction to compel arbitration because the FAA exempts transportation workers. Application of the FAA's transportation worker exemption is a threshold question of arbitrability in the dispute between Green and SuperShuttle. Parties can agree to have arbitrators decide threshold questions of arbitrability. See *Rent-A-Center West, Inc. v. Jackson*, ___ U.S. ___, 130 S.Ct. 2772, 2777, 177 L.Ed.2d 403 (2010). (We have recognized that parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.)

In this case, the UFAs specifically incorporated the Rules of the American Arbitration Association (AAA). Those Rules provide that an arbitrator has the power to determine his or her own jurisdiction over a controversy between the parties. By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability. See *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009). Green therefore agreed to

have the arbitrator decide whether the FAA's transportation worker exemption applied, and thus the district court did not err in granting the motion to compel arbitration.

[4] Green also claims the district court erred when it enforced the class action waivers in the UFAs and directed the drivers to submit their claims to the arbitrator individually rather than as a class. He contends the class action waivers in the UFAs are unenforceable under Minnesota law. In the alternative, he claims the district court should have left to the arbitrator the question whether the class action waivers were enforceable.

The Supreme Court recently held the FAA preempted a state law based unconscionability challenge to a class action waiver provision in arbitration agreements between AT & T and some of its cellular phone customers. *AT & T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 1753, 179 L.Ed.2d 742 (2011). Like the phone customers in *Concepcion* who based their challenge to the enforceability of a class action waiver provision based upon California law, Green and the other drivers make a Minnesota state-law based challenge to the enforceability of the class action waivers in the UFAs. Our reading of *Concepcion* convinces us the state-law based challenge involved here suffers from the same flaw as the state law based challenge in *Concepcion*—it is preempted by the FAA. Consequently, *Concepcion* forecloses Green's claim that the district court erred in concluding the class action waivers were enforceable.

[5][6] Finally, Green contends the district court should have stayed this action pending completion of the arbitration, rather than dismissing it without prejudice. We have not previously addressed which standard of review applies when a party challenges the district court's dismissal of an action in favor of arbitration, as opposed to a stay of the action. We conclude such a decision should be reviewed for an abuse of discretion. See *Bercovitch v. Baldwin Sch. Inc.*, 133 F.3d 141, 156 n. 21 (1st Cir. 1998).

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(indicating a district court has discretion to dismiss rather than stay a case when all of the issues before the court are arbitrable.)

The FAA generally requires a federal district court to stay an action pending an arbitration rather than to dismiss it. See 9 U.S.C. § 3 (stating district courts *shall* stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement) (emphasis added). The district court relied upon a judicially created exception to the general rule which indicates district courts may in their discretion dismiss an action rather ⁷⁷⁰ than stay it where it is clear the entire controversy between the parties will be resolved by arbitration. See *Jann v. Interplastic Corp.*, 631 F.Supp.2d 1161, 1167 (D.Minn.2009) (collecting cases).

In this case, it is not clear all of the contested issues between the parties will be resolved by arbitration. The arbitrator may very well determine the transportation worker exemption applies. If such happens, Green and the other drivers may be prejudiced by the dismissal of the district court action because the statute of limitations may run and bar them from refiling complaints in state or federal court. Under these circumstances, we believe the district court abused its discretion in dismissing the action rather than staying it pending completion of the arbitration.

III

We affirm the district court's grant of the motion to compel arbitration as well as its enforcement of the class action waivers. We reverse the order dismissing this case without prejudice rather than staying it pending completion of arbitration and remand for further proceedings consistent with this opinion.

SHEPHERD Circuit Judge, concurring in part and concurring in the result.

I concur in the court's opinion except for its holding that the abuse of discretion standard applies to a district court's decision to dismiss or stay an

action when all of the issues before the court are arbitrable. See *Bercovitch v. Baldwin Sch. Inc.*, 133 F.3d 141, 156 n.21 (1st Cir.1998). With respect to this issue, I agree with the court's conclusion that the district court should have stayed this case pending arbitration under 9 U.S.C. § 3. However, I would have reached this conclusion regardless of whether nonarbitrable issues were involved because I believe section 3 affords the district court no discretion to dismiss a case even where it is clear the entire controversy between the parties will be resolved by arbitration. *Ante* at 770. In my view, the plain language of section 3 and the purpose of the FAA require district courts to stay an action pending arbitration upon a party's application and therefore district courts should not be afforded discretion to dismiss the action.

Generally, where the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language. *United States v. Sabri*, 326 F.3d 937, 943 (8th Cir.2003) (internal citations and quotations omitted). Section 3 directs the district court to enter an order staying the proceedings upon application of a party; the court shall, on application of one of the parties, stay the trial of the action. 9 U.S.C. § 3. Nothing in the statute gives the court discretion to dismiss the action when all of the issues in the case are arbitrable. Moreover, when Congress uses the word *shall*, it normally creates an obligation impervious to judicial discretion. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998). Although this rule of statutory construction is not absolute, *Dubois v. Thomas*, 820 F.2d 943, 948 (8th Cir.1987), no language in section 3 indicates a contrary legislative intent.

I recognize that the court adopts the approach of the majority of the circuits that have spoken to this issue. See, e.g., *Choice Hotels Int'l Inc. v. BSR Tropicana Resort Inc.*, 252 F.3d 707, 709–10 (4th

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(Cite as 653 F 3d 766)

Cir 2001) *Bercovitch* 133 F 3d at 156 & n 21
Alford v Dean Witter Reynolds Inc 975 F 2d
1161 1164 (5th Cir 1992) *Sparling v Hoffman*
Constr Co 864 F 2d 635 638 (9th Cir 1988) In
my view however the Third Circuit has adopted
the correct*771 —albeit minority—approach in de-
clining to engage in a tortured interpretation of sec-
tion 3, and thereby taking Congress at its word See
Lloyd v HOVENSA LLC 369 F 3d 263 268–71
(3d Cir 2004)

I also find convincing the analysis employed by
the Third Circuit in support of its plain language
approach In particular the Third Circuit empha-
sizes that one of the main purposes of the FAA is to
enable a party entitled to arbitration to proceed
with arbitration without the substantial delay
arising from an appeal *Lloyd* 369 F 3d at 271
The interpretation of section 3 used by the majority
of the circuits undermines this purpose because a
dismissal of a case constitutes an immediately ap-
pealable final order whereas a party opposing ar-
bitration may not immediately appeal an order
granting a stay Compare 9 U S C § 16(a)(3) with 9
U S C § 16(b)(1) See also *Green Tree Fin*
Corp Ala v Randolph 531 U S 79, 86–87 & n 2
121 S Ct 513 148 L Ed 2d 373 (2000) *Lloyd* 369
F 3d at 270 Thus by creating an exception to the
mandatory directive of section 3 that the action be
stayed the majority of the circuits confer a right to
an immediate appeal that would not otherwise ex-
ist under section 16 *Lloyd* 369 F 3d at 271 Be-
cause this may cause substantial delay in arbitra-
tion the holding of the majority of the circuits as
well as the holding of the majority in this case fails
to comport with the FAA's aim to effectively pro-
mote and facilitate arbitration *Id* at 270

Further the rationale of the approach taken by
the majority of the circuits as found in the Fifth
Circuit's *Alford* decision is unpersuasive The
Alford court interprets section 3 to provide that a
stay is mandatory only in embedded proceed-
ings—where the action involves a request for arbi-
tration and other claims—as opposed to independent

proceedings—where a request for arbitration is the
only issue *Alford* 975 F 2d at 1164 see also *Green*
Tree Fin Corp Ala 531 U S at 87, 121 S Ct 513
(explaining the difference between embedded and
independent proceedings) However, the court
provides no statutory support for its conclusion that
staying an action serves no purpose in independent
proceedings See *Alford* 975 F 2d at 1164 To the
contrary the district court continues to perform sig-
nificant functions under the FAA even when all of
the claims are arbitrable See e g 9 U S C § 5
(requiring the district court to resolve disputes over
appointment of arbitrators) § 7 (allowing the dis-
trict court to compel attendance of witnesses in ar-
bitration) §§ 9–11 (entitling parties to obtain a
judgment on an arbitration award or an order modi-
fying or vacating the award)

Accordingly I would hold that section 3 re-
quired the district court to grant a stay because Su-
perShuttle so moved

C A 8 (Minn) 2011

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Only the Westlaw citation is currently available

United States District Court,
 C D California
 In re DIRECTV EARLY CANCELLATION FEE
 MARKETING AND SALES PRACTICES LITIG-
 ATION

This document relates to Plaintiffs Annette Kahaly
 John Mulea Maureen Van Meter Ira Boshnack
 Sean and Tara Murray Louis Wilson and Carolyn
 Forbes Tracy Twyman Keith and Jana Harper
 Eben Paguirigan Paul and Karen Brice Joseph
 Lombardi, Kathleen O'Brien Sandra Johannes
 Gary Smith Christine Slakans Christine
 Schuessler and Roberta and Edward Pifer

No ML 09-2093 AG (ANx)
 Sept 6 2011

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 L Rhodes Vaughan & Evans Cartersville GA
 Christa L Collins Christa L Collins LLC St
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 Morgan PA Fort Myers FL for Defendant

**ORDER DENYING MOTION TO RECON-
 sider, GRANTING IN PART MOTION TO
 COMPEL, DENYING REQUEST FOR MORE
 DISCOVERY, AND ORDERING FURTHER
 BRIEFING**

ANDREW J GUILFORD District Judge

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*1 The Supreme Court's ruling in *AT & T Mobility LLC v Concepcion* 131 S Ct 1740 (2011) changes the arbitration landscape and thus alters the course of this case. This Court previously granted in part and denied in part a motion to compel arbitration filed by Defendant DirecTV (Defendant) in an order dated September 7, 2010 (September 2010 Order). After *Concepcion* appeared on the horizon the Court stayed this multi-district litigation pending the outcome of that case.

Defendant DirecTV (Defendant) now brings a Motion to Reconsider Under Local Rule 7-18 And Motion to Dismiss Or Stay Proceedings Pending Arbitration And To Compel Arbitration (Dkt # 213). The Court will break that down into three separate motions all addressed in this Order. First the Court addresses the Motion to Reconsider regarding the Court's ruling in the September 2010 Order denying Defendant's motion to compel as to certain Plaintiffs. Defendant has appealed the portion of the September 2010 Order it now asks the Court to reconsider so the Court will address that procedural issue. Second the Court addresses the Motion to Compel regarding Plaintiffs who were not included in Defendant's previous motion to compel. And third the Court addresses the Motion to Dismiss Or Stay which is applicable to any Plaintiffs who will now be subject to arbitration.

The Court ISSUES an indicative ruling regarding the Motion to Reconsider. The Court GRANTS in part and DENIES in part the Motion to Compel. The Court DENIES Plaintiffs' request for more discovery. The Court ORDERS further briefing on the Motion to Dismiss or Stay as described in Section 4.

BACKGROUND

Plaintiffs' claims concern Defendant's alleged practice of charging improper early cancellation fees to their customers. The operative complaint is a Third Amended Class Action Complaint filed on behalf of the named plaintiffs and a putative class.

Defendant's customers are subject to the Dir

ecTV Customer Agreement (Customer Agreement) (Declaration of Valerie McCarthy Ex F). Within the Customer Agreement is a section entitled Resolving Disputes which provides for arbitration of most claims (Id Ex F § 9). Section 9 is referred to by the parties and the Court as the Arbitration Clause. The Customer Agreement was revised in 2007, 2009, and 2010 but the relevant provisions are substantially identical. Various Plaintiffs are bound by different versions of the Customer Agreement. The Arbitration Clause also includes a class action waiver that is not severable from the rest of the clause and a statement that if the class action waiver is unenforceable then the arbitration clause is unenforceable. The Court addresses this in more detail later in this Order.

The first case in this multi-district litigation was filed in July 2008. The Judicial Panel on Multidistrict Litigation transferred to this Court the cases pending in various federal district courts. The parties have engaged in several rounds of motions regarding arbitration or dismissal of claims. In November 2010, the Court stayed litigation pending *Concepcion*. After the Supreme Court ruled on *Concepcion* the Court lifted the stay in May 2011 and Defendant filed this Motion shortly thereafter. This Court along with courts around the country must now sort out the effect of *Concepcion* on previous rulings and on future rulings. See Gabe Friedman *Judges Grapple With Arbitration Clauses After Concepcion* DAILY JOURNAL Aug 5 2011 at 1.

PRELIMINARY MATTERS

*2 The parties have filed numerous objections. The Court has reviewed the objections filed here and relies only on admissible evidence. See *FTC v Neovi Inc* 598 F Supp 2d 1104 1118 n 5 (S D Cal 2008) (The parties have each filed evidentiary objections. However in deciding the present motions the Court has only relied upon admissible evidence). *Schroeder v San Diego Unified School Dist* No 07cv1266-IEG (RBB) 2009 WL 1357414 at *2 n 1 (S D Cal May 13 2009).

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See also Doe v Starbucks Inc No SACV 08-0582 AG (CWx) 2009 WL 5183773 at *1 (C D Cal Dec 18 2009)

The parties have also filed numerous supplemental recent decisions that address issues raised in the present Motions. The Court has reviewed the filings and has relied on them where necessary.

ANALYSIS

After *Concepcion* Defendant now wants to compel arbitration with all Plaintiffs. Previously Defendant chose not to seek to compel arbitration with some Plaintiffs because of clearly adverse state law. But the law has now changed. For purposes of these Motions Plaintiffs fall into three categories. The procedural status of each Plaintiff affects what Defendant now asks the Court to do.

First there are those Plaintiffs against whom Defendant previously did not seek to compel arbitration. These are Plaintiffs from California New Jersey Oregon, and Washington. Those states had rules that most consumer arbitration agreements with class action waivers were unenforceable so Defendant determined that seeking to compel arbitration would be futile. Defendant now moves to compel arbitration with those Plaintiffs. Those are Plaintiffs Kahaly Mulea and Van Meter from California Plaintiffs the Murrys from New Jersey Plaintiffs Forbes and Wilson from Oregon and Plaintiffs Twyman the Harpers Paguirigan and the Brices from Washington.

Second there are those Plaintiffs against whom Defendant previously moved to compel arbitration and the Court granted the motion to compel. Those are Plaintiffs Wilson and Jones from Louisiana Plaintiff McBroom from South Carolina and Plaintiff Folkerth from New York. These four Plaintiffs are not subject to the current Motion.

Third there are those Plaintiffs against whom Defendant previously moved to compel arbitration and the Court denied the motion to compel. Some of these Plaintiffs filed suit in California although

they are from other states. They are Plaintiffs O'Brien and Lombardi from Florida Plaintiff Schuessler from Illinois and Plaintiffs the Pifers from Virginia. The Court concluded that California law applied to those Plaintiffs and denied the motion to compel on that basis. For other Plaintiffs the Court applied the law of their home state and determined that the Arbitration Clause was unenforceable. These Plaintiffs are Plaintiff Slakans from Arizona Plaintiff Boshnack and Johannes from Florida and Plaintiff Smith from Pennsylvania. Defendant asks the Court to reconsider its prior ruling as to these Plaintiffs.

*3 The Court begins with the Motion to Reconsider.

1 MOTION TO RECONSIDER

Ordinarily a motion to reconsider is governed by Local Rule 7-18 which allows reconsideration based on previously unknown fact or law new material facts or a change in the law or the court's failure to consider material facts. But here the issues subject to the Motion to Reconsider are currently on appeal to the Ninth Circuit. *See* Dkt # 117 Notice of Appeal. Thus the Court looks to Federal Rule of Civil Procedure 62.1 which guides the Court when it lacks jurisdiction or authority due to a pending appeal. As set forth previously Defendant asks the Court to reconsider its denial of a motion to compel as to Plaintiffs in the third group just described who are O'Brien Lombardi Schuessler the Pifers Slakans Boshnack Johannes and Smith.

Rule 62.1(a) states: If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending the court may (1) defer considering the motion (2) deny the motion or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue. The statements issuable under Rule 62.1(a)(3) are often referred to as indicative rulings. *See* Fed Ct App Manual § 15.12.5 (5th ed.) If the district court issues an indicative rul

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ing—either that it would grant the motion or that there are substantial issues—the court of appeals then decides whether to remand the case for a ruling by the district court. A statement that the motion raises substantial issues does not tie the district court to a particular ruling on the motion after remand.

Here, the Court lacks authority to rule on the question of compelling arbitration as to the listed Plaintiffs because that issue is on appeal. Thus, the Court may either defer ruling, deny the Motion to Reconsider, or issue an indicative ruling. Defendant asks the Court to issue an indicative ruling stating that it intends to grant the motion. Plaintiffs do not address Rule 62.1.

The holding of *Concepcion* raises substantial issues regarding the Court's ruling denying arbitration in the September 2010 Order. In denying the previous motion to compel regarding many of the Plaintiffs, the Court relied on California's strong public policy against arbitration, which was based on the *Discover Bank* rule. *Discover Bank v Superior Court*, 36 Cal 4th 148 (2005). Since the Supreme Court overruled the *Discover Bank* rule in *Concepcion*, this Court's previous ruling is on less sure footing. Without a thorough analysis—which is not appropriate here given the Ninth Circuit's current jurisdiction over this issue—the Court can not be sure that it would grant Defendant's motion in full. But there are certainly substantial issues raised in Defendant's request for reconsideration.

If the Ninth Circuit chooses to remand, the Court will consider the issues at that time. But considering the significant impact of *Concepcion* and questions about its ramifications, the Ninth Circuit may elect to retain jurisdiction and rule on the pending appeal rather than remand.

*4 Thus, the Court ISSUES an indicative ruling of substantial issues under Rule 62.1 regarding Defendant's Motion to Reconsider, and the Ninth Circuit will then determine whether to remand the issues on appeal or whether to retain jurisdiction to

adjudicate the appeal.

2 MOTION TO COMPEL

The other group of Plaintiffs now before the Court are those against whom Defendant did not previously move to compel arbitration. These Plaintiffs are from California, New Jersey, Oregon, and Washington. Defendant argues that when it moved to compel arbitration previously, those four states had adopted rules that invalidated most consumer arbitration agreements containing class action waivers. (Motion at 8.7–8.) Thus, Defendant argues, [its] hands were effectively tied. (*Id.* at 8.21–22.) But Defendant contends that *Concepcion* changes everything.

Plaintiffs have presented multiple arguments for why the Court should not compel arbitration here. The Court will now address those arguments, although not in the order presented by Plaintiffs. First, Plaintiffs argue that Defendant waived its right to seek arbitration. Second, Plaintiffs argue that the Arbitration Clause is unconscionable, both procedurally and substantively. Third, Plaintiffs argue that, as a matter of contract law, Plaintiffs from California, New Jersey, Oregon, and Washington did not agree to the Arbitration Clause. And fourth, Plaintiffs argue that their claims for injunctive relief under the UCL and CLRA are not arbitrable.

2.1 Waiver

Plaintiffs argue that Defendant has waived its right to compel arbitration as to the Plaintiffs from California, Oregon, Washington, and New Jersey.

A party seeking to prove waiver of a right to arbitration must demonstrate (1) knowledge of an existing right to compel arbitration, (2) acts inconsistent with that existing right, and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts. *Hoffman Constr. Co. v. Active Erectors and Installers, Inc.*, 969 F.2d 796, 798 (9th Cir. 1992) (quoting *Fisher v. A.G. Becker Partners, Inc.*, 791 F.2d 691, 694 (9th Cir. 1986)). A party arguing waiver of arbitration bears a heavy burden, as "[w]aiver of a contractual right to arbitration is not favored." *Fisher*, 791 F.2d at 694.

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Regarding the first factor Plaintiffs don't really argue that Defendant had knowledge of an existing right to compel arbitration Plaintiffs would be hard pressed to establish that there was a right to compel arbitration pre *Concepcion* for the Plaintiffs from California Oregon Washington and New Jersey In *Fisher* the Ninth Circuit concluded that [u]ntil the Supreme Court's decision in [a recent case] the arbitration agreement in this case was unenforceable Therefore the Fishers have failed to demonstrate that Becker acted inconsistently with a known existing right to compel arbitration *Fisher* 791 F 2d at 697 Here until the Supreme Court's decision in *Concepcion* the arbitration agreements in California, Oregon Washington and New Jersey would have been unenforceable so there was no *existing* right When a motion to compel arbitration would be futile there is no existing right *Letizia v Prudential Bache Securities Inc* 802 F 2d 1185 1187 (9th Cir 1986) Plaintiffs here fail to argue that a motion to compel as to the California Oregon Washington and New Jersey Plaintiffs would have been anything but futile

*5 Under *Hoffman* a plaintiff must satisfy all three prongs to demonstrate waiver Although Plaintiffs have failed to satisfy the first prong the Court reviews the remaining prongs for the sake of complete analysis Since there was no existing right to compel arbitration against Plaintiffs from those states Defendant could not have acted inconsistently with any such right Regarding prejudice Plaintiffs argue that they have spent enormous amounts of time and money investigating their claims through discovery which they would not have done in arbitration (Opposition at 36 8-9) But if the Court adopted Plaintiffs' argument that there was a known right to compel arbitration then Plaintiffs would have been litigating at their own peril and *Fisher* found that such expense is self-inflicted *Fisher* 791 F 2d at 698 Additionally because the Court finds that the UCL and CLRA claims are not subject to arbitration the discovery undertaken by Plaintiffs is still useful in this litigation and Plaintiffs have not been prejudiced

The Court concludes that Defendant has not waived its right to compel arbitration as to Plaintiffs from California Washington Oregon and New Jersey The Court now moves on to other issues regarding the Motion to Compel

2.2 Unconscionability

Plaintiffs argue that the Arbitration Clause is unconscionable under applicable state law While Plaintiffs briefly argue that California law should apply to all Plaintiffs it appears that the parties had previously agreed that the home state law should apply to complaints initially filed in their home states See September 2010 Order at 17 9-11 Defendant argues that the law of a Plaintiff's home state should apply although they make this argument in the context of discussing Plaintiffs covered by the Motion to Reconsider not the Motion to Compel (Motion at 13-14) The Court previously applied California law to certain non California Plaintiffs on the basis of *Masters v DirecTV* Nos 08-55825 08-55830 2009 WL 4885132 (9th Cir Nov 19 2009) But *Masters* relies heavily on *Discover Bank* which is no longer good law after *Concepcion* The Court concludes that it should apply the home state law of each Plaintiff

As *Concepcion* made clear the savings clause of the FAA still permits agreements to arbitrate to be invalidated by generally applicable contract defenses such as fraud duress or unconscionability but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue *Concepcion* 131 S Ct at 1746 (quoting *Doctor's Associates Inc v Casarotto* 517 U S 681 687 (1996)) Plaintiffs argue here that general contract principles of unconscionability would still render Defendant's arbitration clause unenforceable

There are two categories of unconscionability procedural and substantive Some states require a showing of both procedural and substantive unconscionability while other states may require a showing of only one or the other Procedural unconscionability refers to the manner in which a contract

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was made while substantive unconscionability refers to whether the contract terms are fair. The Court considers unconscionability under the laws of each of the four states relevant here.

2.2.1 California Unconscionability

*6 Under California law, Plaintiffs must prove both substantive and procedural unconscionability. Procedural unconscionability involves oppression or surprise due to unequal bargaining power. *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004 (9th Cir. 2010). Substantive unconscionability, on the other hand, addresses the fairness of the term in dispute. *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010). A court considering substantive unconscionability should inquire whether the term is one-sided and will have an overly harsh effect on the disadvantaged party. *Id.*

The Court turns first to substantive unconscionability, where Plaintiffs make two arguments. First, Plaintiffs argue that arbitration of individual claims against DirecTV would be prohibitively expensive and that it would be difficult for Plaintiffs to find counsel. Second, Plaintiffs argue that the Arbitration Clause is unconscionable because it allows Defendant to litigate claims while Plaintiffs are obligated to arbitrate.

Plaintiffs' arguments about prohibitive expense and difficulty obtaining counsel are an attempt to relitigate *Concepcion*. As stated in a recent case,

After *Concepcion*, [plaintiffs'] argument that provisions of his arbitration agreement effectively establishes barriers to bringing small claims in arbitration, thereby exempting [Defendant] from liability, is untenable. *In re Apple and AT & T iPad Unlimited Data Plan Litigation*, No. C1002553 RMW, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011) (internal quotation marks omitted). The dissent in *Concepcion* addressed with sympathy the argument about how plaintiffs would be unable to find attorney representation in the absence of class actions, but the majority apparently was unconvinced. *Concepcion*, 131 S.Ct. at 1761 (dissent).

Thus, because of *Concepcion*, Plaintiffs' first argument regarding substantive unconscionability fails.

Plaintiffs' second argument regarding substantive unconscionability about lack of mutuality is based on a faulty premise. The relevant section of the Arbitration Clause states that certain listed types of claims may be decided only by a court of competent jurisdiction. (Declaration of Valerie McCarthy In Support of Motion Ex. F at Section 9(d).) The list includes claims under the Communications Act of 1934, the Digital Millennium Copyright Act, the Electronic Communications Privacy Act, or any other statement or law governing theft of service. (*Id.*) This section of the Arbitration Clause does not limit those rights to Defendant only, and it is conceivable that a plaintiff might have a claim against Defendant for violation of those statutes. While Plaintiffs contend that the Customer Agreement requires one contracting party but not the other to arbitrate all claims, even a quick reading of the Arbitration Clause reveals that this is untrue. (Opposition at 29-12-13, quoting *Covin v. Cintas Corp.*, No. CIV S-09-2384 FCD/KJM, 2009 WL 5206712, at *7 (E.D. Cal. Dec. 18, 2009).) Plaintiffs are empowered to litigate certain claims as well. Further, substantive unconscionability requires more than a contract that sometimes favors the drafter. Even if the Customer Agreement skews in favor of Defendant in some respects, the terms of the Arbitration Clause regarding litigating certain claims cannot be categorized as overly harsh. *Pokorny*, 601 F.3d at 997. The Arbitration Clause largely incorporates the provisions in the rules of a reputable arbitration organization, and those rules have not been shown to be overly harsh. Because Plaintiffs have failed to demonstrate sufficient substantive unconscionability, the unconscionability argument fails with regards to Plaintiffs Kahaly, Mulea, and Van Meter.

2.2.2 Washington Unconscionability

*7 Under Washington law, substantive unconscionability alone is enough to render an agreement unenforceable. *Adler v. Fred Lind Manor*, 153

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Wash 2d 331 346-47 (Wash 2004) ([W]e now hold that substantive unconscionability alone can support a finding of unconscionability) The *Adler* court decline[d] to consider whether [procedural unconscionability] alone will support a claim of unconscionability *Id* But a subsequent Washington state case considering *Adler* held that in the absence of any substantive unconscionability we can not conclude that the demonstrated procedural unconscionability by itself precludes enforcement of an otherwise unremarkable arbitration agreement *Ayala v Continental Services* No 61029-5-I 2008 WL 4069456 *3 (Wash Ct App Sept 2 2008) Under *Ayala* it appears that Washington law does not permit a finding of unenforceability based on procedural unconscionability alone Thus this Court follows the holdings of *Adler* and *Ayala* and concludes that unenforceability requires a finding of substantive unconscionability

In Washington [s]hocking to the conscience, monstrously harsh and exceedingly calloused are terms sometimes used to define substantive unconscionability *Nelson v McGoldrick* 127 Wash 2d 124 131 (1995) Plaintiffs' arguments for substantive unconscionability are intended to apply to all states and as discussed above Plaintiffs' substantive unconscionability arguments are not sufficient after *Concepcion* Without a showing of substantive unconscionability Plaintiffs have not met their burden of showing that the Arbitration Clause is unconscionable under Washington law Accordingly Plaintiffs unconscionability argument fails as to Plaintiffs Twyman the Harpers, Paguirigan and the Brices

2 2 3 Oregon Unconscionability

Under Oregon law while both procedural and substantive unconscionability are relevant only substantive unconscionability is absolutely necessary *Vasquez-Lopez v Beneficial Oregon Inc* 210 Or App 553 567 (2007) Thus even if Plaintiffs can demonstrate procedural unconscionability under Oregon law they must still show substantive unconscionability as well See *King v*

Town & Country Chrysler Inc Civ No 10-1237-AC 2011 WL 1059108 at *2 (D Or Mar 21 2011) To show procedural unconscionability a plaintiff must demonstrate more than just the adhesive nature of a contract *Chalk v T-Mobile USA Inc* 560 F 3d 1087 1094 (9th Cir 2009) A plaintiff must also demonstrate surprise which can involve[] 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 terms *Vasquez-Lopez* 210 Or App at 566

As discussed previously in this Order Plaintiffs' substantive unconscionability arguments do not succeed And even if they could succeed it unlikely that Plaintiffs could successfully demonstrate surprise since the first page of the Customer Agreement clearly states that the agreement is subject to arbitration (McCarthy Deck Ex F Intro) Thus Plaintiffs' unconscionability arguments fail with regard to Plaintiffs Forbes and Wilson

2 2 4 New Jersey Unconscionability

*8 Under New Jersey law Plaintiffs must demonstrate both procedural and substantive unconscionability Procedural unconscionability includes among other things various inadequacies like age, literacy and lack of sophistication *Travelodge Hotels Inc v Honeysuckle Enterprises Inc* 357 F Supp 2d 788 801 (D N J 2005)

Substantive unconscionability describes an exchange of promises that is so one sided as to shock the conscience of the court *Id* Needless to say a shocks the conscience standard is a high bar

Plaintiffs have not set forth sufficient arguments regarding substantive unconscionability Accordingly because substantive unconscionability is necessary for an overall showing of unconscionability Plaintiffs' argument fails as to Plaintiffs the Murrays

2 2 5 Conclusion

Plaintiffs' arguments about unconscionability fail for all of the Plaintiffs now subject to this Mo

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tion to Compel

2 3 Contract Law Arguments

Plaintiffs first argue that the Arbitration Clause is not enforceable by its own terms. However, Plaintiffs concede for purposes of this Motion to Compel that the Customer Agreement as a whole was a valid agreement (Opposition at 9 fn 8). They argue that at the time the Plaintiffs from California, New Jersey, Oregon, and Washington agreed to the Customer Agreement, the laws of their home states would not have enforced the Arbitration Clause and thus it is not enforceable now. The Arbitration Clause states that “[i]f the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable” (McCarthy Decl. Ex. 3 § 9(c)(ii)). The Court will refer to this language as the Non-Severability Clause.

Plaintiffs contend that “[a]n elementary rule of contract interpretation in every jurisdiction is to give effect to the mutual intention of the parties as it existed at the time the contract was entered into” (Opposition at 10 22–24). Plaintiffs rely on *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754 (9th Cir. 1988). In *Van Ness*, an arbitration clause expressly excluded claims arising under certain of the federal securities laws. *Id.* at 757. The Ninth Circuit concluded in *Van Ness* that the arbitration agreement does not apply to the appellants’ securities claims, so arbitration could not be compelled. *Id.* at 758. But the Ninth Circuit rested this decision on the express exclusion from arbitration of certain claims. *Id.* In making this determination, the Ninth Circuit rejected the argument that arbitrability of a particular dispute is determined by the substantive law at the time of the hearing. *Id.*

Defendant argues that the Arbitration Clause here is distinguishable from the one in *Van Ness*. Defendant contends that the word “would” in the Non-Severability Clause means that the Clause was intended to put the parties on notice about potential

limits on arbitration. In *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co. Inc.*, 925 F.2d 1136, 1144 (9th Cir. 1991), the Ninth Circuit found that similar “would” language merely places the parties on notice that the agreement does not waive any rights they may have under the federal securities laws that cannot be waived under such laws. *Id.* at 1143–44. The *Three Valleys* court concluded that “[s]uch a provision should be read expansively and we see no reason to freeze its scope as of the date of the execution of the contract.” *Id.* at 1144. In another case cited by Defendant, *Paulson v. Dean Witter Reynolds Inc.*, 905 F.2d 1251, 1255, the Ninth Circuit rejected the argument that the parties had incorporated the law existing at the time of formation into their [arbitration] agreements, where the arbitration agreement simply called for arbitration of “any controversy”

*9 Here, the Court finds the reasoning of *Three Valleys* to be on point. The language of the Non-Severability Clause demonstrates that the parties agree simply to be bound by the applicable law whenever arbitration is sought. Unlike in *Van Ness*, the Non-Severability Clause does not exempt any particular type of claim from arbitration. In *Van Ness*, the application of the arbitration clause was not explicitly contingent on outside sources such as the Arbitration Clause here referring to the law of your state (McCarthy Decl. Ex. 3 § 9(c)(ii)). Thus, there was no reason for the clause in *Van Ness* to vary in meaning depending on changes in the law, while here the Non-Severability Clause is contingent and in fact its effect varied for different Plaintiffs depending on their home state. Plaintiffs’ related arguments likewise fall short.

Plaintiffs also argue that “[f]ederal preemption is irrelevant where the arbitration provision’s language shows that the parties privately and voluntarily agreed to be bound exclusively by state law” (Opposition at 18 3–5). But Defendant points out that the Arbitration Clause states: “Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.” (McCarthy Decl. Ex. f §

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10(b)) Plaintiffs seem to contend that the non-severability clause—which mentions state law—renders that statement about the FAA to be meaningless. But the language of the Arbitration Clause is clear that the parties intended for federal law to apply. Thus, this argument falls short.

2.4 Arbitration of Claims for Injunctive Relief

California law provides that certain types of claims for injunctive relief are not subject to arbitration. In *Broughton v. Cigna Healthplans of California*, 21 Cal 4th 1066, 1080 (1999), the California Supreme Court held that when a plaintiff bringing a Consumer Legal Remedy Act (CLRA) claim for injunctive relief is acting as a private attorney general, arbitration is not a suitable forum. In *Cruz v. PacificCare Health Systems, Inc.*, 30 Cal 4th 303, 320 (2003), the California Supreme Court extended that reasoning to claims under the California Unfair Competition Law (UCL) and other injunctive relief claims, so long as the plaintiff is acting on behalf of the general public rather than seeking to vindicate a more private right.

Defendant now argues that continued reliance on the *Broughton* and *Cruz* line of cases is misplaced in light of *Conception*. (Motion at 23-27-28.) In *Arrellano v. T-Mobile USA, Inc.*, No. C 10-05663 WHA, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011), the court held that at least in federal court, *Conception* overruled *Cruz* and *Broughton*. See also *Zarandi v. Alliance Data Sys. Corp.*, No. CV 10-8309 DSF (JCGx), 2011 WL 1827228, at *2 (C.D. Cal. May 9, 2011) (rejecting plaintiff's request to bifurcate injunctive relief claims). In *Conception*, the Supreme Court stated that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward. The conflicting rule is displaced by the FAA." 131 S.Ct. at 1747. Neither *Arrellano* nor *Zarandi* discuss whether this overrules *Cruz* and *Broughton*, before deciding that it clearly does. The Court has also reviewed subsequent authority submitted by the parties and the Court is not convinced that *Cruz* and *Broughton* are overruled by

Conception

*10 Both *Cruz* and *Broughton* are more nuanced in their holdings than an outright prohibition of certain claims. In *Cruz*, the court held that arbitration was improper for injunctive claims brought on behalf of the general public but declined to rule on all injunctive claims, such as UCL injunctive relief actions brought by injured business competitors. *Cruz*, 30 Cal 4th at 315. And in *Broughton*, the court again shied away from a broad holding about all injunctive relief claims. *Broughton*, 21 Cal 4th at 1079. (We need not decide the broad question framed by the Court of Appeal and by plaintiffs as to whether an arbitrator may ever issue a permanent injunction.) Instead, the holding in *Broughton* is that when a plaintiff is functioning as a private attorney general, the injunctive claim is not arbitrable. *Id.* at 1080. Thus, both *Cruz* and *Broughton* acknowledge that certain injunctive claims may be arbitrable and instead provide guidelines for determining when injunctive claims are not subject to arbitration. It is not clear that *Conception* intended to overrule the *Cruz* and *Broughton* line of cases.

Further, as set forth thoroughly in *Broughton*, there are compelling reasons why arbitration is not the proper forum for vindicating a broad public right. *Broughton* notes that "[o]ur path begins by recalling that the purpose of arbitration is to voluntarily resolve private disputes in an expeditious and efficient manner." *Id.* at 1080. And the court was cognizant of the evident institutional shortcomings of private arbitration in the field of such public injunctions. *Id.* at 1081. *Broughton* goes on to discuss these shortcomings. For example, a superior court retains jurisdiction over a public injunction, but arbitrators are not bound by earlier decisions of arbitrators in the same case, and this could cause inconsistency. *Id.* at 1081. And arbitration awards don't automatically have effect on non-parties, so even a public injunction could be enforceable only by the parties to the original case. *Id.* If another consumer plaintiff sought to enforce an injunction

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he or she would need to re arbitrate the same claim. Further judges are accountable to the public in ways that arbitrators are not so *Broughton* stated that judges are more suitable for overseeing injunctive remedies designed for public protection. *Id*

Here Plaintiffs bring their UCL and CLRA claims as private attorneys general seeking to vindicate a public right. These claims are not intended to remedy a primarily private right or rights merely incidental to the public benefit. See *Cruz* 30 Cal 4th at 315. The holdings of *Cruz* and *Broughton* are not inconsistent with *Concepcion* and they protect important public rights and remedies. Thus the Court DENIES the Motion to Compel regarding the UCL and CLRA injunctive relief claims.

2.5 Conclusion on Motion to Compel

*11 The Court concludes that most of Plaintiffs' arguments on the Motion to Compel are unsuccessful. However Plaintiffs have convincingly argued that the UCL and CLRA claims should be severed and not sent to arbitration. The Court DENIES the Motion to Compel as to the UCL and CLRA injunctive relief claims but otherwise GRANTS the Motion to Compel as to the California Washington Oregon and New Jersey Plaintiffs.

3 PLAINTIFFS' REQUEST FOR ADDITIONAL DISCOVERY

Plaintiffs include a last-ditch request for additional discovery to create a fully developed factual record. (Opposition at 36:17-18.) Plaintiffs renew their request for discovery as previously set forth in an ex parte application filed on June 7, 2011 (Dkt # 216). The Court denied the ex parte because among other reasons the requested documents and numerous interrogatories were not narrowly tailored (Dkt # 220). Plaintiffs have not tailored their request for more discovery here. Although the Court reserved the right to order discovery after reviewing the briefing on this Motion, the Court does not find that such discovery would be necessary for resolving the issues presented. The issues here are

largely questions of law rather than fact and more discovery is likely to add costs without providing benefits.

4 MOTION TO DISMISS OR STAY PENDING ARBITRATION

Under 9 U.S.C. § 3, if a case is referred to arbitration, the Court shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement. (Emphasis added.) Defendant argues that the Court is also empowered to dismiss a case after compelling arbitration. See *Sparling v Hoffman Construction Co.* 864 F.2d 635, 638 (9th Cir. 1988). In addition, Defendant asks the Court to stay the UCL and CLRA claims in the event the Court finds those claims to be non-arbitrable. (Motion at 24:17-21.) Plaintiffs do not address the question of a stay or a dismissal if the Court were to grant the motion to compel, nor do they discuss whether the litigation of the UCL and CLRA claims should be stayed.

The Court finds that the issue of a stay has not been adequately briefed by the parties at this time, particularly regarding the injunctive relief claims. The Court ORDERS further briefing on the Motion to Dismiss or Stay in light of this Order. Defendant may file a supplemental brief on the issue of dismissing or staying the case due by September 19, 2011. Plaintiffs may file an opposition by October 3, 2011. Defendants may file a reply by October 11, 2011. The Court sets a hearing on the Motion to Dismiss or Stay for October 24, 2011 at 10:00 a.m.

DISPOSITION

The Court ISSUES an indicative ruling under Rule 62.1 regarding the Motion to Reconsider, finding that the motion raises substantial issues. The Court will reconsider the issues raised if the Ninth Circuit elects to remand after receiving notice of this Order. The Court DENIES the Motion to Compel as to the UCL and CLRA injunctive relief claims but otherwise GRANTS the Motion to Compel as to Plaintiffs from California Washington Oregon and New Jersey. The Court DENIES

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Plaintiffs' request for more discovery The Court
ORDERS further briefing on the Motion to Dismiss
Or Stay as set forth in Section 4 The Court sets a
hearing on the Motion to Dismiss or Stay for Octo
ber 24 2011 at 10 00 a m

***12 IT IS SO ORDERED**

C D Cal 2011
In re DirecTV Early Cancellation Fee Marketing
and Sales Practices Litigation
F Supp 2d - 2011 WL 4090774 (C D Cal)

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Only the Westlaw citation is currently available

United States District Court N D California
San Jose Division

Jonathan C KALTWASSER Plaintiff

v

AT & T MOBILITY LLC a Delaware Corporation
f/k/a Cingular Wireless LLC Defendant

No C 07-00411

Sept 20 2011

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er Brown LLP Palo Alto CA Felicia Yi-Wen
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cisco CA for Defendant

ORDER GRANTING MOTION TO COMPEL AR-
BITRATION AND TERMINATING MOTION TO
STRIKE CLASS ALLEGATIONS

JEREMY FOGEL District Judge

*1 In January 2007 Plaintiff Jonathan C Kalt
wasser filed this putative class action alleging
claims under California law against AT & T Mobil
ity LLC f/k/a Cingular Wireless LLC (ATTM)
ATTM moved to compel arbitration of Kaltwasser's
claims Relying upon *Discover Bank v Superior
Court* 36 Cal 4th 148 (Cal 2005) this Court found
the contractual arbitration agreement unenforce-
able and that determination was affirmed by the
Court of Appeals See *Kaltwasser v Cingular Wire
less LLC* 350 F App'x 108 109 (9th Cir 2008)
The Court subsequently deferred a decision on

Kaltwasser's motion for class certification pending
the United States Supreme Court's ruling in *AT & T
Mobility LLC v Concepcion* 131 S Ct 1740 (2011)

In a decision issued on April 27 2011 the Su-
preme Court held that California's *Discover Bank*
rule impermissibly conflicted with the Federal Ar-
bitration Act See *Concepcion* 131 S Ct at 1748
(citing 9 U S C §§ 2-4) ATTM therefore renewed
its motion to compel arbitration and moved to strike
Kaltwasser's class allegations For the reasons dis-
cussed below the motion to compel will be gran-
ted and the motion to strike will be terminated as
moot

I BACKGROUND

In July 2006 Kaltwasser who then resided in
California renewed his wireless telephone contract
with ATTM a Delaware corporation with its prin-
cipal place of business in Atlanta Georgia Kalt-
wasser claims that he decided to renew because
ATTM advertised that it was the cellular service
provider with the fewest dropped calls Kalt-
wasser's complaint in the present action alleges that
ATTM's advertising was false giving rise to claims
for (1) unfair competition under Cal Bus &
Prof Code §§ 17200 *et seq* (2) false advertising
under Cal Bus & Prof Code §§ 17500 *et seq* (3) a
violation of the Consumer Legal Remedies Act
Cal Civ Code §§ 1750 *et seq* and (4) breach of
contract or alternatively unjust enrichment He as-
serts his claims on behalf of all customers who con-
tracted for cell phone service with ATTM in Cali-
fornia on or after March 1 2006

ATTM moved to compel Kaltwasser to arbit-
rate his claims on an individual basis citing the
terms of an arbitration agreement that it began in-
cluding in its Terms of Service in December 2006
(the 2006 agreement) Kaltwasser argued that he
never accepted the 2006 agreement and that
ATTM's previous arbitration agreement which
ATTM used from 2003 to December 2006 (the
2003 agreement) applied to him However al-
though the 2003 agreement and 2006 agreement

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differ in some respects both are take-it or leave it form contracts that preclude ATTM's customers from bringing any purported class or representative proceeding FNI

FNI The 2003 agreement states YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY and not as a plaintiff or class member in any purported class or representative proceeding Dkt 62 at 2

The 2006 agreement states YOU AND CINGULAR AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING Dkt 28-1 at 31

On April 11 2008 this Court denied ATTM's motion to compel It observed that under California law as articulated by the California Supreme Court in *Discover Bank* consumer contracts binding parties to bilateral arbitration are generally unconscionable In particular *Discover Bank* held that a class action waiver is unconscionable when it appears 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 36 Cal 4th at 162-63 The Court reasoned that because damages in consumer cases are often small the class action is often the only effective way to halt and redress [consumer] exploitation *Id* at 161 (internal quotation marks and citation omitted) Conversely bilateral arbitration agreements in consumer contracts typically become[] in practice the exemption of the party from responsibility for [its] own fraud or willful injury to the person or prop

erty of another making them unconscionable under California law *Id* at 163 (quoting Cal Civ Code § 1668) In its order affirming this Court's decision the Ninth Circuit explained that it makes no difference whether the 2003 agreement or the 2006 agreement applies to Kaltwasser because both include a waiver of the right to bring a class action that is unconscionable as a matter of California law See *Kaltwasser* 350 F App'x at 109 (citing *Shroyer v New Cingular Wireless Services Inc* 498 F 3d 976 981 (9th Cir 2007) *Discover Bank* 36 Cal 4th at 161)

*2 The parties proceeded with discovery and Kaltwasser retained an expert to analyze the data that ATTM produced as support for its fewest dropped calls advertisements On February 26 2010 Kaltwasser filed a motion to certify the proposed plaintiff class

II LEGAL STANDARD

Section 4 of the FAA permits a party aggrieved by the alleged failure neglect or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court for an order directing that arbitration proceed in the manner provided for in [the arbitration] agreement 9 U S C § 4 Upon a showing that a party has failed to comply with a valid arbitration agreement the district court must issue an order compelling arbitration *Id*

The FAA espouses a general policy favoring arbitration agreements *Moses H Cone Mem'l Hosp v Mercury Constn Corp* 460 U S 1, 24-25 (1983) see also *Hall Street Assoc L L C v Mat tel Inc* 552 U S 576 581 (2008) Federal courts are required to rigorously enforce an agreement to arbitrate See *Hall Street Assoc* 552 U S at 582 In determining whether to issue an order compelling arbitration the court may not review the merits of the dispute but must limit its inquiry to (1) whether the contract containing the arbitration agreement evidences a transaction involving interstate commerce (2) whether there exists a valid agreement to arbitrate and (3) whether the dispute(s) fall within

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the scope of the agreement to arbitrate. See *Republic of Nicaragua v. Standard Fruit Co.* 937 F.2d 469, 477–78 (9th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992). If the answer to each of these queries is affirmative, then the court must order the parties to arbitration in accordance with the terms of their agreement. 9 U.S.C. § 4.

The FAA provides that arbitration agreements generally 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. Thus, generally applicable contract defenses such as fraud, duress, or unconscionability may be applied to invalidate arbitration agreements without contravening federal law. *Doctor's Assoc. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). In interpreting the validity and scope of an arbitration agreement, the courts apply state law principles of contract formation and interpretation. See *id.* at 686–87; see also *Wolsey Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1210 (9th Cir. 1998). Accordingly, a court reviews a plaintiff's arbitration agreement in light of the liberal federal policy favoring arbitration agreements. *Moses H. Cone*, 460 U.S. at 24, and considers the enforceability according to the laws of the state of contract formation. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Ingle v. Cui City Stores*, 328 F.3d 1165, 1170 (9th Cir. 2003).

III DISCUSSION

*3 In *Concepcion*, the Supreme Court considered whether the *Discover Bank* rule came within the savings clause of Section 2 of the FAA, which provides that a court may find an arbitration agreement unenforceable upon such grounds as exist at law or in equity for the revocation of any contract. See *Concepcion*, 131 S.Ct. at 1745–48 (citing 9 U.S.C. § 2). The Court held that it did not. It concluded that although the *Discover Bank* rule was characterized as arising from the generally applicable contract law doctrine of unconscionability, it was applied in a fashion that disfavors arbitration, as California's courts have been more

likely to hold contracts to arbitrate unconscionable than other contracts. *Id.* at 1747. The FAA was designed to promote arbitration, which typically has the objective of achieving streamlined proceedings and expeditious results. *Id.* at 1749 (quoting *Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008)). The *Discover Bank* rule interferes with arbitration by enabling a consumer who has agreed to bilateral arbitration to demand [classwide arbitration] *ex post*; it subjects the parties to fundamental changes in the arbitration process. *Id.* at 1750 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1776 (2010)). The switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. *Id.* at 1751. Class arbitration, unlike bilateral arbitration, requires procedural formality and due process safeguards that might entail increased judicial intervention. See *id.* at 1751–52 (emphasis in the original). Class arbitration also greatly increases risks to defendants because it can impose devastating loss[es] with very limited judicial review. *Id.* at 1752. Concluding that class arbitration is not arbitration as envisioned by the FAA, the Court held that California's *Discover Bank* rule is preempted by the FAA. *Id.* at 1753.

Kaltwasser nonetheless argues that *Concepcion* does not require him to arbitrate his action against ATTM. First, he contends that *Concepcion* left intact a vindication of rights doctrine under federal common law, which allows him to avoid bilateral arbitration if he can show that the costs involved in proving his claims exceed the damages he can potentially recover. Second, he asserts that *Concepcion* did not affect public policy principles of contract law expressed in *Broughton v. Cigna Health Plans of Cal.*, 21 Cal.4th 1066 (Cal. 1999); *Cruz v. PacificCare Health Sys., Inc.*, 30 Cal.4th 303 (Cal. 2003); and Cal. Civ. Code § 3513 (2011), which provides that a law established for a public reason cannot be contravened by a private agree-

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ment FN2 Third, he argues that ATTM has waived its right to bilateral arbitration. Each of these arguments is unavailing.

FN2 Kaltwasser erroneously cites Cal Civ Code § 3515 for this proposition, but it is in fact stated at Cal Civ Code § 3513.

A Vindication-of-Rights Doctrine

*4 As Kaltwasser reads it, *Concepcion* invalidated the *Discover Bank* rule because the rule operated too broadly, invalidating most consumer arbitration agreements and having no real limiting principles. See 131 S Ct at 1750 (The rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long past. The rule also requires that damages be predictably small, and that the consumer allege a scheme to cheat customers. The former requirement, however, is toothless and malleable, and the latter has no limiting effect, as all that is required is an allegation.) (internal citations omitted). He suggests that *Concepcion* leaves room for a court to perform an individualized case-by-case analysis of whether binding a particular plaintiff to bilateral arbitration would preclude that plaintiff from vindicating his rights, and that in such a case the plaintiff should not be bound by the arbitration agreement. Kaltwasser's Response Br. at 9. Kaltwasser asserts that the costs of proving his claims in this case make it impossible for him to vindicate his claims through individual arbitration. He represents that he has spent \$65,000 on expert fees and that his expert estimates that a full statistical analysis will cost at least \$165,000. In contrast, Kaltwasser's actual damages will not exceed \$2,000, which represents the total of his contract payments to ATTM.

Kaltwasser bases his vindication-of-rights argument on *Green Tree Financial Corporation—Alabama v. Randolph*, 531 U.S. 79 (2000). In that case, the plaintiff brought federal statutory claims against a financing company and its subsidiary (collectively, *Green Tree*). *Id.* at 82–83. *Green Tree* moved to compel arbitration pursuant to

a contract between the parties, but the plaintiff sought to invalidate the arbitration provision on the ground that the arbitration agreement's silence with respect to costs and fees creates a risk that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have against *Green Tree*. *Id.* at 90. The Supreme Court held that when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. *Id.* at 92. It concluded that the plaintiff in *Green Tree* fell far short of meeting that burden. She made conclusory statements about filing and arbitrator's fees, but she offered nothing to show that she herself would bear such costs if she [went] to arbitration. See *id.* at 90–91 & n. 6. Without more, the plaintiff's concern about the expense of arbitrating was too speculative to justify the invalidation of an arbitration agreement. *Id.* at 91.

Kaltwasser seizes on the Court's statement in *Green Tree* that "[i]t may well be that the existence of large arbitration costs could preclude a litigant from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90. He asserts that if a litigant *can* prove that the cost of arbitrating would prevent him from vindicating his rights, the arbitration agreement may be held invalid. He points out that in *In re American Express Merchants' Litigation*, 634 F.3d 187, 197–99 (2d Cir. 2011), the Second Circuit recently applied *Green Tree* to invalidate a class-action waiver in an arbitration agreement on these very grounds. The plaintiffs in *American Express* submitted an affidavit from an economist who estimated that the cost of analyzing their Sherman Act claims would cost, in the middle of the typical range for an antitrust case, \$300,000 to \$2 million. *Id.* at 198. The largest amount that any of the named plaintiffs could expect to win was approximately \$39,000. *Id.* Based upon this showing, the Second Circuit concluded that the cost of plaintiffs' individually ar

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bitrating their dispute with Amex would be prohibitive effectively depriving plaintiffs of the statutory protections of the antitrust laws *Id* at 197–98 Finding that the plaintiffs' only economically feasible means for enforcing their statutory rights is via a class action the Second Circuit refused to enforce the class-action waiver *Id* at 198

*5 There are several problems with Kaltwasser's reliance on *Green Tree* First it is not clear that *Green Tree*'s solicitude for the vindication of rights applies to rights arising under state law which are the only rights that Kaltwasser seeks to vindicate here *Green Tree* refers expressly to the possibility that arbitration costs could preclude a litigant from effectively vindicating her federal statutory rights 531 U.S. at 90 (emphasis added) and it states that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue *id* at 92 (emphasis added) But compare *Stutler v TK Constructors Inc* 448 F.3d 343–346 (6th Cir 2006) (stating that vindication of rights principle based on *Green Tree* applies only where federal statutorily provided rights are affected) with *Kristian v Comcast Corp* 446 F.3d 25–29 (1st Cir 2006) (finding provisions of arbitration agreements invalid because they prevent the vindication of statutory rights under state and federal law) Because *American Express* involved only federal claims it does not help Kaltwasser in this regard

Second even assuming that *Green Tree* applies to state law claims the notion that arbitration must never prevent a plaintiff from vindicating a claim is inconsistent with *Concepcion* In striking down the *Discover Bank* rule the Supreme Court recognized the possibility that small-dollar claims might slip through the system because of the cost of proving a claim 131 S.Ct. at 1753 The *Concepcion* dissent found this consequence greatly troubling See *id* at 1760 ([A]greements that forbid the consolidation of claims can lead small dollar claimants to abandon their claims rather than to litigate) *id*

at 1761 (The realistic alternative to a class action is not 17 million individual suits but zero individual suits as only a lunatic or fanatic sues for \$30 (quoting *Carnegie v Household Int'l Inc* 376 F.3d 656–661 (7th Cir 2004)) (emphasis in the original)) If the *Concepcion* majority had intended to allow for the plaintiffs to avoid class-action waivers by offering evidence about particular costs of proof they would face—essentially applying the underlying rationale of *Discover Bank* without relying on *Discover Bank* as a rule—one would expect it to have drawn attention to such a significant point in response to the dissent *American Express* was decided prior to *Concepcion* and in fact the Second Circuit has stayed proceedings in that case while it sua sponte consider[s] rehearing in light of *Concepcion* See Order *In re American Express Merchants' Litigation* No. 06–1871–cv (2d Cir Aug. 1, 2011) see also *D'Antuono v Service Road Corp* No. 3:11cv33 (MRK) — F Supp 2d — 2011 WL 2175932 at *29 (D Conn May 25, 2011) (expressing some doubt about *American Express* in light of *AT & T Mobility v Concepcion*) although concluding that district courts in the Second Circuit remain[] obligated to apply *American Express*)

*6 Third Kaltwasser's position is unworkable as a practical matter of judicial administration Under his approach every court evaluating a motion to compel arbitration would have to make a fact specific comparison of the potential value of a plaintiff's award with the potential cost of proving the plaintiff's case Defendants predictably will challenge the qualifications and methodology of experts who are called upon to estimate a plaintiff's costs of proof It is highly doubtful that in striking down the *Discover Bank* rule the Supreme Court intended to open the door to such proceedings as a means for plaintiffs to avoid arbitration agreements

For these reasons, it is incorrect to read *Concepcion* as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs

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and benefits at stake *Concepcion* not only rejected the *Discover Bank* rule but also upheld the 2006 agreement at issue in that case. Cf. *Cruz v Cingular Wireless LLC* No 08-16080 — F 3d — 2011 WL 3505016 at *8 (11th Cir Aug 11 2011) (interpreting *Concepcion* to validate the 2006 agreement although without reach[ing] the question of whether *Concepcion* leaves open the possibility that in [other] cases an arbitration agreement may be invalidated where it effectively prevents the claimant from vindicating her statutory cause of action.) And if the 2006 agreement is valid then so is the 2003 agreement, which does not differ materially from the former.^{FN3}

FN3 Admittedly the 2003 agreement is less favorable to the consumer. It provides that if the arbitrator grants relief to [the consumer] that is equal to or greater than the value of [his] Demand—the specific amount of relief he must request when initiating a claim against ATTM—ATTM will reimburse him for reasonable attorneys' fees and expenses incurred for the arbitration. Dkt 41-1 at 17. The 2006 agreement replaces this provision with one that obliges ATTM to pay at least the greater of \$5000 or the maximum available in the local small claims court along with twice the amount of attorney's fees and expenses whenever a consumer obtains an arbitration award greater than ATTM's last settlement offer before selection of an arbitrator. See Dkt 41-2 at 4-5. *Concepcion* 131 S Ct at 1753.

However Kaltwasser's objections to the 2003 agreement apply equally to the 2006 agreement. Kaltwasser argues that the expenses and fees guarantee in the 2003 agreement is illusory because there is information asymmetry between the consumer and ATTM. Kaltwasser Response Br at 21. He claims that the consumer without any discovery has

little means of identifying the appropriate amount for his demand. If he guesses too low ATTM can simply pay the demand undervaluing the claim. If he guesses too high ATTM can refuse to pay the demand wait for the arbitrator to award a lower amount and avoid paying fees and expenses. To the extent that this situation poses a real difficulty for plaintiffs it does not get any better with the 2006 agreement under which the recovery of expenses and fees also depends on the parties' pre-arbitration estimates of the value of the claim. Kaltwasser agrees. See *id* at 23-24 (arguing that recovery of expenses and fees under the 2006 agreement remains dependent upon a consumer's ability to determine prior to discovery what is the actual value of his or her claim. While more artfully crafted this provision is still substantively illusory (emphasis in original)). *Concepcion* did not find the conditions for obtaining expenses and fees in the 2006 agreement problematic see 131 S Ct at 1753 so they also fail to provide a basis for avoiding the 2003 agreement.

To be sure *Concepcion* does not explicitly overrule *Green Tree* but it does make it untenable to read *Green Tree* for a vindication of rights principle as robust as Kaltwasser asserts here. If *Green Tree* has any continuing applicability it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process such as filing fees and arbitrator's fees prevent her from vindicating her claims. See *Green Tree* 531 U S at 90-91 & n 6. *Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages.

B Broughton, Cruz, and California Civil Code §

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3513

Kaltwasser's next objection to the arbitration agreement is based upon the fact that he seeks injunctive relief for his claims under California's Unfair Competition Law (UCL) Cal Bus & Prof Code § 17200 *et seq* False Advertising Law (FAL) Cal Bus & Prof Code § 17500 *et seq* and Consumer Legal Remedies Act (CLRA) Cal Civ Code § 1750 *et seq* The California Supreme Court has held that claims for injunctive relief under these laws are not arbitrable In *Broughton v Cigna Healthplans* 21 Cal 4th 1066 (Cal 1999) it held that claims for injunctive relief under the CLRA may not be arbitrated because the purpose of such relief is to remedy a public wrong *id* at 1080 and the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators *id* at 1082 In *Cruz v PacificCare Health Svcs Inc* 30 Cal 4th 303 307 (Cal 2003) the California Supreme Court reaffirmed *Broughton* and extended its holding to encompass claims for injunctive relief under the UCL and FAL

*7 Since *Concepcion* numerous courts have concluded that the FAA preempts the holdings of *Cruz* and *Broughton* because they amount to state law[s] prohibit[ing] outright the arbitration of a particular type of claim See *e.g. Nelson v AT & T Mobility LLC* No C10-4802 TEH 2011 WL 3651153 at *2 (N D Cal Aug 18 2011) *In re Apple and AT & T iPad Unlimited Data Plan Litigation* No C-10-02553 RMW 2011 WL 2886407 at *4 (N D Cal July 19 2011) *Arellano v T-Mobile USA Inc* No C 10-05663 WHA 2011 WL 1842712 at *2 (N D Cal May 16 2011) (all quoting *Concepcion* 131 S Ct at 1747) Kaltwasser nonetheless contends that *Cruz* and *Broughton* are not preempted because the statutes that they examine the UCL FAL and CLRA do not prohibit arbitration on their face He asserts that *Cruz* and *Broughton* both rest upon a public interest analysis

akin to that expressed in Cal Civ Code § 3513 which states that a law established for a public reason cannot be contravened by a private agreement According to Kaltwasser Cal Civ Code § 3513 and the similar public interest rationales expressed in *Cruz* and *Broughton* are generally applicable contract law principles that come within the savings clause of Section 2 of the FAA and remain valid after *Concepcion*

This argument is unpersuasive *Discover Bank* itself was based upon public policy rationales intertwined with the generally applicable doctrine of unconscionability It invoked Cal Civ Code § 1668 which provides that All contracts which have for their object to exempt anyone from responsibility for his own violation of law whether willful or negligent are against the policy of the law See *Discover Bank* 36 Cal 4th at 161 163 The Supreme Court however found that *Discover Bank* applied the unconscionability doctrine in a fashion that disfavors arbitration *Concepcion* 131 S Ct at 1747 *Cruz* and *Broughton* even more patently than *Discover Bank* apply public policy contract principles to disfavor and indeed prohibit arbitration of entire categories of claims

C Waiver of Rights

The right to arbitration like any other contract right can be waived *United States v Park Place Assocs* 563 F 3d 907 921 (9th Cir 2009) The Ninth Circuit has emphasized however that waiver of the right to arbitration is disfavored because it is a contractual right and thus any party arguing waiver of arbitration bears a heavy burden of proof *Id* (internal quotation marks and citations omitted) To demonstrate that ATTM has waived its right to arbitrate Kaltwasser must show (1) knowledge of an existing right to compel arbitration (2) acts inconsistent with that existing right and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts *Id* (internal quotation marks and citation omitted)

Kaltwasser fails to meet the first requirement The Ninth Circuit has held that there was no exist

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ing right to arbitrate if it would have been futile to pursue arbitration under the then prevailing law in this circuit *Letizia v Prudential Bache Secs Inc* 802 F 2d 1185 1187 (9th Cir 1986) Before *Concepcion* adhesive consumer contracts requiring bilateral agreement were generally invalid under *Discover Bank* so it was futile for ATTM to pursue arbitration against Kaltwasser See *Fisher v A G Becker Paribas Inc* 791 F 2d 691, 695 (9th Cir 1986) (finding that it was futile [for defendant] to file a motion to compel arbitration until the Supreme Court rejected a Ninth Circuit ruling that had been applicable to the defendant's case) see also e.g. *Morse v ServiceMaster Global Holdings Inc* No C 10-00628 SI 2011 WL 3203919 at *3 (N D Cal July 27 2011) (finding that defendants who did not move to compel arbitration prior to *Concepcion* did not act inconsistently with a known existing right to compel arbitration) *Bryant v Service Corp Intl* No C 08-1190 SI 2011 WL 2709643 at *5 (N D Cal July 12 2011) (The arbitration agreement that plaintiffs are seeking to enforce in this case appears not to permit class action arbitration and therefore until [*Concepcion*] would not have been enforceable according to its terms) *In re Cal Title Ins Antitrust Litigation* No 08-01341 JSW 2011 WL 2566449 at *3 (N D Cal June 27 2011) (finding that it would have been futile for Defendants to compel arbitration prior to the decision in *Concepcion*)

*8 Because ATTM did not have a right to compel arbitration before *Concepcion* and it promptly moved to compel arbitration after the Supreme Court decided *Concepcion* it did not waive or abandon its right to arbitration

IV ORDER

Good cause therefor appearing IT IS HEREBY ORDERED that ATTM's motion to compel arbitration is GRANTED ATTM's motion to strike Kaltwasser's class allegations is terminated without prejudice as moot

IT IS SO ORDERED

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United States District Court N D California
Oakland Division
Amir KHAN on behalf of himself and all similarly
situated Plaintiff

v

ORKIN EXTERMINATING COMPANY INC , a
Delaware corporation Rollins Inc a Delaware
corporation Orkin Inc a Delaware corporation
Orkin LLC a Delaware Limited Liability Corpora
tion Defendants

No C 10-02156 SBA
Dkt No 40
Oct 13 2011

Arthur William Lazear H Tim Hoffman Morgan
Matthew Mack Thomas Franklin Campbell Hoff
man & Lazear Oakland CA Donald Keiron
McGowin Campbell Law PC Birmingham AL
for Plaintiff

Mark Lemar Eisenhut Call Jensen & Ferrell New
port Beach, CA for Defendants

ORDER GRANTING DEFENDANTS' MO- TION TO COMPEL ARBITRATION

SAUNDRA BROWN ARMSTRONG District
Judge

*1 Plaintiff Amir Khan brings the instant con
sumer class action on behalf of himself and all oth
ers similarly situated against Orkin LLC (formerly
known as Orkin Inc and Orkin Exterminating Co
Inc) and Rollins Inc claiming that their Direct L
iquid Plus Bait system is ineffective The parties are
presently before the Court on Defendants Orkin
LLC and Rollins Inc s (collectively Defendants)
motion to compel arbitration Having read and con
sidered the papers submitted and being fully in
formed the Court GRANTS Defendants' motion
The Court in its discretion finds this matter suit
able for resolution without oral argument See

Fed R Civ P 78(b) N D Cal L R 7-1(b)

I BACKGROUND

In November 2006 plaintiff entered into a Res
idential Single Family Dwelling California 10-Year
Drywood Termite or Subterranean Termite Program
Directed Liquid Bait Control Service Agreement
(Service Agreement) Compl ¶ 35 The Service
Agreement provided for initial treatment of
Plaintiff's property for drywood or subterranean ter
mites and retreatment at no cost if termites re
turned to the treated structure Defs' Ex 1 ¶ 1
Plaintiff paid \$2 108 as the initial fee for the ser
vice which was renewable for ten years annually
upon payment of a \$496 renewal fee *Id* Plaintiff
alleges that he has renewed the service annually
Compl ¶ 35

Paragraph 4 of the Service Agreement sets
forth an arbitration clause which includes a class
action waiver which states as follows

4 MEDIATION/ARBITRATION ANY CON
TROVERSY OR CLAIM ARISING OUT OF OR
RELATING TO THIS AGREEMENT OR THE
SERVICES PERFORMED BY ORKIN UNDER
THIS AGREEMENT OR ANY OTHER AGREE
MENT REGARDLESS OF WHETHER THE
CONTROVERSY OR CLAIM AROSE BEFORE
OR AFTER THE EXECUTION TRANSFER
OR ACCEPTANCE OF THIS AGREEMENT
INCLUDING BUT NOT LIMITED TO ANY
TORT AND STATUTORY CLAIMS AND
ANY CLAIMS FOR PERSONAL OR BODILY
INJURY OR DAMAGE TO REAL OR PER
SONAL PROPERTY SHALL BE SETTLED BY
BINDING ARBITRATION UNLESS THE
PARTIES AGREE OTHERWISE THE ARBIT-
RATION SHALL BE ADMINISTERED UNDER
THE RULES OF THE AMERICAN ARBITRA
TION ASSOCIATION (AAA) AND SHALL
BE CONDUCTED BY AAA IF ADMIN-
ISTERED UNDER THE AAA RULES A
CLAIM SHALL BE DETERMINED UNDER

THE AAA SUPPLEMENTARY PROCEDURES FOR CONSUMER-RELATED DISPUTES IN CASES WHERE SUCH PROCEDURES ARE APPLICABLE ANY OTHER CONTROVERSY OR CLAIM SHALL BE DETERMINED UNDER THE AAA COMMERCIAL ARBITRATION RULES THE CUSTOMER AND ORKIN AGREE THAT THE ARBITRATOR SHALL FOLLOW THE LAW INCLUDING THE TERMS AND CONDITIONS OF THIS AGREEMENT THE ARBITRATOR'S POWERS TO CONDUCT ANY ARBITRATION PROCEEDING UNDER THIS AGREEMENT SHALL BE LIMITED AS FOLLOWS *ANY ARBITRATION PROCEEDING UNDER THIS AGREEMENT WILL NOT BE CONSOLIDATED OR JOINED WITH ANY ACTION OR LEGAL PROCEEDING UNDER ANY OTHER AGREEMENT OR INVOLVING ANY OTHER PREMISES AND WILL NOT PROCEED AS A CLASS ACTION PRIVATE ATTORNEY GENERAL ACTION OR SIMILAR REPRESENTATIVE ACTION THE AWARD RENDERED BY THE ARBITRATOR(S) SHALL BE FINAL AND BINDING JUDGMENT MAY BE ENTERED ON THE AWARD IN ANY COURT HAVING JURISDICTION THEREOF* CUSTOMER AND ORKIN ACKNOWLEDGE AND AGREE THAT *THIS ARBITRATION PROVISION IS MADE PURSUANT TO A TRANSACTION INVOLVING INTERSTATE COMMERCE AND SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT* BEFORE HAVING RECOURSE TO ARBITRATION, CUSTOMER AND ORKIN EACH AGREES TO TRY IN GOOD FAITH TO SETTLE ANY CONTROVERSY OR CLAIM BY AT LEAST FOUR (4) HOURS OF MEDIATION ADMINISTERED UNDER THE AAA COMMERCIAL MEDIATION RULES WITH ORKIN AGREEING TO PAY THE COSTS OF THE MEDIATION THE AAA MAY BE CONTACTED AT THE TOLL-FREE NUMBER 800-778-7879, OR THROUGH THE FOLLOWING WEBSITE <http://www.adr.org>

*2 Compl Ex A ¶ 4 (emphasis added)

On May 19 2010 Plaintiff filed the instant action in this Court alleging seven causes of action for (1) breach of contract and warranty and breach of the duty of good faith and fair dealing (2) breach of duty to warn (3) negligent training supervision and retention (4) assumpsit/money had and received (5) violation of the California Consumer Legal Remedies Act (CLRA) Cal Civ Code § 1750 et seq (6) violation of California Business and Professions Code § 17200 et seq and (7) violation of California Business and Professions Code § 17500 et seq These claims are predicated on allegations that the Direct Liquid Plus Bait is misleadingly presented as an effective solution for preventing termite infestation The action originally was assigned to the Honorable Vaughn R Walker (ret)

Shortly after the Complaint was filed Defendants filed a motion to compel arbitration based on the arbitration clause contained in Plaintiff's Service Agreement Plaintiff opposed the motion arguing that Orkin's arbitration clause is unconscionable under California law and *Discover Bank v Superior Court* 36 Cal 4th 148 30 Cal Rptr 3d 76 113 P 3d 1100 (2005) The parties completed briefing on the motion and Judge Walker heard oral argument At Defendants request Judge Walker stayed further proceedings in light of *AT & T Mobility LLC v Concepcion* No 09-893 which was pending before the Supreme Court On April 27 2011 the Supreme Court decided *Concepcion* holding that the test of unconscionability in *Discover Bank* is pre-empted by the FAA *AT & T Mobility v Concepcion* — U S ——— 131 S Ct 1740 753 179 L Ed 2d 742 ——— (2011) (internal citation omitted) In light of *Concepcion* Defendants again move to compel arbitration

II LEGAL STANDARD

Under the Federal Arbitration Act (FAA) any party bound by an arbitration agreement that falls within the scope of the FAA may bring a petition in federal district court to compel arbitration 9

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U S C § 4 When faced with a petition to compel arbitration the district court's role is a discrete and narrow one By its terms the [FAA] leaves no place for the exercise of discretion by a district court but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed *Chiron Corp v Ortho Diagnostic Sys Inc* 207 F 3d 1126 1130 (9th Cir 2000) (quoting *Dean Witter Reynolds Inc v Byrd* 470 U S 213 218 105 S Ct 1238 84 L Ed 2d 158 (1985))

The court's role under the Act is therefore limited to determining (1) whether a valid agreement to arbitrate exists and if it does (2) whether the agreement encompasses the dispute at issue If the response is affirmative on both counts then the Act requires the court to enforce the arbitration agreement in accordance with its terms *Id* To require arbitration [plaintiff]'s factual allegations need only touch matters' covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability *Simula Inc v Autoliv Inc* 175 F 3d 716 721 (9th Cir 1999) Where the claims alleged in a pleading are subject to arbitration the Court may stay the action pending arbitration or dismiss the action *See* 9 U S C § 3 *Sparling v Hoffman Const Co* 864 F 2d 635 638 (9th Cir 1988)

III DISCUSSION

A ENFORCEMENT OF THE ARBITRATION CLAUSE

*3 In *Concepcion* the Supreme Court reviewed the Ninth Circuit's decision in *Laster v AT & T Mobility LLC* 584 F 3d 849 (9th Cir 2009) *rev'd sub nom Concepcion* — U S — 131 S Ct 1740 179 L Ed 2d 742 which had held that a class action waiver provision in an arbitration agreement was unenforceable under the test for unconscionability set forth in *Discover Bank* The Supreme Court reversed *Laster* and held that the *Discover Bank* rule was preempted because [r]equiring the availability of classwide arbitration interferes with fun

damental attributes of arbitration and thus creates a scheme inconsistent with the FAA *Concepcion* 131 S Ct at 1748 As such [w]hen state law prohibits outright the arbitration of a particular type of claim the analysis is straightforward The conflicting rule is displaced by the FAA *Id* at 1747 After *Concepcion* a challenge to an arbitration clause is limited to generally applicable contract defenses such as fraud duress or unconscionability *Id* at 1746 Defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue are preempted by the FAA *Id*

Plaintiff contends that *Concepcion* is inapt because Defendants' arbitration clause expressly provides that arbitration is permitted only to the extent that it does not conflict with state law In support of his contention Plaintiff cites the final sentence of the Paragraph 5 of the Service Agreement entitled Limitation of Liability which states Nothing in this Agreement shall be construed as depriving the Customer of remedies available under applicable state consumer protection laws Defs' Ex A ¶ 5 According to Plaintiff California's CLRA authorizes class actions *see* Cal Civ Code § 1781(a) and expressly renders as unenforceable and void any waiver of statutory rights including the right to bring class actions provided for under the CLRA *id* § 1751 In view of these CLRA provisions Plaintiff contends that enforcement of the class action waiver contained in the arbitration clause would deprive him of rights codified under state law thereby rendering the arbitration clause unenforceable The Court disagrees

As a threshold matter [t]he class action device is a *procedural mechanism* to aggregate individual claims for purposes of judicial efficiency *Dukes v Wal-Mart Stores Inc* 603 F 3d 571 651 (9th Cir 2010)) *rev'd on other grounds* — U S — 131 S Ct 2541 180 L Ed 2d 374 (2011) (emphasis added) As such it is unclear whether Defendants' class action waiver actually deprives Plaintiff of any *substantive remedies* under the

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CLRA But even if it did Plaintiff's contention that the purported carve-out in Paragraph 5 of the Service Agreement allows the consumer laws of the state take precedence over the class action waiver is misplaced See Pl 's Opp'n at 4 It is a well settled canon of contract interpretation that specific terms of an agreement control its general terms See e.g. *Cent Ga Elec Membership Corp v Ga Power Co* 217 Ga 171 121 S E 2d 644 646 (1961) (citing *Restatement (First) of Contracts* § 236(c) (1932))^{FN1} Here the arbitration clause expressly provides that the parties agree that *this arbitration provision shall be governed by the Federal Arbitration Act* Compl Ex A ¶ 4 (emphasis added) The Ninth Circuit has held that the FAA preempts the CLRA's prohibition against class action waivers *Ting v AT & T* 319 F 3d 1126 1148 (9th Cir 2003) Because the arbitration clause expressly relies upon the FAA and because the FAA preempts the CLRA's class action waiver the carve out contained in the separate Limitation of Liability section of the Service Agreement cannot be interpreted as a bar to the enforcement of its arbitration clause

FN1 Although Defendants cite California law for this proposition the Court notes that the Service Agreement provides that [t]his agreement shall be governed by and construed under the laws of the State of Georgia Compl Ex A ¶ 11

B PLAINTIFF'S REQUEST FOR DISCOVERY

*4 As an alternative matter Plaintiff requests that the Court defer resolution of Defendants motion to allow him the opportunity to gather evidence to demonstrate that the practical effect of the class ban is that of an unconscionable exculpatory provision Pl's Opp'n at 6 Aside from vague assertions regarding the need to conduct discovery see *id* at 6–12 Plaintiff fails to articulate with any specificity what discovery he seeks to obtain To the extent that Plaintiff is seeking to establish that it is too costly for him to pursue consumer protection claims on an individual as opposed to a class basis

the Court notes that post-*Concepcion* decisions have rejected the cost of litigation as a basis for invalidating a class action waiver See e.g. *In re Apple and AT & T iPad Unlimited Data Plan Litig* No C 10–2553 RMW 2011 WL 2886407 at *3 (N D Cal July 19, 2011) (Plaintiffs contention that their modest claims simply do not provide sufficient motivation for an aggrieved customer to seek redress on an individual basis (Opp at 10) is the very argument that was struck down in *Concepcion*) (Whyte J) *Arellano v T-Mobile USA Inc* No C 10–5663 WHA 2011 WL 1842712 at *2 (N D Cal May 16 2011) (finding that *Concepcion* forecloses argument that an arbitration agreement is void because small claims might be prohibitively expensive to pursue on an individual basis) (Alsup J)

Plaintiff also posits that the evidence necessary to establish that Defendants' arbitration clause is unconscionable is exclusively within the possession of the Defendant[s] as ostensibly shown by the fact that Defendants supported their motion with declarations of their employees Pl's Opp'n at 9–10 The only supporting employee declaration proffered by Defendants however is from Sonja Rice a litigation specialist with Defendant Rollins Rice Decl Dkt 40–1^{FN2} In her declaration Ms Rice simply confirmed that Plaintiff entered into a Service Agreement on November 3 2006 that he made an initial payment of \$3 100 and that he renewed his service twice at a cost of \$496 per year *Id* ¶¶ 2–5 These facts obviously are within Plaintiff's possession There simply is nothing in Ms Rice's declaration or anything else in the record to support the conclusion that Defendants possess facts unavailable to him that bear upon the enforceability of the Service Agreement^{FN3}

FN2 This is the same declaration filed on September 23, 2010 by Defendants with their reply in support of their earlier motion to compel arbitration Dkt 27

FN3 The Court also notes that Plaintiff's request to conduct discovery is untimely

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The Supreme Court issued its opinion in Concepcion on April 27, 2011 and on the same date requested that the Court reopen the action. In the parties' case management statement filed on June 29, 2011 Plaintiff stated that he continued to oppose Defendants' efforts to compel arbitration but made no mention of needing to conduct any discovery. Dkt 36. Nor is there any indication in the record that Plaintiff has made any attempt to conduct any discovery since the issuance of Concepcion. To the extent that Plaintiff legitimately believed that discovery was necessary to oppose Defendants' motion, he should have made endeavors to commence discovery sooner as opposed to embedding such a request in his opposition.

END OF DOCUMENT

In sum, the Court finds that Plaintiff has failed to present any compelling grounds to grant Plaintiff's belated request to conduct discovery and to hold the instant motion in abeyance and therefore, denies said requests.

IV CONCLUSION

For the reasons stated above

IT IS HEREBY ORDERED THAT

1 Defendants' motion to compel arbitration is GRANTED. Plaintiff's request to conduct discovery and to hold Defendants' motion in abeyance is DENIED.

2 The instant action is STAYED and administratively closed pending the arbitration of Plaintiff's claims.

*5 3 This Order terminates Docket 40

IT IS SO ORDERED

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(Cite as 2011 WL 3861898 (E D Pa))

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Only the Westlaw citation is currently available

United States District Court
E D Pennsylvania
Raymond KING et al Plaintiffs
v
ADVANCE AMERICA Cash Advance Centers
Inc et al Defendants
Sharlene Johnson et al Plaintiffs
v
Advance America Cash Advance Centers Inc et
al Defendants

Civil Action Nos 07-237 07-3142
Aug 31 2011

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Sutherland Asbill & Brennan LLP Washington
DC for Defendants

**MEMORANDUM REGARDING ENFORCEAB-
ILITY OF CLASS-ACTION WAIVERS**

BAYLSON District Judge

I Introduction

*1 In these related matters Plaintiffs entered
into various payday loan agreements with De-
fendants The two separate actions correspond to
two separate programs Defendants offered at differ-

ent times Plaintiffs filed suit to recover *inter alia*
damages including allegedly illegal usurious in-
terest charged by Defendants and paid by Plaintiffs
Presently before the Court are the King Defendant's
Motion to Compel Arbitration (King ECF No 6)
the Johnson Defendants Motion for Stay of Judicial
Proceedings Pending Arbitration or in the Alternat-
ive, to Dismiss the Complaint for Failure to State a
Claim Upon Which Relief May Be Granted
(Johnson ECF No 21) and the Johnson Plaintiffs'
Motion to Compel Discovery (Johnson ECF No
76) On August 18 2011 the Court entered an Or-
der granting the King Defendant's Motion granting
in part and denying in part the Johnson Defendants
Motion and denying the Johnson Plaintiffs Mo-
tion (King ECF No 76 Johnson ECF No 86)
This Memorandum will state the reasons

II Factual and Procedural Background**A Relevant Factual Background**

On January 18 2007 Raymond King and
Sandra Coates on behalf of themselves and others
similarly situated (the King Plaintiffs) filed a
class action complaint against Advance America
Cash Advance Centers of Pennsylvania LLC (the
King Defendant) The King Plaintiffs allege that
the King Defendant unlawfully charged
Pennsylvania consumers in excess of 700% annual
percentage rate (APR) on short term loans com-
monly referred to as payday loans ^{FN1} (King
Compl ECF No 1 ¶ 1) Defendants achieve these
high interest rates by charging a fee of approxi-
mately \$8 50 to \$9 50 per \$50 borrowed (*Id* ¶ 16)

FN1 Payday loans are short-term high
interest-or-fee loans that are generally se-
cured by a post-dated check or a debit au-
thorization executed by the borrower and
subsequently presented by the lender after
a predetermined period usually set at two
weeks to coincide with the borrower's pay-
day *Pa Dep't of Banking v NCAS of*

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Del LLC 596 Pa 638, 948 A 2d 752 754
(Pa 2008) [*NCAS I*]

Sharlene Johnson Helena Love and Bonny Bleacher on behalf of themselves and others similarly situated (the Johnson Plaintiffs together with the King Plaintiffs Plaintiffs), also filed a class action complaint against Advance America Cash Advance Centers Inc Advance America, Cash Advance Centers of Pennsylvania LLC and NCAS of Delaware, LLC (the Johnson Defendants together with the King Defendant Defendants) The Johnson Plaintiffs allege that the Johnson Defendants offer a predatory payday lending program that charges Pennsylvania customers a monthly participation fee of \$149.95 on loans of \$500 or less in addition to a monthly interest charge of \$17 to \$20 per \$100 borrowed (Johnson Compl ECF No 1 ¶¶ 1-19)

Plaintiffs allege that Defendants' programs are regulated by Pennsylvania's Consumer Discount Company Act (CDCA) 7 Pa Stat §§ 6201 *et seq* which allows licensed companies to offer consumers small loans at rates capped at twenty-four percent (24%) (King Compl ¶ 17 Johnson Compl ¶ 25) Without a CDCA license Plaintiffs assert that Pennsylvania's general usury law caps the permissible interest rate at six percent (6%) (King Compl ¶ 8 Johnson Compl ¶ 24) (citing 41 Pa Stat § 201) Plaintiffs allege that Defendants programs charged effective interest rates of 400% to 700% or higher (King Compl ¶ 16 Johnson Compl ¶ 19)

*2 The King Plaintiffs allegations focus on the King Defendants' earlier business model dubbed rent-a-bank schemes Under these schemes the King Defendant would facilitate a loan agreement between a customer and a bank located in another state for the purpose of invoking federal interest rate preemption (King Compl ¶¶ 27-28 32) Each loan the King Plaintiffs entered contained an arbitration clause that waived among other things their right to file a class action represent a class of litigants, and participate in a class as a member (*Id* ¶

48) The relevant portion of the arbitration provision in the King agreements provides

You acknowledge and agree that by entering in to this Arbitration Provision **YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US** ”

[A]ll disputes including any Representative Claims against us shall be resolved by binding arbitration only on an individual basis with you THEREFORE THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION THAT IS THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE AS A PRIVATE ATTORNEY GENERAL OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION

(*Id* Exs A B)

The Johnson Plaintiffs allegations focus on the Johnson Defendants' more recent business model FN2 the Advance America Choice-Line of Credit (Johnson Compl ¶ 43) Under this program the Johnson Defendants offer consumers a line of credit and charge a 5.98% APR in addition to a \$149.95 monthly participation fee (*Id* ¶ 45) These line of credit agreements also included arbitration clauses which like those in the King matter include class-action waivers (*Id* ¶¶ 52-91) The relevant portion of the clause for the Johnson Plaintiffs appears in the Arbitration Provision of the Revolving Credit Agreement

FN2 Defendants engaged in the prior model with BankWest a South Dakota bank and member of the Federal Deposit Insurance Corporation (FDIC) According to Plaintiffs in March 2006 BankWest

ceased its operations with Defendants based on FDIC instructions and guidelines (Johnson Compl ¶¶ 37–41)

5 NO CLASS ACTIONS OR SIMILAR PROCEEDINGS SPECIAL FEATURES OF ARBITRATION If you or we elect to arbitrate a Claim^{FN3} neither you nor we will have the right to (1) have a court or jury decide the Claim (b) obtain information prior to the hearing to the same extent that you or we could in court (c) participate in a class action in court or in arbitration either as a class representative or class member (d) act as a private attorney general in court or in arbitration or (e) join or consolidate your Claim(s) with claims of any other person

FN3 The term Claim means any legal claim dispute or controversy between you and us that arises from or relates to this Agreement your account the fees we charge the loans you obtain our collection of amounts you owe or the validity enforceability or scope of this Arbitration Provision or any other part of this Agreement Claim does not include (b) any assertion by you that Section 5(c) (d) or (e) of this Arbitration Provision is invalid or unenforceable The matters described in subsection (b) of the preceding sentence must be resolved by a court and not an arbitrator (Johnson Mot for Partial Summ J ECF No 20 Ex 10(c) at 3 § 2)

(Johnson Mot for Partial Summ J ECF No 20 Ex 10(c) at 3 § 5)

Defendants moved to compel individual arbitration based on the arbitration provisions in each case

B Pennsylvania Enforcement Action Against Defendants

According to Plaintiffs Defendants approached the Pennsylvania Department of Banking for approval of their line-of-credit program (Mot to

Compel Memo ECF No 76–2 at 6) Plaintiffs allege that officials advised Defendants that its programs are illegal under Pennsylvania law (*Id* at 6 & n 3) Defendants nevertheless pursued their program (*Id* at 6)

*3 Consequently in 2006 the Department of Banking initiated an enforcement action against Defendants seeking declaratory and injunctive relief against Defendants line-of-credit arrangement *NCAS I* 948 A 2d at 755 The Pennsylvania Commonwealth Court concluded that the 5.98% interest rate combined with the monthly participation fee effectively charged interest at a rate exceeding the statutorily-allowed six percent *Id* at 756 Thus the court enjoined Defendants from continuing to offer this product *Id* Both the Commonwealth Court and the Pennsylvania Supreme Court declined to stay the effect of the injunction pending appeal *Id* at 756 n 4 The Pennsylvania Supreme Court affirmed the Commonwealth Court's decision finding that [t]he fees and interest [Defendants] charged in relation to its payday loans aggregate in excess of six percent APR therefore [Defendants] violated the CDCA *Id* at 762

In a subsequent action the Pennsylvania Commonwealth Court declined to permit the Department of Banking to pursue claims against Defendants on behalf of individual borrowers *See Pa Dep't of Banking v NCAS of Del LLC* 995 A 2d 422 435–39 (Pa Commw Ct 2010) [*NCAS II*]

C Procedural History

Before the transfer of these two matters to the undersigned by Order dated April 21 2011 (King ECF No 61 Johnson ECF No 63) Judge Fullam had granted Defendants' motions to compel arbitration in each case but left for the arbitrator to decide whether the respective arbitrations should proceed on a class wide or individual basis (King ECF Nos 29 40 Johnson ECF Nos 37 43) The Third Circuit reversed holding that whether arbitration should proceed on a class or individual basis is a question of arbitrability for the court to decide *King v Advance Am Cash Advance Ctrs of Pa*

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LLC 415 F App'x 399, 402 (3d Cir 2011) The Third Circuit vacated Judge Fullam's orders which had the effect of reviving Defendants' motions (see King ECF No. 6 Johnson ECF No. 21) and instructed this Court to consider the validity of the class action waiver provisions. *King* 415 F App'x at 403 see *Puleo v Chase Bank USA NA* 605 F.3d 172, 183 (3d Cir 2010) (en banc) (holding enforceability of class-action waiver is question of arbitrability for the court).^{FN4}

FN4 The scope of this remand is also consistent with the arbitration provision at issue in the Johnson matter. According to that agreement, the Court, not the arbitrator, will resolve any challenges to the enforceability of the class action waiver provision. (See Johnson Mot. for Partial Summ. J. Ex. 10(c) at 3 §§ 2, 5.)

The Court has entertained extensive letter briefing on this issue and held hearings on June 21, 2011 and August 17, 2011. Plaintiffs in both cases participated in the June 21 hearing; only the Johnson Plaintiffs participated in the August 17 hearing. After the June 21 hearing, the Court permitted the Johnson Plaintiffs to engage in limited discovery and set a schedule for any discovery motions. The King Plaintiffs did not wish to pursue additional discovery; instead, requesting updated responses in light of the passage of time. The Johnson Plaintiffs propounded discovery requests to Defendants and subsequently filed a Motion to Compel Discovery. Other than the Johnson Plaintiffs' desire to pursue further discovery, the Court discerns no difference between the scope of the Third Circuit's remand or the legal issues in these cases.

III Jurisdiction and Standard of Review

*4 This Court has jurisdiction over these matters pursuant to 28 U.S.C. § 1332(d)(2). A district court decides a motion to compel arbitration under the same standard it applies to a motion for summary judgment. *Kaneff v. Del. Title Loans, Inc.* 587 F.3d 616, 620 (3d Cir. 2009). The party opposing arbitration is given the benefit of all reason-

able doubts and inferences that may arise. *Id.* (quoting *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.* 636 F.2d 51, 54 (3d Cir. 1980)). Before compelling a party to arbitrate pursuant to the Federal Arbitration Act (FAA), a court must determine that (1) there is a valid agreement to arbitrate and (2) the dispute at issue falls within the scope of that agreement. *Century Indem. Co. v. Certain Underwriters at Lloyd's London* 584 F.3d 513, 523 (3d Cir. 2009).

IV Discussion

A Defendants' Motions to Compel Arbitration and Stay Judicial Proceedings

1 Parties' Contentions

Plaintiffs all together raise several defenses to the class waiver clause in their agreements. They argue the clauses are unconscionable under Pennsylvania law, which they contend is the appropriate substantive law to apply in this matter and applies to all contracts generally; the clauses unlawfully exculpate and immunize Defendants' allegedly wrongful conduct; the clauses are illegal means of enforcing usurious contracts. Defendants are judicially estopped from arguing against class-wide resolution, and arbitration is unnecessary because a Pennsylvania state court judgment has preclusive effect on the merits of the dispute.

Defendants rely on the Supreme Court's decision in *AT & T Mobility LLC v. Concepcion* — U.S. — 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)

to argue that Pennsylvania's law on the unconscionability of class waiver provisions is preempted by the FAA and therefore this Court should compel arbitration. Further, they contend judicial estoppel is not appropriate because they did not take the position in state court which Plaintiffs ascribe to them, and an arbitrator should decide whether the contract as a whole is illegal, not the court.

2 Unconscionability and Exculpation Defenses

These defenses can be disposed of with only a

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brief discussion in light of the Supreme Court's decision in *Concepcion* and the Third Circuit's subsequent decision in *Litman v Celco Partnership* applying *Concepcion* to New Jersey law. See *Litman v Celco P Ship* — F 3d — 2011 WL 3689015, at *3–5 (3d Cir Aug 24 2011)

Congress enacted the FAA to reverse the longstanding judicial hostility to arbitration agreements and to place arbitration agreements upon the same footing as other contracts. *Gilmer v Interstate/Johnson Lane Corp* 500 U S 20 24 111 S Ct 1647 114 L Ed 2d 26 (1991). The FAA is applicable to arbitration agreements that are (1) in writing and (2) part of any contract evidencing a transaction involving commerce. 9 U S C § 2. The parties do not dispute the FAA applies

*5 The Supreme Court succinctly stated the applicable legal principles

Section 2 the primary substantive provision of the Act provides in relevant part as follows

A written provision in any maritime transaction or contract shall be valid irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract

We have described this provision as reflecting both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract. In line with these principles courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms

The final phrase of § 2 however permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract. This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses such as fraud duress or unconscionability but not by defenses that apply only to arbitration or

that derive their meaning from the fact that an agreement to arbitrate is at issue

Concepcion 131 S Ct at 1745–46 (citations and quotations omitted)

In *Concepcion* the Supreme Court concluded that a California rule invalidating unconscionable class action waivers interferes with arbitration. Although the rule does not require classwide arbitration it allows any party to a consumer contract to demand it *ex post*. *Id* at 1750. The conclusion follows that class arbitration to the extent it is manufactured by *Discover Bank[v Superior Court]* 36 Cal 4th 148 30 Cal Rptr 3d 76 113 P 3d 1100 (Cal 2005)] rather than consensual is inconsistent with the FAA. *Concepcion* 131 S Ct at 1750–51

On remand from the Supreme Court the Third Circuit adopted a broad and clear understanding of *Concepcion* a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with and therefore preempted by the FAA irrespective of whether class arbitration is desirable for unrelated reasons. *Litman* 2011 WL 3689015 at *5 (quotations omitted) see also *Celco P'ship v Litman* — U S — — 131 S Ct 2873 2873 — L Ed 2d — — (2011) (vacating Third Circuit decision and remanding for further consideration in light of *Concepcion*) In light of this broad holding the Third Circuit concluded *Concepcion* controls its consideration of whether the FAA similarly preempts New Jersey law on unconscionability. *Litman* 2011 WL 3689015 at *4–5. Noting that it had previously reached a contrary decision in an earlier case because New Jersey law had taken pains to apply its rule on class-actions waivers to judicial litigation and arbitration the Third Circuit nevertheless concluded that *Concepcion* mandated the court overrule its prior decision and affirm the district court's order compelling arbitration. *Id* at *2–3 (citing *Homa v Am Express Co* 558 F 3d 225 (3d Cir 2009)) see also *Cruz v Cingular Wireless LLC* — F 3d — No 08–16080 2011 WL

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3505016 at *9 (11th Cir Aug 11 2011) (adopting broad view of *Concepcion* and finding similar Florida rule preempted by FAA)

*6 This Court discerns no difference between California New Jersey and Pennsylvania law on the matter and therefore concludes the FAA preempts Pennsylvania law.^{FN5} *Accord Alfeche v Cash Am Int'l Inc* No 09-953 2011 WL 3565078 at *5 (E D Pa Aug 12 2011) (Shapiro, J), *see Litman* 2011 WL 3689015 at *3 n 5 (suggesting Third Circuit previously opined New Jersey rule was less likely to contravene FAA than Pennsylvania rule) *Compare Thibodeau v Comcast Corp* 912 A 2d 874 (Pa Super Ct 2006) with *Muhammad v Cnty Bank of Rehoboth Beach Del* 189 N J 1 912 A 2d 88 (N J 2006) and *Discover Bank* 36 Cal 4th 148 30 Cal Rptr 3d 76 113 P 3d 1100

FN5 The agreements in this case include choice-of-law provisions selecting South Dakota law for the King Plaintiffs and Delaware law for the Johnson Plaintiffs. Both sets of Plaintiffs argue however that pursuant to Pennsylvania choice-of-law principles Pennsylvania law should govern the enforceability of the class waiver. Even assuming this contention is true the FAA preempts Pennsylvania law which would require class wide arbitration.

Plaintiffs contend their cases are distinguishable from *Concepcion* because they allege Defendants knowingly engaged in illegal conduct and relied on the class waiver clauses to shield them from liability. This argument is simply another spin on Pennsylvania's unconscionability rule under *Thibodeau* and therefore is preempted by the FAA pursuant to *Concepcion*. Plaintiffs raise no other challenges to the formation of the agreements such as fraud or duress.

3 Other Defenses to Class-Waiver Clauses

Plaintiffs assert several other defenses to the class waiver clauses at issue in these cases: the

clause is an illegal mechanism to enforce a usury contract in violation of Pennsylvania law. Defendants are judicially estopped from arguing against class-wide arbitration and arbitration is unnecessary because a Pennsylvania state court judgment has preclusive effect on the decision the arbitrator will reach. The Court will address each argument in turn.

Plaintiffs' first alternative defense—the class-waiver clause is an illegal usury-enforcement mechanism—suffers from the same flaw *Concepcion* found fatal to the unconscionability and unlawful exculpation arguments under California law. To the extent Pennsylvania courts would recognize that an arbitration clause could be an unlawful enforcement mechanism in the usury context, such a rule would derive its meaning from the fact an arbitration clause is at issue. Therefore the FAA would preempt its enforcement. *See Concepcion* 131 S Ct at 1746 (citing *Doctor's Assocs Inc v Casarotto* 517 U S 681 687 116 S Ct 1652 134 L Ed 2d 902 (1996)).

This Court also concludes that Defendants are not judicially estopped from arguing against class-wide resolution because *Concepcion* represents an intervening change in the law. Judicial estoppel is a tool designed to protect the court from parties who seek to gain advantage by litigating one theory and then subsequently seeking additional advantage by pursuing an irreconcilably inconsistent theory. *Ryan Ops G P v Santiam-Midwest Lumber Co* 81 F 3d 355 358 (3d Cir 1996). It is an extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. *Id.* at 365. This doctrine is not intended to eliminate all inconsistencies, no matter how trivial; rather, it is designed to prevent litigants from playing fast and loose with the courts. *Id.* at 358.

*7 Plaintiffs argue Defendants should be judicially estopped because Defendants cited the instant cases to the Pennsylvania state courts to counter the Pennsylvania Department of Banking's attempt to pursue individual relief on behalf of Defendants'.

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customers See *NCAS II* 995 A 2d at 439 n 20 Plaintiffs contend the Commonwealth Court relied on this representation to deny the Commonwealth's attempt to seek relief on the customers' behalf within the context of its enforcement action. Even assuming Defendants made the representations Plaintiffs allege which Defendants dispute, judicial estoppel is not appropriate because the Commonwealth Court predominantly relied on other grounds to deny the Department of Banking's request. See *id.* at 435–39. Further, *Concepcion* represents an intervening change in the law. See *Longaberger Co v Kolt* 586 F 3d 459, 470 (6th Cir 2009) (collecting cases including *United States v Vastola* 989 F 2d 1318 (3d Cir 1993) for proposition that judicial estoppel is not appropriate when there has been an intervening change in the law).

Finally, any preclusive effect of the Pennsylvania state courts' decision that the underlying transactions between Plaintiffs and Defendants are illegal is an issue for the arbitrator. Generally, affirmative defenses, including *res judicata*, are considered components of the dispute and must be considered by the arbitrator, not the court. See *Interdigital Commc'ns Corp v Fed Ins Co* 308 F App'x 593, 596 (3d Cir 2009). But the Third Circuit recognizes a narrow exception to this rule when the preclusive effect of a prior federal judgment is at issue. See *John Hancock Mut Ins Co v Olick* 151 F 3d 132, 139 (3d Cir 1998). *Am Home Assurance Co v Popowicz*, No. 03–678, 2003 WL 21652287 at *1 (E D Pa. May 28, 2003) (asserting *Olick* creates a narrow exception for judicial determination of preclusive effect of pre-existing federal judgment). In those circumstances, the federal court has an interest in protecting the finality and integrity of its own judgment. *Olick* 151 F 3d at 138.

In this case, Plaintiffs rely on the existence of a state court judgment to argue there is nothing left to arbitrate and this Court should find the underlying agreements wholly illegal.^{FN6} *Olick* recognizes a narrow exception where a federal judgment exists prior to arbitration and the Third Circuit has not yet

extended that rule to pre-existing state court judgments. Because such an issue is generally reserved to the arbitrator, the Court declines to determine the preclusive effect of the state court judgment.^{FN7} See *Zurich Am Ins Co v Watts Indus* 466 F 3d 577, 581 (7th Cir 2006) (finding that preclusive effect of state court judgment is properly left to arbitrator) see also *Alfeche* 2011 WL 3565078 at *5 (concluding that speculation regarding how arbitrator will construe loan agreement based on prior state court determination has no bearing on whether to compel arbitration; arguments regarding legality of contract as a whole are for arbitrator).

FN6 At the August 17 hearing in this matter, the Johnson Plaintiffs conceded they are not arguing that the Court should find the contract as a whole illegal and, as a consequence, the arbitration clause unenforceable. They acknowledged such a position would be contrary to Supreme Court precedent. See *Buckeye Check Cashing Inc v Cardegna* 546 U.S. 440, 449, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (holding illegality of entire loan agreement is issue for arbitrator, not court). Rather, the Johnson Plaintiffs clarified that they are arguing any arbitration would be a hollow exercise in light of the state court judgment that the transactions at issue are illegal under Pennsylvania law.

FN7 Also at the August 17 hearing, the Court inquired as to whether there was any doubt the arbitrator would apply relevant precedential law, including the Pennsylvania judgment at issue. The parties appearing at that hearing, Defendants and the Johnson Plaintiffs, expressed no doubt the arbitrator would faithfully abide by relevant precedent.

*8 For the foregoing reasons, the Court concluded that Plaintiffs entered into valid, enforceable arbitration agreements with Defendants and waived their rights to pursue relief on a class-wide basis.

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Plaintiffs do not dispute their claims are within the scope of the arbitration agreements. Accordingly, the Court granted the King Defendants Motion to Compel Arbitration and granted in part and denied in part the Johnson Defendants' Motion to Stay Judicial Proceedings.^{FN8}

FN8 The Johnson Defendants also moved in the alternative to dismiss the Johnson Plaintiffs Complaint. Rather than dismiss the Complaint, the Court stayed proceedings pending the outcome of arbitration.

B Johnson Plaintiffs' Motion to Compel Discovery

The Johnson Plaintiffs sought to compel discovery directed at whether the class-waiver clause itself is unlawful for the foregoing reasons. The requested discovery falls outside this Court's role on the pending Motion to Stay Judicial Proceedings in light of *Concepcion* and *Litman*. Accordingly, the requested discovery is irrelevant to the Court's task on remand from the Third Circuit. For this reason, the Court denied without prejudice the Johnson Plaintiffs Motion to Compel Discovery.

V Conclusion

For the foregoing reasons, the Court granted the King Defendants Motion to Compel Arbitration, granted in part and denied in part the Johnson Defendants Motion to Stay Judicial Proceedings, and denied the Johnson Plaintiffs' Motion to Compel Discovery. An appropriate Order was previously entered.

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Only the Westlaw citation is currently available

United States District Court N D California
Oakland Division
Brooks LEWIS on behalf of himself all others
similarly situated and the general public Plaintiff
v
UBS FINANCIAL SERVICES INC et al UBSs

No C 10-04867 SBA
Docket No 29
Sept 30 2011

Scot David Bernstein Law Offices of Scot D Bern
stein A Professional Corporation Folsom CA
William Philip Tornngren Law Offices of William
P Tornngren Sacramento CA for Plaintiff

Jeffrey David Wohl M Kirby C Wilcox Maurice
Kirby Collette Wilcox Zachary P Hutton Paul
Hastings LLP San Francisco CA for UBS Finan
cial Services Inc et al UBSs

ORDER GRANTING DEFENDANT'S MO- TION TO COMPEL ARBITRATION

SAUNDRA BROWN ARMSTRONG District
Judge

*1 Plaintiff Brooks Lewis (Plaintiff) filed the
instant putative class action against his former em
ployer UBS Financial Services Inc (UBS) al
leging violations of the California Labor Code and
California's Unfair Competition Law (UCL) Cal
Bus and Prof Code § 17200 The parties are
presently before the Court on Defendant UBS's mo
tion to compel arbitration and to dismiss or stay all
proceedings Dkt 29 Having read and considered
the papers filed in connection with this matter and
being fully informed the Court hereby GRANTS
the motion and DISMISSES the action for the reas
ons stated below The Court in its discretion finds
this matter suitable for resolution without oral argu
ment See Fed R Civ P 78(b) N D Cal L R
7-1(b)

I BACKGROUND

A FACTUAL SUMMARY

Plaintiff was employed by UBS as a financial
advisor from May 2006 through April 2009 Compl
¶ 6 21 Dkt 3 According to Plaintiff UBS en
gages in the practice of enticing financial advisors
who have an existing book of business to bring
their customers to UBS through the promise of up
front bonuses to the advisor *Id* ¶ 24 UBS typic
ally structures such bonuses as employee forgiv
able loans (EFLs) secured by promissory notes
Id ¶ 37 Burenin Decl ¶ 2 & Ex A If the advisor
remains employed by UBS for a specified amount
of time the debt is forgiven *Id* However if the ad
visor's employment is terminated for any reason be
fore the loan is completely forgiven the promissory
note is accelerated and begins bearing interest
Compl ¶ 37 Plaintiff alleges that this practice viol
ates California law

Plaintiff joined UBS in or about May 2006 *Id*
¶ 6 On May 16 2006 Plaintiff executed a Form
U-4 Uniform Application for Securities Industry
Regulation or Transfer (U-4 Form) to register
with the self regulating organizations (SROs) of
The NASD Inc (NASD) and the New York
Stock Exchange Inc (NYSE) among other entit
ies Burenin Decl Ex E Dkt 30-1 The U-4 Form
contains an arbitration clause in which Plaintiff
agreed to arbitrate any dispute claim or contro
versy that may arise between [him] and [his] firm
or a customer or any other person that is required
to be arbitrated under the rules constitutions or by
laws of the SROs with whom he registered *Id* §
15A(5)

In connection with his recruitment to join UBS
Plaintiff received a bonus of \$520 488, which was
structured as an EFL and secured by a promissory
note to be forgiven over equal annual installments
over six years *Id* ¶¶ 37 38 In connection with the
bonus Plaintiff signed a promissory note on June 5

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2006 for an amount equal to the bonus Burenin Decl Ex A The promissory note contains an arbitration clause requiring the parties to arbitrate any disputes concerning compensation benefits or other terms of conditions of employment [] *Id* at 5 The clause further states that [a]ny such arbitration will be conducted under the auspices and rules of The NASD Inc or if the NASD is unavailable or unable to hear the matter then the appropriate forum is The New York Stock Exchange Inc to the extent that forum is available *Id* Claims for injunctive relief under the promissory note are expressly excluded from the arbitration clause however *Id*

*2 Two years later Plaintiff received an additional bonus of \$83 753 which was again structured as an EFL secured by a promissory note in the same amount Compl ¶¶ 37 38 Burenin Decl Ex C at 6 The promissory note contains an arbitration clause which also includes a class action waiver

With the exception of claims for injunctive relief under this Agreement Employee and UBS Financial Services agree that *any disputes* between Employee and UBS Financial Services *will be determined by arbitration* as authorized by the arbitration law of the state of New York Any such arbitration will be conducted under the auspices and rules of The NASD Inc *To the fullest extent permitted by law by signing this Agreement Employee waives any right to commence be a party to or an actual or putative class member of any class or collective action arising out of or relating to his/her employment with UBS Financial Services or the termination of his/her employment with UBS Financial Services*

Id at 4–5 (emphasis added) Plaintiff signed the promissory note on September 30 2008

In addition to the U–4 Form and the two promissory notes Plaintiff executed two additional agreements during his employment with UBS which contain an arbitration clause Specifically Plaintiff signed a 2007 Compensation Plan on March 22 2007 which requires the arbitration of

any disputes between Plaintiff and UBS before NASD or NYSE Burenin Decl Ex F at 26 On July 22 2008 Plaintiff signed an Advisor Account Reassignment Agreement which requires the arbitration of employment related disputes before the Financial Industry Regulatory Authority (FINRA) or JAMS *Id* Ex G ¶ 5 Both the arbitration clauses in those agreements also contain a class action waiver *Id* Ex F at 26 *Id* Ex G ¶ 5

On April 24 2009 Plaintiff voluntarily terminated his employment with UBS Compl ¶ 8 At the time of his separation Plaintiff owed \$404 030 99 on promissory notes Burenin Decl ¶ 9 On April 20 2010 UBS initiated an arbitration proceeding against Plaintiff before FINRA to recover the balance on the promissory notes Burenin Decl ¶ 10

B PROCEDURAL HISTORY

On July 9 2010, Plaintiff filed the instant class action in San Francisco County Superior Court asserting four causes of action for (1) failure to pay wages and provide accurate records in violation of the California Labor Code (2) injunctive relief under Labor Code § 226, (3) violation of the UCL and (4) declaratory relief^{FN1} Among other things Plaintiff alleges that the EFLs constitute bonuses that UBS cannot legally recoup and that enforcement of the promissory notes is contrary to California law On December 10 2010 UBS removed the action to this Court based on diversity jurisdiction

FN1 On the same date that Plaintiff filed suit he sent a letter to FINRA requesting that it dismiss UBS's claim in light of the class action that Plaintiff filed in state court Burenin Decl ¶ 11 & Ex I A FINRA case administrator placed UBS's arbitration claim on the inactive docket *Id* ¶ 12 & Ex J

On January 29 2011 UBS filed a motion to compel arbitration and to dismiss or stay all proceedings pending the completion of arbitration Dkt 29 UBS argues that New York law applies and therefore the Court is required to enforce the

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class action waiver and to compel arbitration *Id* Plaintiff counters that California law is controlling and therefore under *Discover Bank v Superior Court* 36 Cal 4th 148 30 Cal Rptr 3d 76 113 P 3d 1100 (2009) the Court must deem the class action waiver unconscionable and deny the motion to compel arbitration Dkt 34 Plaintiff also argues that the arbitration agreements are unenforceable because the fora specified in those agreements the NASD and NYSE no longer exist *Id* Plaintiff further maintains that his claims for injunctive relief are excluded from the arbitration agreements *Id*

*3 During the pendency of UBS's motion the United States Supreme Court rendered its decision in *AT & T Mobility v Concepcion* — U S —, 131 S Ct 1740 179 L Ed 2d 742 (2011) which held that the FAA preempts California's *Discover Bank* rule and prohibits states from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures 131 S Ct at 1744 1753 The Court subsequently permitted the parties to submit supplemental briefing regarding the impact of *Concepcion* on the pending motion With matter now fully briefed the motion is now ripe for adjudication

II LEGAL STANDARD

Under the Federal Arbitration Act (FAA) any party bound by an arbitration agreement that falls within the scope of the FAA may bring a petition in federal district court to compel arbitration 9 U S C § 4 When faced with a petition to compel arbitration the district court's role is a discrete and narrow one By its terms the [FAA] leaves no place for the exercise of discretion by a district court but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed *Chiron Corp v Ortho Diagnostic Sys Inc* 207 F 3d 1126 1130 (9th Cir 2000) (quoting *Dean Witter Reynolds Inc v Byrd* 470 U S 213 218 105 S Ct 1238 84 L Ed 2d 158 (1985))

The court's role under the Act is therefore limited to determining (1) whether a valid agreement

to arbitrate exists and if it does (2) whether the agreement encompasses the dispute at issue If the response is affirmative on both counts then the Act requires the court to enforce the arbitration agreement in accordance with its terms *Id* To require arbitration [plaintiff]'s factual allegations need only touch matters' covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability *Simula Inc v Autoliv Inc* 175 F 3d 716 721 (9th Cir 1999) Where the claims alleged in a pleading are subject to arbitration the Court may stay the action pending arbitration or dismiss the action *See* 9 U S C § 3 *Sparling v Hoffman Constr Co* 864 F 2d 635 638 (9th Cir 1988)

III DISCUSSION

A ARBITRATION FORUM

As a threshold matter Plaintiff contends that compelling arbitration before FINRA is inappropriate on the grounds that NASD and NYSE no longer exist and that FINRA is not expressly referenced in the respective arbitration clauses However Plaintiff overlooks that the Advisor Account Reassignment Agreement specifically requires arbitration before FINRA Burenin Decl Ex G The arbitration clause contained therein provides that

With the exception of claims for injunctive relief or for denial of benefits under the Firm's disability or medical claims you and UBS agree that unless prohibited by applicable law *any disputes between you and UBS including claims concerning compensation benefits or other terms or conditions of employment and termination of employment* will be determined by arbitration by the arbitration law of New Jersey *Any such arbitration will be conducted under the auspices and rules of the Financial Industry Regulatory Authority (FINRA)*

*4 Burenin Decl Ex G (emphasis added)

Moreover the fact that the other arbitration

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clauses do not specify FINRA is of little moment. On July 26, 2007, NYSE and NASD were consolidated following the regulatory approval of the Securities and Exchange Commission. See 72 Fed Reg 42146 (August 1, 2007). Under the terms of the consolidation, NYSE's regulatory and enforcement functions were transferred to NASD. *Id.* The expanded NASD was then renamed the Financial Industry Regulatory Authority, i.e., FINRA. *Id.* see *Stiegel v. SEC*, 592 F.3d 147, 149 n.1 (D.C. Cir. 2010). Given that FINRA is merely the successor entity to NASD, courts have compelled arbitration before FINRA where, as in this case, the arbitration agreement specifies that arbitration will occur under the rules of NASD. See e.g., *Shammami v. Broad Street Sec. Inc.*, 544 F. Supp. 2d 585, 586, 588 (E.D. Mich. 2008); *Suschil v. Ameriprise Financial Servs. Inc.*, No. 1:07CV2655, 2008 WL 974045, *1, *6 (N.D. Ohio, April 7, 2008); *O.N. Equity Sales Co. v. Prims*, 519 F. Supp. 2d 1006, 1007 n.1 (D. Minn. 2007).

Plaintiff's reliance on this Court's decision in *Adlao v. JP Morgan Chase & Co.*, No. C 10-04508 SBA, 2011 WL 864929, *4 (N.D. Cal., Mar. 11, 2011), is misplaced. In *Adlao*, the Court declined to compel arbitration because the defendant failed to provide any reasoned legal argument or cite any authority demonstrating that compelling arbitration before FINRA was appropriate where only the NASD and NYSE were referenced in the arbitration clause. The Court found that [g]iven the lack of discussion or analysis regarding the aforementioned issues, the Court cannot make a fully informed decision as to whether to compel arbitration, and if so, whether FINRA or JAMS is the appropriate forum in which the arbitration should proceed. *Id.* see also *Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003) (noting that [o]ur adversarial system relies on the advocates to inform the discussion and raise the issues to the court). Thus, it is readily apparent that despite Plaintiff's claims to the contrary, the Court's decision in *Adlao* is limited to the specific circumstances of that case. Moreover, unlike the defendant in *Adlao*, UBS has

in fact presented sufficient support for its contention that FINRA is the appropriate forum for arbitration.

B CLASS-ACTION WAIVER

The next issue before the Court is whether the class action waivers contained in the arbitration clauses are enforceable. UBS asserts that under New York law such waivers are not unconscionable and are therefore enforceable. Plaintiff does not dispute that UBS's agreements are enforceable under New York law, but instead argues that California law applies and that under *Gentry v. Superior Court*, 42 Cal.4th 443, 64 Cal. Rptr.3d 773, 165 P.3d 556 (2007), class action waivers are unconscionable. However, the parties' choice of law arguments are inapposite in light of *Concepcion* because even if California law applies, class action waivers are not unconscionable and are enforceable.

*5 In *Concepcion*, the Supreme Court reviewed the Ninth Circuit's decision in *Laster v. AT & T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub. nom. AT & T Mobility LLC v. Concepcion*, — U.S. —, 130 S.Ct. 3322, 176 L.Ed.2d 1218 (May 24, 2010), which had held that a class action waiver provision in an arbitration agreement was unenforceable under the test for unconscionability set forth in *Discover Bank*. The Supreme Court reversed *Laster* and held that the *Discover Bank* rule was preempted because [r]equiring 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. In so finding, however, the Court specifically noted that the FAA permits agreements to arbitrate to be invalidated by generally applicable contract defenses such as fraud, duress, or unconscionability [although] not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Id.* at 1746 (quoting *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 685, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)).

Plaintiff argues that notwithstanding *Concep*

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cion arbitration cannot be compelled based on the California Supreme Court's decision in *Gentry*. In *Gentry*, the California Supreme Court extended the *Discover Bank* rule to the employment context and held that class action waivers in employee arbitration agreements may be unenforceable in certain circumstances. *Id.* at 463. 30 Cal Rptr 3d 76, 113 P 3d 1100. *Gentry* counsels that in assessing the enforceability of a class action waiver, the court should consider (1) the size of plaintiff's potential recovery, (2) the potential for retaliation against members of a class, (3) whether there is a significant risk that class members are ill informed about their rights, and (4) whether other real world obstacles would prevent the vindication of class members' rights through individual arbitration. *Id.*

Though acknowledging that *Concepcion* abrogated *Discover Bank*, Plaintiff nonetheless contends that *Gentry* remains viable because it addresses arbitration agreements contained in employment contracts, while *Concepcion* pertains to consumer contracts. *Concepcion* cannot be read so narrowly. Rather, the Supreme Court made it clear that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward. The conflicting rule is displaced by the FAA." *Concepcion*, 131 S Ct at 1747. Like *Discover Bank*, *Gentry* advances a rule of enforceability that applies specifically to arbitration provisions, as opposed to a general rule of contract interpretation. As such, *Concepcion* effectively overrules *Gentry*. See *Moise v ServiceMaster Global Holdings, Inc.*, No. C 10-0628 SI, 2011 WL 3203919 at *3 n. 1 (N D Cal July 27, 2011) ("Concepcion rejected the reasoning and precedent behind *Gentry*, which had applied the *Discover Bank* rule to certain employment cases, even if it did not explicitly overrule *Gentry*."). (Illston J.), *accord Valle v Don Perolino Cristobal*, No. C 11-1489 SC, 2011 WL 3667441 at *6 (N D Cal Aug 22, 2011) (finding that *Concepcion* overrules *Gentry*); (Conti J.), *Murphy v DIRECTV*, No. 07-6465, 2011 WL 3319574 at *4 (C D Cal Aug 2, 2011).^{FN2}

FN2 The Court is not persuaded by *Plows v Rockwell Collins, Inc.* — F Supp 2d —, 2011 WL 3501872, at *4 (C D Cal Aug 9, 2011), which concluded that *Gentry* was not implicitly overruled by *Concepcion*. *Plows* cites the California Court of Appeal's decision in *Brown v Ralphs Grocery Co.*, 197 Cal App 4th 489, 497–98, 128 Cal Rptr 3d 854 (2011), which reversed the denial of a motion to compel arbitration on the ground that the plaintiff failed to make the requisite evidentiary showing under *Gentry* to invalidate the arbitration clause. Notably, *Brown* did not hold that *Gentry* survives *Concepcion*. Rather, the appellate court simply assumed without deciding that *Gentry* is still controlling after *Concepcion*. *Brown*, 197 Cal App 4th at 498, 128 Cal Rptr 3d 854 (stating that "[it] does not have to determine whether under [*Concepcion*] the rule in *Gentry* concerning the invalidity of class action waivers in employee-employer contract arbitration clauses is preempted by the FAA"). Thus, *Brown* does not support, let alone compel, the conclusion that *Gentry* remains viable notwithstanding the Supreme Court's decision in *Concepcion*.

*6 Even if *Concepcion* did not overrule *Gentry*, Plaintiff has not demonstrated that the class action waiver is unenforceable under *Gentry*'s four factor test. See *Brown*, 197 Cal App 4th at 497–98, 128 Cal Rptr 3d 854. Here, application of the *Gentry* test favors enforcement of UBS's arbitration clauses. First, Plaintiff's potential recovery is at least \$404,030—the amount of the unpaid employee forgivable loan debt he seeks to recover, as well as wages—plus interest and penalties. Second, Plaintiff has not shown that UBS has retaliated against any advisor, threatened to retaliate against any advisor, discouraged any advisor from making complaints, or did anything else to cause putative class members to reasonably fear retaliation. Third, there is no showing that UBS's financial advisors are ill-

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informed And finally Plaintiff has not established that there are real world obstacles that would prevent the vindication of class members' rights through individual arbitration Indeed financial advisors who wish to assert claims against UBS can effectively assert their rights in individual arbitration particularly given the amounts at stake See *Borrero v Travelers Indem Co* No CIV S10-322 KJM Slip Copy 2010 WL 4054114 at *2 (E D Cal Oct 14 2010) (class action waiver enforced under *Gentry* where plaintiff sought more than a modest sum and no real world obstacles prevented individual arbitration) Thus the Court concludes that UBS's class action waiver is enforceable

C STATUTORY CLAIMS

Plaintiff next contends that his statutory claims cannot be arbitrated However courts have held that since arbitration agreements do not weaken the protections provided by substantive law courts may compel arbitration of statutorily-based employment claims See *EEOC v Luce Forward Hamilton & Scripps* 345 F 3d 742 750 (9th Cir 2003) see also *Gilmer v Interstate/Johnson Lane Corp* 500 U S 20, 26 111 S Ct 1647 114 L Ed 2d 26 (1991) (holding arbitration agreements involving statutory claims are enforceable under the FAA) By agreeing to arbitrate a statutory claim a party does not forgo the substantive rights afforded by the statute it only submits to their resolution in an arbitral rather than a judicial forum *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 U S 614 628 105 S Ct 3346 87 L Ed 2d 444 (1985) Hence a district court cannot deny a motion to compel arbitration of a valid arbitration agreement on the ground that it involves statutory employment claims See *Dean Witter Reynolds Inc v Byrd* 470 U S 213 218 105 S Ct 1238 84 L Ed 2d 158 (1985)

D INJUNCTIVE RELIEF

The final question before the Court is whether Plaintiff's claims for injunctive relief are subject to arbitration Plaintiff argues that his claims for in-

junctive relief under § 226 of the California Labor Code (second cause of action) and the UCL (third cause of action) are not subject to arbitration because the arbitration clauses specifically exclude claims for injunctive relief See *Lifescan Inc v Premier Diabetic Servs Inc* 363 F 3d 1010 1012 (9th Cir 2004) (the court must order the parties to proceed to arbitration only in accordance with the terms of their agreement) Plaintiff asserts that the operative agreement for purpose of the instant motion is the promissory note that plaintiff signed on September 30 2008 That agreement states With the exception of claims for injunctive relief *under this Agreement* Employee and UBS Financial Services agree that *any disputes* between Employee and UBS Financial Services including claims concerning compensation *will be determined by arbitration* Burenin Decl ¶ 3 Ex C at 4-5 (emphasis added) Since Plaintiff is not seeking injunctive relief *under the terms of the promissory note* the exclusion is inapplicable

E DISMISSAL

*7 Where a dispute is subject to arbitration under the terms of a written agreement the district court shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement 9 U S C § 3 The Ninth Circuit however has held that courts have discretion under 9 U S C § 3 to dismiss claims that are subject to an arbitration agreement See *Sparling* 864 F 2d at 638 accord *Thinket Ink Info Res Inc v Sun Microsystems Inc* 368 F 3d 1053 1060 (9th Cir 2004) (holding that the district court properly exercised its discretion in dismissing an action where all claims were subject to arbitration) As discussed above the class action waivers are enforceable which leaves only Plaintiff's individual claims remaining in this action Since those claims are subject to arbitration dismissal is appropriate

IV CONCLUSION

For the reasons set forth above

IT IS HEREBY ORDERED THAT UBS's motion to compel arbitration is GRANTED and the in

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stant action is DISMISSED with prejudice The
Clerk shall close the file and terminate all pending
matters

IT IS SO ORDERED

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Lewis v UBS Financial Services Inc
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(Cite as 2011 WL 3689015 (C A 3 (N J)))

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Only the Westlaw citation is currently available

United States Court of Appeals
Third Circuit
Keith LITMAN Robert Wachtel Individually and
on behalf of all others similarly situated Appel
lants
v
CELLCO PARTNERSHIP d/b/a Verizon Wireless

No 08-4103
Argued Nov 5 2009
Submitted Under Third Circuit LAR 34 1(a) on
June 6 2011
Filed Aug 24 2011

Background Customers brought putative class action against provider of wireless telephone service alleging that provider charged customers an improper administrative charge in violation of its contractual obligation to provide cell phone service at a fixed price and asserting claims for breach of contract unjust enrichment and violations of the New Jersey Consumer Fraud Act The United States District Court for the District of New Jersey Freda Wolfson J 2008 WL 4507573 granted provider's motion to compel individual arbitration and dismissed the case Customers appealed The Court of Appeals 381 Fed Appx 140 vacated and remanded Provider appealed The Supreme Court — U S — 131 S Ct 2872 179 L Ed 2d 1184 vacated and remanded

Holding On remand the Court of Appeals Jordan Circuit Judge held that New Jersey law forbidding class arbitration waivers as unconscionable was preempted by the Federal Arbitration Act (FAA)

Affirmed

West Headnotes

[1] Alternative Dispute Resolution 25T 117

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk117 k Preemption Most Cited Cases

States 360 18 15

360 States

360I Political Status and Relations

360I(B) Federal Supremacy Preemption

360k18 15 k Particular cases preemption or supersession Most Cited Cases

New Jersey law forbidding class arbitration waivers as unconscionable was preempted by the Federal Arbitration Act (FAA) notwithstanding savings clause of the FAA where state law requiring the availability of classwide arbitration created a scheme inconsistent with the FAA 9 U S C A § 2

[2] Alternative Dispute Resolution 25T 134(3)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk131 Requisites and Validity

25Tk134 Validity

25Tk134(3) k Validity of assent

Most Cited Cases

Alternative Dispute Resolution 25T 134(6)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk131 Requisites and Validity

25Tk134 Validity

25Tk134(6) k Unconscionability

Most Cited Cases

Consistent with the Federal Arbitration Act (FAA) generally applicable contract defenses such as fraud duress or unconscionability may be applied to invalidate arbitration agreements 9 U S C A § 2

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[3] Alternative Dispute Resolution 25T ➡114

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk114 k Constitutional and statutory provisions and rules of court Most Cited Cases

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170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(C) Application to Particular Matters

170Bk403 k Arbitration Most Cited Cases

In considering an arbitration agreement federal courts may use the law of the involved state or territory as an interpretive guide but the liberal federal policy favoring arbitration which gave birth to the FAA requires that arbitration agreements be on an equal footing with other contracts and that they be enforced according to their terms 9 U S C A § 1 et seq

[4] Alternative Dispute Resolution 25T ➡117

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk117 k Preemption Most Cited Cases

States 360 ➡18 15

360 States

360I Political Status and Relations

360I(B) Federal Supremacy Preemption

360k18 15 k Particular cases preemption or supersession Most Cited Cases

A state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with and therefore preempted by the Federal Arbitration Act irrespective of whether class arbitration is desirable for unrelated reasons 9 U S C A § 1 et seq

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Alan S. Kaplinsky Jeremy T. Rosenblum Ballard Spahr Andrews & Ingersoll LLP Philadelphia PA for Amicus Appellees

Before SCIRICA JORDAN and COWEN Circuit Judges

OPINION OF THE COURT

JORDAN Circuit Judge

*1 This case is before us on remand from the United States Supreme Court. Appellants Keith Litman and Robert Wachtel had earlier asked us to reverse an order of the United States District Court for the District of New Jersey compelling them to arbitrate their contract dispute with Cellco Partnership d/b/a Verizon Wireless (Verizon) on an individual rather than a class-wide basis. In an unpublished opinion and order filed May 21, 2010, we vacated the District Court's order because a recent precedent of ours bound us to conclude that class arbitration should have been available to the appellants. *Litman v. Cellco P'ship*, 381 Fed. Appx. 140 (3d Cir. 2010) (citing *Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009)). Verizon responded to our ruling by seeking a stay of our mandate and filing a petition for a writ of certiorari, both of which were granted. The Supreme Court shortly after issuing its opinion in *AT&T Mobility v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), vacated our decision and remanded the case to us for further consideration. *Cellco P'ship v. Litman*, — U.S. —, 131 S.Ct. 2872, 179 L.Ed.2d 1184 (2011) (table). On remand, we asked for supplemental briefing to gain the parties' perspectives on how *Concepcion* applies to this case. Having now reviewed the supplemental

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briefing and *Concepcion* we conclude that the New Jersey law at issue which [r]equire[es] the availability of classwide arbitration [] creates a scheme inconsistent with the [Federal Arbitration Act] *Concepcion* 131 S Ct at 1748 Accordingly we will affirm the District Court's order compelling individual arbitration in accordance with the terms of Litman s and Wachtel's contracts with Verizon

I Background

Verizon provides wireless telephone service to millions of customers nationwide Litman and Wachtel were among that number They each entered into a Customer Agreement (the Agreements) pursuant to which Verizon supplied them cell phone service for a fixed monthly price

Beginning on or about September 30, 2005 Verizon allegedly began to impose on its fixed-price customers a bogus unlawful and inequitable monthly administrative charge of forty cents (App at 26–27) Later in March 2007 it allegedly charged fixed price customers an improper seventy-cent administrative charge According to Litman and Wachtel the added charges amounted to a unilateral price increase for all of its customers in violation of Verizon's contractual obligation to provide cell phone service at a fixed price (App at 27 35–37) On that theory Litman and Wachtel filed this putative class action

The complaint asserts three claims breach of contract unjust enrichment and violations of the New Jersey Consumer Fraud Act N J STAT ANN §§ 56 8–1 *et seq* Verizon moved to compel individual arbitration pursuant to the following clause in the Agreements ^{FN1}

WE EACH AGREE TO SETTLE DISPUTES
ONLY BY ARBITRATION

*2 * * *

(1) THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT ANY CONTROVERSY OR CLAIM ARISING OUT OF OR

RELATING TO THIS AGREEMENT OR ANY PRIOR AGREEMENT FOR WIRELESS SERVICE WITH [VERIZON] WILL BE SETTLED BY ONE OR MORE NEUTRAL ARBITRATORS BEFORE THE AMERICAN ARBITRATION ASSOCIATION (AAA) OR BETTER BUSINESS BUREAU (BBB)

* * *

(3) THIS AGREEMENT DOESN'T PERMIT CLASS ARBITRATIONS EVEN IF TH[E] PROCEDURES [OF THE AAA OR BBB] WOULD

* * *

(6) IF FOR SOME REASON THE PROHIBITION ON CLASS ARBITRATIONS SET FORTH IN SUBSECTION (3) IS DEEMED UNENFORCEABLE THEN THE AGREEMENT TO ARBITRATE WILL NOT APPLY FURTHER IF FOR ANY REASON A CLAIM PROCEEDS IN COURT RATHER THAN THROUGH ARBITRATION WE EACH WAIVE ANY TRIAL BY JURY

(App at 54–55 71–72)

Litman and Wachtel opposed Verizon's motion to compel individual arbitration arguing that pursuant to the New Jersey Supreme Court's decision in *Muhammad v County Bank of Rehoboth Beach Delaware* 189 N J 1 912 A 2d 88 100 (2006) the Agreements' arbitration clause—specifically its class arbitration waiver—was unconscionable and therefore unenforceable under New Jersey law ^{FN2} For purposes of its motion Verizon did not challenge the applicability of *Muhammad* but instead argued that the Federal Arbitration Act (FAA) preempted *Muhammad* The District Court accepted that argument Relying on our decision in *Gay v CreditInform* 511 F 3d 369 (3d Cir 2007) which stated that Pennsylvania court decisions declaring class-wide arbitration waivers unconscionable were preempted by the FAA ^{FN3} the District Court held that the class arbitration waiver at issue here is val-

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id The Court thus granted Verizon's motion to compel individual arbitration and dismissed the case. Litman and Wachtel timely appealed.

After the opening and answering briefs had been submitted we decided *Homa v American Express Co* 558 F 3d 225 (3d Cir 2009) in which we specifically addressed whether the conclusion expressed by the New Jersey Supreme Court in *Muhammad* was preempted by the FAA. We held that it was not preempted and we distinguished our earlier decision in *Gay* by noting that the Pennsylvania cases considered there though written ostensibly to apply general principles of contract law hold that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate *id* at 229 (quoting *Gay* 511 F 3d at 395) whereas the New Jersey Supreme Court in *Muhammad* was we thought at pains to say that a waiver of class wide dispute resolution would be improper in the context of either litigation or arbitration. We thus concluded that *Muhammad* plainly [did] not hold that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate. *Homa* 558 F 3d at 229–30 (internal quotation marks and citations omitted). Rather we said because *Muhammad* provides a defense against all waivers of class wide actions not simply those that also compel arbitration it was not preempted by the FAA 558 F 3d at 230 (emphasis added).

*3 Not surprisingly Litman and Wachtel moved for summary reversal in this case based on our decision in *Homa*. We agreed that reversal was required.^{FN4} See *Litman* 381 Fed Appx at 142. We recognized that *Gay*'s discussion of the FAA's preemptive effect on Pennsylvania law was only dicta.^{FN5} *Id*. In contrast we noted *Homa* was precedent directly on point and binding on us so we were required to conclude[] that the FAA does not preempt *Muhammad*. *Id* at 143. Accordingly we vacated the District Court's order compelling individual arbitration and remanded the case for further proceedings which might have involved some

class-wide dispute resolution. *Id*

Verizon filed a motion to stay our mandate pending the filing of a petition for writ of certiorari. We allowed the stay and Verizon filed its petition. On May 2, 2011, the Supreme Court granted Verizon's petition, vacated our May 2010 opinion and order, and remanded the case for our review in light of its newly issued opinion in *AT&T Mobility v Concepcion*. See *Cellco P ship* 131 S Ct at 2872.

II Discussion^{FN6}

[1] The specific question before us remains whether the FAA preempts the New Jersey Supreme Court's ruling in *Muhammad*. As noted above we had previously held that pursuant to *Homa* it did not. We now examine that decision anew and hold that *Homa* has been abrogated by *Concepcion* and that *Muhammad* is preempted by the FAA.

[2][3] Section 2 of the FAA, the primary substantive provision of the Act, *Moses H Cone Mem'l Hosp v Mercury Constr Corp* 460 U S 124, 103 S Ct 927, 74 L Ed 2d 765 (1983) provides that

[a] written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction 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 (emphasis added). Thus consistent with § 2, generally applicable contract defenses such as fraud, duress, or unconscionability may be applied to invalidate arbitration agreements. *Doctor's Assocs, Inc v Casarotto* 517 U S 681, 687, 116 S Ct 1652, 134 L Ed 2d 902 (1996). In considering an arbitration agreement we may use the law of the involved state or territory as an interpretive guide, *Gay* 511 F 3d at 388, but the liberal federal policy favoring arbitration, *Moses H Cone* 460 U S at 24, 103 S Ct 927.

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which gave birth to the FAA requires that arbitration agreements [be] on an equal footing with other contracts and [that they be] enforce[d] according to their terms *Concepcion* 131 S Ct at 1745 (internal citations omitted)

As is obvious from our decisions in *Gay* and *Homa* this case is not our first effort to reconcile waivers of class arbitration with state court decisions reflecting public policies against such waivers In our initial ruling in this case we discussed the tension between *Gay* and *Homa* and decided we had to follow *Homa* since it addressed precisely the question at issue here namely whether New Jersey's *Muhammad* decision forbidding class arbitration waivers could withstand the preemptive sweep of the FAA We are bound by precedential opinions of our Court[] we observed, unless they have been reversed by an en banc proceeding or have been adversely affected by an opinion of the Supreme Court *Litman* 381 Fed Appx at 143 (internal quotation marks and citation omitted)

*4 The Supreme Court's more recent opinion in *Concepcion* works just such a change in the law The Court addressed whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures 131 S Ct at 1744 The *Concepcions* had purchased AT & T cell phone service which was advertised to include free phones *Id* at 1744 They were charged sales tax on the phones and believing that to be inconsistent with the promise that the phones were free they brought a putative class action against AT & T *Id* AT & T moved to compel arbitration under the terms of its contract with the *Concepcions* which provided for arbitration of all disputes between the parties but required that claims be brought in the parties' individual capacity and not as a plaintiff or class member in any purported class or representative proceeding *Id* at 1744 (internal quotation marks and citations omitted) The district court ruled that pursuant to the California Supreme Court's decision in *Discover Bank v Superior*

Court 36 Cal 4th 148 30 Cal Rptr 3d 76 113 P 3d 1100 (2005)^{FN7} the governing contract's arbitration provision was unconscionable *Concepcion* 131 S Ct at 1745 AT & T appealed but the United States Court of Appeals for the Ninth Circuit affirmed concluding that the *Discover Bank* rule was not preempted by the FAA because it was simply a refinement of the unconscionability analysis applicable to contracts generally *Id* The Supreme Court saw it differently

In dispatching the reasoning and rule of *Discover Bank* the Supreme Court stated that the clause in § 2 of the FAA that requires enforcement of an arbitration agreement save upon such grounds as exist at law or in equity for the revocation of any contract[] does not preserve state law rules that stand as an obstacle to the accomplishment of the FAA's objectives *Id* at 1748 In the Court's view [r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA *Id* More specifically the Court held that requiring the availability of class action mechanisms undermines the principal purpose of the FAA[which] is to ensure that private arbitration agreements are enforced according to their terms *Id* (internal quotation marks and brackets omitted) Further the Court determined that the FAA's objective of affording parties discretion in designing arbitration processes to allow for efficient streamlined[] tailored mechanisms to address a dispute *id* at 1749 is compromised by state rules [r]equiring the availability of classwide arbitration *id* at 1748 The Court reasoned that the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower more costly and more likely to generate procedural morass than final judgment *id* at 1751 not to mention that it increases the risks to defendants *id* at 1752 Accordingly the Supreme Court held that California's *Discover Bank* rule stood as an obstacle to the accomplishment and execution of the full purposes and objectives of

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Congress [and was] preempted by the FAA *Id* at 1753 (internal citations and quotation marks omitted)

*5 [4] We understand the holding of *Concepcion* to be both broad and clear a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with and therefore preempted by the FAA irrespective of whether class arbitration is desirable for unrelated reasons *Id* at 1753 Therefore we must hold that contrary to our earlier decisions in *Homa* and in this case the rule established by the New Jersey Supreme Court in *Muhammad* is preempted by the FAA It follows that the arbitration clause at issue here must be enforced according to its terms which requires individual arbitration and forecloses class arbitration FN8

III Conclusion

Because the United States Supreme Court's decision in *Concepcion* holds that state law [r]equiring the availability of classwide arbitration is inconsistent with the FAA[] 131 S Ct at 1748 we now endorse the District Court's decision to reject New Jersey law holding that waivers of class arbitration are unconscionable and we will affirm the District Court's order compelling individual arbitration of the appellants' claims

FN1 Litman's relationship with Verizon was governed by a November 2006 Agreement and Wachtel's by a September 2007 Agreement The arbitration clause in each is identical

FN2 In *Muhammad* the New Jersey Supreme Court examined a class arbitration waiver in a consumer contract of adhesion specifically a payday loan agreement and held that that waiver was unconscionable and as such unenforceable because it deprived Muhammad of the mechanism of a class wide action whether in arbitration or in court litigation 912 A 2d at 101 In

reaching its holding the *Muhammad* Court considered the public interests affected by the contract *Id* at 99 It noted that when found in a consumer contract of adhesion in a setting in which disputes between the contracting parties *predictably* involve small amounts of damages class waivers are problematic since rational consumers may decline to pursue individual consumer-fraud lawsuits because it may not be worth the time spent prosecuting the suit even if competent counsel was willing to take the case *Id* (emphasis original) Thus the court opined such class action waivers functionally exculpate wrongful conduct *Id* at 100 As a result the waivers compromise [t]he public interest at stake in consumers effectively pursu[ing] their statutory rights under [New Jersey's] consumer protection laws and that interest, the court concluded overrides enforcement of the class-arbitration bar in th[e] agreement[s] *Id* at 101

FN3 More precisely *Gay* reviewed two Pennsylvania Superior Court cases *Lytle v CitiFinancial Services Inc* 810 A 2d 643 (Pa Super Ct 2002) and *Thibodeau v Comcast Corp* 912 A 2d 874 (Pa Super Ct 2006) *Lytle* indicated that a class arbitration waiver would be problematic in small-stakes cases *See* 810 A 2d at 666 (saying the record before us is devoid of any evidence that would establish that the damages claimed by appellants are insufficient to permit the Lytles to seek legal redress for their injuries in the absence of a class action [.] but going on to hold that upon remand the trial court may also receive and consider evidence relevant to the Lytles' argument that the costs associated with individual versus class based litigation of their claim would in light of the amount of their damages result in con

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tinuing immunity for [defendant] for its wrongful acts) *Thibodeau* later characterized the holding of *Lyle* as being that mandatory individual arbitration [is] unconscionable when it actually prohibits consumer claims 912 A 2d at 883

FN4 Before we reached that decision Verizon moved to stay the appeal pending our *en banc* consideration of *Puleo v Chase Bank USA* in which we addressed whether the question of arbitrability specifically the contention that a class action waiver was unconscionable and therefore unenforceable was for a court or arbitrator to decide 605 F 3d 172 175 (3d Cir 2010) (*en banc*) In *Puleo* we concluded among other things that when a contractual party challenges the validity of an arbitration agreement by contending that one or more of its terms is unconscionable and unenforceable a question of arbitrability is presented which is a gateway matter for judicial determination *Id* at 180 We explained that a challenge to a class arbitration ban necessarily calls into question the very authority of the arbitrator to preside over the dispute and by extension the validity of the [arbitration agreement] itself which necessarily makes it a question for the court to resolve *Id* at 183

FN5 That discussion was dicta because our holding in *Gay* was that Virginia law governed the parties arbitration agreement *Puleo* 605 F 3d at 177 n 2 (citing *Gay* 511 F 3d at 390) In our earlier opinion in this case we noted that even if the commentary about preemption were the holding of *Gay* it could still be reconciled with *Homa Litman* 381 Fed Appx at 142–43 We reasoned that under Pennsylvania case law an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate

id at 142 (quoting *Gay* 511 F 3d at 395) whereas the holding in *Homa* rested on the conclusion that in invalidating the class-arbitration waiver *Muhammad* applied general principles of contract and importantly did not evince hostility toward arbitration clauses in general *id* at 143 (citing *Homa* 558 F 3d at 230 and *Puleo* 605 F 3d at 177 n 2 ([T]he New Jersey case law at issue in *Homa* did not evince hostility toward arbitration clauses which was the concern about Pennsylvania law expressed in *Gay*))

FN6 The District Court had jurisdiction pursuant to 28 U S C § 1332(d) We have jurisdiction pursuant to 9 U S C § 16(a)(3)

We exercise plenary review over [a] District Court's decision to compel arbitration *Tripple Mfg Co v Niles Audio Corp* 401 F 3d 529, 531 (3d Cir 2005)

FN7 Like the New Jersey Supreme Court's decision in *Muhammad* the California Supreme Court held in *Discover Bank* that class arbitration waivers in consumer adhesion contracts are unconscionable and contrary to public policy when the 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 deliberately cheat[ed] large numbers of consumers out of individually small sums of money 30 Cal Rptr 3d 76 113 P 3d at 1110

FN8 Litman and Wachtel make two arguments against this outcome neither of which is compelling First, they posit that their Agreements with Verizon stipulate that New Jersey law—most significantly *Muhammad* —applies not federal law (Appellant Supp Br at 1) The Agreements choice of law provision reads that [e]xcept to the extent we've agreed other

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wise in the provision[] on arbitration or as required by Federal law disputes are to be governed by the laws of the state encompassing the area code assigned to [Litman and Wachtel's] phone number[s] when [Litman and Wachtel] accepted th[e] agreement[s] (App at 55 72) The arbitration provision reads that the FAA applies to the Agreements (App at 72) and independent of that the FAA governs the duty to honor arbitration agreements See 9 U S C §§ 1 et seq *Invista S A R L v Rhodia S A* 625 F 3d 75 83 (3d Cir 2010) (The Federal Arbitration Act creates a body of federal substantive law establishing and governing the duty to honor agreements to arbitrate disputes (internal citation and quotation marks omitted)) Thus New Jersey law applies only to the extent it is consistent with the FAA making Litman and Wachtel's first argument baseless Second Litman and Wachtel argue that they should be allowed to proceed to litigation because the Agreements say that if for some reason the prohibition on class arbitrations is deemed unenforceable then the agreement to arbitrate will not apply (App at 55 72) As Litman and Wachtel see it that provision was triggered by *Muhammad* However because *Muhammad* is preempted by the FAA it is inapplicable here and cannot trigger that provision

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Only the Westlaw citation is currently available

United States District Court
N D California
Genevieve MEYER Plaintiff
v
T-MOBILE USA INC Defendant

No C 10-05858 CRB
Sept 23 2011

Rosemary M Rivas Mark Punzalan Finkelstein
Thompson LLP San Francisco CA Gordon M
Fauth Jr Litigation Law Group Alameda CA for
Plaintiff

Joseph Edward Addiego III Davis Wright Tre-
maine LLP San Francisco CA James Condon
Grant Davis Wright Tremaine LLP Seattle WA
for Defendant

**MEMORANDUM AND ORDER GRANTING
MOTION TO COMPEL ARBITRATION AND
STAYING CASE**

CHARLES R BREYER District Judge

*1 Plaintiff Genevieve Meyer has brought a pu-
tative class action against T-Mobile USA Inc
(T-Mobile) alleging four causes of action relat-
ing to T-Mobile's assessment of state and federal
surcharges on its bills to subscribers for mobile
telephone services *See generally* Rivas Decl
(dkt 20-1) Ex A (Complaint)

Now pending is T-Mobile's Motion to Compel
Arbitration and Stay the Case *See generally* Mot
(dkt 16) T-Mobile argues that Plaintiff is bound to
an arbitration agreement including class action
waiver included in the Terms and Conditions (T
& C) of the Service Agreement Plaintiff signed
when she purchased and renewed her T-Mobile
phone service *See* Mot (dkt 16) at 2

Because Plaintiff's claims are covered by the

arbitration agreement and the arbitration agreement
is valid and enforceable the Motion to Compel Ar-
bitration is GRANTED and the case is STAYED

I BACKGROUND

In 1996 Congress passed the Telecommunica-
tions Act, requiring telecommunications companies
such as T-Mobile to contribute to a federal Univer-
sal Service Fund (Fed-USF) to facilitate univer-
sal telecommunications service Rivas Decl
(dkt 20-1) Ex A (Complaint) ¶ 3 A company's
required contribution to Fed-USF is calculated ac-
cording to the company's interstate and internation-
al telecommunications revenues and the company
may lawfully pass along to its subscribers the costs
of fulfilling its required contribution *Id* ¶ 3

California also has a Universal Service pro-
gram (Cal-USF) to which telecommunications
companies must contribute *Id* ¶ 5 A company's re-
quired contribution to Cal-USF is calculated ac-
cording to the company's intrastate revenues *Id* A
company may lawfully pass along to its subscribers
the costs of fulfilling its required contribution but
the company's calculation of its state contribution
cannot be based on its interstate or international
telecommunications revenues *Id*

Plaintiff Genevieve Meyer purchased two lines
of service and phones from T-Mobile on June 27
2004 *See generally* Baca Decl (dkt 17) Ex A
(2004 Service Agreement) Thereafter Plaintiff
renewed and extended her T-Mobile service three
times on June 28 2007 January 5 2008 and most
recently August 1 2008 Baca Decl (dkt 17) ¶ 5

Plaintiff claims that during her service con-
tract T-Mobile assessed Cal-USF fees based on
the aggregate calculation of intrastate interstate
and international telecommunications services
rather than on intrastate services alone T-Mobile's
practice of including interstate and international
revenues in the calculation of Cal-USF fees artifi-
cially and unlawfully inflates the five Cal-USF

charges on its subscribers phone bills Rivas Decl (dkt 20-1) Ex A (Complaint) ¶ 6 Based on T-Mobile's alleged misconduct, Plaintiff has brought a putative class action on behalf of herself and those similarly situated *Id* ¶ 1 Plaintiff alleges four causes of action (1) violation of the Federal Communications Act (FCA) (2) violation of California's Unfair Competition Law (UCL) (3) fraudulent concealment and (4) violation of the Consumers Legal Remedies Act (CLRA) *See generally id*

*2 T-Mobile argues that Plaintiff is bound to the arbitration agreement including class action waiver contained in the T & C of the Service Agreement Plaintiff signed when she purchased and renewed her T-Mobile phone service *See* Mot (dkt 16) at 2 Plaintiff argues that the arbitration agreement is unenforceable for the following reasons

(1) T-Mobile agreed that any provision in the Service Agreement rendered invalid under California law would be unenforceable, and the class action waiver was invalid under California law at the time Plaintiff entered the agreement in August 2008

(2) the arbitration agreement is unconscionable and

(3) the arbitration agreement would prevent Plaintiff from vindicating her statutory rights *See generally* Opp'n (dkt 20)

If the Court does not find the arbitration agreement unenforceable based on Plaintiff's arguments and available evidence Plaintiff requests to conduct limited discovery on the issue of whether the arbitration agreement is valid ^{FN1} *Id* at 17

FN1 On the eve of the hearing Plaintiff filed a Request for Judicial Notice of cases brought by T-Mobile alleging trade infringement and/or computer hacking *See generally* Request Local Civil Procedure

Rule 7-3(d) however prohibits additional memoranda papers or letters to be filed after a reply has been filed unless (1) new evidence has been submitted in the reply and the additional memoranda paper or letter states a party's objections to the new evidence, or (2) the additional memoranda paper or letter is a relevant judicial opinion [that was] published after the date the opposition or reply was filed Civ L R 7-3(d) As neither of the exceptions to Local Rule 7-3(d) apply Plaintiff's Request is improperly filed Even if Plaintiff's Request were properly filed the materials Plaintiff submits regarding alleged trade infringement and computer hacking by parties who were not legitimate T-Mobile customers are irrelevant to the disposition of the pending Motion

II LEGAL STANDARD

The Federal Arbitration Act (FAA) provides that an agreement to submit commercial disputes to arbitration 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 Congress's purpose in passing the Act was to put arbitration agreements upon the same footing as other contracts thereby reversing centuries of judicial hostility to arbitration agreements and allowing the parties to avoid the costliness and delays of litigation *Scherk v Alberto Culver Co* 417 U S 506 510-11 94 S Ct 2449 41 L Ed 2d 270 (1974) (quoting H R Rep No 96 68th Cong 1st Sess 1 2 (1924))

In applying the Act courts have developed a liberal federal policy favoring arbitration agreements *Moses H Cone Mem'l Hosp v Mercury Constr Co* 460 U S 1 24-25 103 S Ct 927 74 L Ed 2d 765 (1983) The Supreme Court has emphasized that courts should refer a matter for arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of

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an interpretation that covers the asserted dispute *United Steelworkers of Am v Warrior & Gulf Navigation Co* 363 U S 574 582–83, 80 S Ct 1347, 4 L Ed 2d 1409 (1960) In the absence of any express provision excluding a particular grievance from arbitration only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail *Id* at 584–85 Thus any doubt about the applicability of an arbitration clause must be resolved in favor of arbitration *Id* at 589

At the same time however the Supreme Court has repeatedly emphasized that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit *AT & T Tech Inc v Com mc'ns Workers of Am* 475 U S 643 648 106 S Ct 1415 89 L Ed 2d 648 (1986) (quoting *United Steelworkers* 363 U S at 582) Thus a federal courts task in reviewing the arbitrability of a particular dispute is to determine whether the parties have agreed to submit that dispute to arbitration

*3 The standard for demonstrating arbitrability is not high *Simula Inc v Autoliv Inc* 175 F 3d 717 719 (9th Cir 1999) By its terms the Act leaves no place for the exercise of discretion by a district court but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed *Dean Witter Reynolds v Byrd* 470 U S 213 105 S Ct 1238 84 L Ed 2d 158 (1985) (citing §§ 3 and 4 of the FAA) (emphasis in original)

The final phrase of § 2 of the FAA provides that arbitration agreements are to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract 9 U S C § 2 Thus in addition to determining the arbitrability of a dispute courts should determine the enforceability of the arbitration agreement Grounds for declaring an arbitration agreement unenforceable are determined by ordinary state law principles that govern the formation of contracts *Circuit City Inc v Adams* 279 F 3d 889 892 (9th

Cir 2002) (quoting *First Options of Chicago Inc v Kaplan* 514 U S 938 944 115 S Ct 1920 131 L Ed 2d 985 (1995)) [T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration *Green Tree Financial Corp-Alabama v Randolph* 531 U S 79 81 121 S Ct 513 148 L Ed 2d 373 (2000)

III DISCUSSION

A Plaintiff's Claims Are Covered By the Arbitration Agreement

Plaintiff's claims are covered by the arbitration agreement ^{FN2}

FN2 Indeed Plaintiff does not even contest this issue See generally Opp'n (dkt 20)

The arbitration agreement contained in the T & C states in relevant part

WE EACH AGREE THAT, EXCEPT AS PROVIDED BELOW ANY AND ALL CLAIMS OR DISPUTES BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OUR SERVICES, DEVICES OR PRODUCTS, INCLUDING ANY BILLING DISPUTES, WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT

See Baca Decl (dkt 17) Ex D (2008 T & C) ¶ 2 (emphasis in original)

The arbitration agreement also contains a class action waiver, which states in part

WE EACH AGREE THAT ANY DISPUTE RESOLUTION PROCEEDINGS, WHETHER IN ARBITRATION OR COURT, WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS OR REPRESENTATIVE ACTION OR AS A MEMBER IN A CLASS, CONSOLIDATED OR REPRESENTATIVE ACTION

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Id (emphasis in original)^{FN3} All of Plaintiff's causes of action—(1) violation of the FCA (2) violation of the UCL (3) fraudulent concealment and (4) violation of the CLRA—arise from T-Mobile's alleged misconduct in assessing surcharges on its bills and thus are billing disputes covered by the arbitration agreement. Because the class action waiver broadly covers any dispute resolution proceedings, whether in arbitration or court, it applies to all of Plaintiff's claims in this case. Thus, Plaintiff's claims are subject to arbitration unless the arbitration agreement is unenforceable.

FN3 T-Mobile has attached as exhibits its 2004 Service Agreement T & C and arbitration agreement with Plaintiff, as well as their 2008 Service Agreement T & C and arbitration agreement. *See generally* Baca Decl. (dkt 17). T-Mobile's Terms and Conditions have changed somewhat over the years, but all of the versions in effect during Ms. Meyer's tenure as a T-Mobile subscriber have contained an arbitration agreement and class action waiver. *Id.* ¶ 8.

Notwithstanding the modifications over the years, T-Mobile states that [b]ased on the most recent renewal of Ms. Meyer's T-Mobile service and contract, the June 28, 2008 version of the Terms & Conditions applies to her account. *Id.* Plaintiff also relies exclusively on the 2008 Service Agreement T & C and arbitration agreement in challenging the validity of the arbitration agreement. *See generally* Opp'n. As the only arbitration agreement at issue is the 2008 agreement, this order is based on the 2008 Service Agreement T & C and arbitration agreement unless otherwise specified.

B The Arbitration Agreement Is Valid and Enforceable

1 The Arbitration Agreement Is Not Governed Only By California Law

*4 Plaintiff argues that T-Mobile voluntarily and privately agreed to limit the application of the Agreement's terms, including the arbitration clause, if any of the terms were invalid under the law of a particular jurisdiction. Opp'n (dkt 20) at 6 (citing Baca Decl. (dkt 17), Ex. D (2008 T & C) ¶ 25). Citing the CLRA^{FN4} and *Discover Bank v. Superior Court*^{FN5}, Plaintiff argues that the class action waiver in the arbitration agreement was invalid under California law in August 2008 and thus is unenforceable now. *Id.*

FN4 Section 1751 of the CLRA renders as unenforceable and void any waiver of statutory rights, including the right to bring class actions, provided for under the CLRA. *See* Cal. Civ. Code § 1751.1751(a).

FN5 *Discover Bank* held that a class action waiver is unconscionable where 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. *Discover Bank v. Superior Court*, 36 Cal.4th 148, 162–63, 30 Cal. Rptr.3d 76, 113 P.3d 1100 (2005).

Plaintiff's argument is flawed both factually and legally. First, the arbitration agreement is not governed *only* by California law. *See* Baca Decl. (dkt 17), Ex. D (2008 T & C) ¶ 25 (This Agreement is governed by the Federal Arbitration Act, applicable federal law, and the laws of the state in which your billing address in our records is located). Second, Plaintiff's citations to the CLRA and *Discover Bank* are misplaced, as the FAA preempts both. *See Ting v. AT & T*, 319 F.3d 1126, 1147 (9th Cir. 2003) (holding that the FAA pre-

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mpts section 1751 of the CLRA prohibiting class action waivers) *AT & T Mobility LLC v Concepcion* — U S ——— 131 S Ct 1740 1753 179 L Ed 2d 742 (2011) (holding that the FAA preempts the *Discover Bank* rule) Although the Supreme Court decided *Concepcion* after Plaintiff entered the 2008 Service Agreement this Court must nonetheless apply *Concepcion* to its review of the agreement See *Ditto v McCurdy* 510 F 3d 1070 1076–77 (9th Cir 2007) (holding that an intervening Supreme Court decision must be given full retroactive effect in all cases still open on direct review and as to all events regardless of whether such events predate or postdate announcement of the rule) Considering the language of the Service Agreement and the federal and state law governing it the arbitration agreement's class action waiver is valid

2 The Arbitration Agreement Is Not Unconscionable

Under California law an arbitration agreement is unenforceable if it is both procedurally and substantively unconscionable See *Davis v O'Melveny & Mevers* 485 F 3d 1066 1072 (9th Cir 2007) Courts use a sliding scale under which the more procedural unconscionability there is the less substantive unconscionability is required and vice versa See *Armendariz v Found Health Psychcare Servs Inc* 24 Cal 4th 83 114 99 Cal Rptr 2d 745 6 P 3d 669 (2000)

I The Arbitration Agreement Is Not Procedurally Unconscionable

The analysis for procedural unconscionability focuses on oppression or surprise See *id* Procedural unconscionability addresses the manner in which agreement to the disputed term was sought or obtained such as unequal bargaining power between the parties and hidden terms included in contracts of adhesion *Szetela v Discover Bank* 97 Cal App 4th 1094 1099 118 Cal Rptr 2d 862 (2002) A contract of adhesion is a standardized contract which imposed and drafted by the party of superior bargaining strength, re-

legates to the subscribing party only the opportunity to adhere to the contract or reject it and with no opportunity to negotiate *Armendariz* 24 Cal 4th at 113–15 99 Cal Rptr 2d 745 6 P 3d 669 There is no contract of adhesion however if the contract provides a meaningful opportunity to opt-out of arbitration *Circuit City Stores Inc v Ahmed* 283 F 3d 1198, 1199 (9th Cir 2002) (finding no procedural unconscionability where plaintiff was given thirty days to decide whether to participate in the arbitration program and mail a simple form to opt-out and the arbitration agreement did not contain any other indicia of procedural unconscionability)

*5 The Service Agreement contains some characteristics of a contract of adhesion it is a standardized contract drafted by T-Mobile the party with superior bargaining strength See Opp n (dkt 20) at 8 However the Service Agreement did not relegate Plaintiff only to the opportunity to accept the arbitration agreement or reject T-Mobile's phone service Instead the agreement contains an **opt-out provision**, which states in relevant part

YOU MAY CHOOSE TO PURSUE YOUR CLAIM IN COURT AND NOT BY ARBITRATION if (a) your claim qualifies, you may initiate proceedings in small claims court or (b) **YOU OPT OUT OF THESE ARBITRATION PROCEDURES WITHIN 30 DAYS FROM THE DATE YOU ACTIVATED THAT PARTICULAR LINE OF SERVICE** (the “Opt Out Deadline”) You may opt out of these arbitration procedures by calling 1–866–323–4405 or via the internet by completing the opt out form located on **www.t-mobiledisputeresolution.com** Any **opt-out received after the Opt Out Deadline will not be valid and you must pursue your claim in arbitration or small claims court**

Baca Decl (dkt 17) Ex D (2008 T & C) ¶ 2 (emphasis in original) ^{FN6} Plaintiff thus had thirty days to decide whether to opt out of the arbitration agreement and had the option to do so either by phone or internet Further the opt out provision does not describe any adverse consequences of opt-

ing out of arbitration and Plaintiff does not allege that she would have suffered any *See* Opp'n (dkt 20) at 10. Moreover, Plaintiff was informed of the legal consequences of failing to opt out.^{FN7} *See* Baca Decl (dkt 17) Ex D (2008 T & C) ¶ 2.

FN6 Although the 2008 T & C contains an opt-out provision, there is no opt out provision in the 2004 Service Agreement or T & C. *See* Baca Decl (dkt 17) Ex A (2004 Service Agreement) ¶ 3 *id* Ex B (2004 T & C) ¶ 3.

FN7 The arbitration agreement states in pertinent part:

THERE IS NO JUDGE OR JURY IN ARBITRATION AND COURT REVIEW OF AN ARBITRATION AWARD IS LIMITED. THE ARBITRATOR MUST FOLLOW THIS AGREEMENT AND CAN AWARD THE SAME DAMAGES AND RELIEF AS A COURT (INCLUDING ATTORNEYS' FEES). Baca Decl (dkt 17) Ex D (2008 T & C) ¶ 2.

Neither the opt-out provision nor the arbitration agreement was a hidden term. The arbitration agreement is located in the second numbered paragraph of the T & C of the Service Agreement and is written in capitalized and bolded letters. *See id*. The opt out provision immediately follows the arbitration agreement in the second numbered paragraph of the T & C and is also written in capitalized and bolded letters. *Id*. Finally, the class action waiver is also located in the second numbered paragraph of the T & C, written in capitalized and bolded letters and contains the heading "**CLASS ACTION WAIVER**". *Id* ¶ 3 (emphasis in original). T-Mobile's T & C are also included in a pamphlet packaged in the boxes of all phones sold by T-Mobile. *see* Baca Decl (dkt 17) ¶ 9 and although Plaintiff does not recall a pamphlet being included in her phone box. *see* Meyer Decl (dkt 20-17) ¶ 7, she does not provide any informa-

tion countering T-Mobile's showing. Because the arbitration agreement contains an opt-out provision and is presented in a clear format, the arbitration agreement is not procedurally unconscionable. *See Arellano v T-Mobile USA, Inc.*, No. C 10-05663 WHA, 2011 WL 1362165, at * 1-2 (N D Cal Apr 11, 2011) (finding no procedural unconscionability for a T-Mobile arbitration agreement that very closely resembles the one in this case).

II. The Arbitration Agreement Contains Some Elements of Substantive Unconscionability

*6 The analysis for substantive unconscionability focuses on an arbitration agreement's overly harsh or one-sided results. *See Armendariz*, 24 Cal 4th at 114, 99 Cal Rptr 2d 745, 6 P 3d 669. Courts require arbitration agreements to contain a modicum of bilaterality. *Id* at 117, 99 Cal Rptr 2d 745, 6 P 3d 669. There is no bilaterality if the arbitration agreement compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party. *Fitz v NCR Corp.*, 118 Cal App 4th 702, 724, 13 Cal Rptr 3d 88 (2004) (citing *Armendariz*, 24 Cal 4th at 119, 99 Cal Rptr 2d 745, 6 P 3d 669). Arbitration agreements limiting the amount of damages that would otherwise be available in court are also substantively unconscionable. *See Ingle v Circuit City Stores, Inc.*, 328 F 3d 1165, 1179 (9th Cir 2003). To determine whether the arbitration agreement is sufficiently bilateral, courts should look beyond facial neutrality and examine the actual effects of the challenged provision. *Ting*, 319 F 3d at 1149.

The arbitration agreement provides for neutral arbitration. *See* Baca Decl (dkt 17) Ex D (2008 T & C) ¶ 2 (The American Arbitration Association (AAA) will arbitrate all disputes). Parties in arbitration can receive the same damages that would otherwise be available in court. *Id* (An arbitrator may award on an individual basis any relief that would be available in a court, including injunctive or declaratory relief and attorneys' fees). Plaintiff

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also does not have to pay arbitrators fees for claims under \$75,000 *Id* (We [T-Mobile] will pay upon filing of the arbitration demand all filing administration and arbitrator fees for claims that total less than \$75 000) Plaintiff argues that T-Mobile's unilateral power to modify the agreement is unconscionable *see* Opp'n (dkt 20) at 13 but Plaintiff has not shown how the modification clause has been applied to her Plaintiff thus lacks standing to challenge the provision *See Lee v Am Express Travel Related Servs Inc* 348 Fed Appx 205 207 (9th Cir 2009) (Plaintiffs cannot satisfy the requirements of Article III because they have not yet been injured by the mere inclusion of these provisions, nor is the threat of future harm from such provisions sufficiently imminent to confer standing)

Notwithstanding some of the bilateral terms in the arbitration agreement the agreement contains some elements of substantive unconscionability The arbitration agreement allows T-Mobile to assign outstanding bills to collection agencies that can then pursue the claims against customers in court but the agreement does not provide customers with the same unequivocal power (customers must opt out of arbitration)^{FN8} Assuming T-Mobile invoked this right in the face of a claim by a customer that the past due amount was wrongly charged the agreement would compel the customer the weaker party to arbitration while exempting T-Mobile the stronger party from arbitration This provision makes the arbitration agreement substantively unconscionable as to this aspect of the agreement but as there is no procedural unconscionability the arbitration agreement is not unconscionable on the whole *See Gatton v T-Mobile USA Inc* 152 Cal App 4th 571 599 61 Cal Rptr 3d 344 (2007) (Because there is an absence on this record of both the surprise and oppression factors of procedural unconscionability the service agreement is not unconscionable and T-Mobile's motion to compel arbitration should be granted)

FN8 The arbitration agreement states in

relevant part

We each agree that if you fail to timely pay amounts due we may assign your account for collection and the collection agency may pursue in court claims limited strictly to the collection of the past due amounts and any interest or cost of collection permitted by law or the Agreement

Baca Decl (dkt 17) Ex D (2008 T & C) ¶ 2 (emphasis in original)

3 Plaintiff's Statutory Claims Are Arbitrable

I Plaintiff's Federal Statutory Claim Is Arbitrable

*7 Contractual arbitration agreements are equally applicable to statutory claims as to other types of common law claims *Lozano v AT & T Wireless Services Inc* 504 F 3d 718 725 (9th Cir 2007) Indeed absent fraud or overwhelming economic power that would provide grounds for the revocation of any contract the FAA provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 U S 614 627 105 S Ct 3346 87 L Ed 2d 444 (1985) (internal citation omitted)

Agreements subjecting federal statutory claims to arbitration must be enforced unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue *Mitsubishi Motors Corp* 473 U S at 628 If such an intention exists it will be discoverable in the text of the [statute], its legislative history or an inherent conflict between arbitration and the [statute's] underlying purposes *Gilmer v Interstate/Johnson Lane Corp* 500 U S 20 26 111 S Ct 1647 114 L Ed 2d 26 (1991) (internal citation omitted) The burden to show such Congressional intent is on the party opposing arbitration *See Loz*

ano 504 F 3d at 725–26 (internal citation omitted)

Plaintiff has not shown how the text of the FCA or its legislative history evinces a Congressional intent to preclude arbitration of Plaintiff's FCA claim. To the extent Plaintiff argues that there is an inherent conflict between arbitration and the FCA's underlying purpose, her argument has been foreclosed by *Lozano*, in which the Ninth Circuit ruled that claims under the FCA may be subject to mandatory arbitration. See *Lozano*, 504 F 3d at 726–27. (Neither the public policy considerations in the FCA, nor the inequality of bargaining power between the parties, is sufficient to show congressional intent to preclude arbitration.) Thus, Plaintiff's claim under the FCA is arbitrable.

ii Plaintiff's State Statutory Claims Are Arbitrable

Plaintiff argues that the arbitration agreement is unenforceable because it would deny her from exercising her statutory right to seek injunctive relief under the UCL and CLRA, rights affirmed by the California Supreme Court. See Opp'n (dkt 20) at 16 (citing *Broughton v. Cigna Healthplans of Cal.*, 21 Cal 4th 1066, 90 Cal Rptr 2d 334, 988 P 2d 67 (1999) and *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal 4th 303, 133 Cal Rptr 2d 58, 66 P 3d 1157 (2003)).^{FN9} *Broughton* held that public injunctive relief claims under the CLRA are inarbitrable. See *Broughton*, 21 Cal 4th at 1080, 1082, 90 Cal Rptr 2d 334, 988 P 2d 67 (holding such claims inarbitrable because the purpose of such relief is to remedy a public wrong, and the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators.) *Cruz* held that public injunctive relief claims brought under the UCL and FAL are also inarbitrable. See *Cruz*, 30 Cal 4th at 316, 133 Cal Rptr 2d 58, 66 P 3d 1157.

FN9 Plaintiff has filed a statement of recent decision pursuant to L.R. 7–3(d) as well. The Court has considered these au-

thorities but finds they do not alter its conclusions for the reasons discussed in more detail below.

*8 *Concepcion* holds that the FAA preempts state law to the extent the state law would preclude enforcement of arbitration agreements according to their terms so as to create streamlined proceedings, even if the state law is based on public policy. *Concepcion*, 131 S Ct at 1748. The effect of *Concepcion* on California's law prohibiting arbitration of public injunctive relief claims was recently addressed by a court in this district, which concluded the FAA preempts California's law. See *Arellano v. T-Mobile USA, Inc.*, No. C 10–05663 WHA, 2011 WL 1842712 at *1 (N D Cal. May 16, 2011).

Arellano involved facts and issues very similar to this case. Plaintiff brought a class action against T-Mobile seeking injunctive relief among other remedies for claims brought under the CLRA and UCL. See *Arellano*, 2011 WL 1842712 at *1. T-Mobile argued that the claims should be arbitrated based on the parties' arbitration agreement, which very closely resembled the one in this case. See *Arellano*, 2011 WL 1362165 at *1. Plaintiff made several public policy arguments for why the CLRA and UCL claims were inarbitrable. See *Arellano*, 2011 WL 1842712 at *2. Judge Alsup, however, ruled that the FAA preempts California's preclusion of public injunctive relief claims from arbitration, at least for actions in federal court. *Id.* at *1. (The recent *Concepcion* decision compels preemption. When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward. The conflicting rule is displaced by the FAA. (citing *Concepcion*, 131 S Ct at 1747).)

Plaintiff in this case makes the same public policy arguments as plaintiff in *Arellano* for why her CLRA and UCL claims are inarbitrable. See Opp'n (dkt 20) at 13–17. (If arbitration is compelled, the claims of Plaintiff and other T-Mobile customers are almost certain to go unresolved.)

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However both *Arellano* and *Concepcion* rejected this argument. See *Concepcion* 131 S Ct at 1753 (The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA even if it is desirable for unrelated reasons.)

Several other courts have also held that the FAA preempts *Broughton* and *Cruz* because they amount to state law[s] prohibit[ing] outright the arbitration of a particular type of claim. See *Nelson v AT & T Mobility LLC* No. 10-4802 2011 WL 3651153 at *2 (N D Cal Aug 18 2011) *In re Apple and AT & T iPad Unlimited Data Plan Litigation* No. 10-2553 2011 WL 2886407 at *4 (N D Cal July 19 2011) *Kaltwasser v AT & T Mobility LLC* No. 07-411 (N D Cal Sept 20 2011) (all quoting *Concepcion* 131 S Ct at 1747).

The Court is aware that one district court came to the opposite conclusion. In *In re DirecTV Early Cancellation Fee Marketing and Sales Practices Litigation* the Court held *Concepcion* did not overrule *Cruz* and *Broughton*. — F Supp 2d — No. 09-2093 2011 WL 4090774 at *9-10 (C D Cal Sept 6 2011). There the Court found that *Cruz* and *Broughton* were not an outright prohibition of certain claims but rather that arbitration was improper for only certain categories of injunctive claims—namely those brought when a plaintiff is acting as a private attorney general and seeking an injunction to vindicate a public right. *Id.* at *10. 90 Cal Rptr 2d 334 988 P 2d 67. While the Court does raise compelling policy arguments to support this conclusion see *id.* (discussing the benefits of a judicial forum for such actions in comparison to an arbitral forum), this Court finds this no longer tenable post *Concepcion*.

*9 *Concepcion* held that [w]hen state law prohibits outright the arbitration of a particular type of claim the analysis is straightforward. The conflicting rule is displaced by the FAA. 131 S Ct 1747. The Central District is correct that *Cruz* and

Broughton do not prohibit outright the arbitration of all injunctive relief claims under the CLRA and UCL but they do prohibit outright the arbitration of all injunctive relief claims brought in the capacity of a private attorney general that seek a public injunction. While this is a more narrow particular type of claim it is still a state court application of public policy to prohibit an entire category of claims. This Court does not disagree with the Central District that public policy supporting such a prohibition may be compelling but such a prohibition does not survive *Concepcion*. Thus Plaintiff's claims under the CLRA and UCL are arbitrable.

C Plaintiff Is Not Entitled to Arbitration-Related Discovery

If the Court does not find the arbitration agreement unenforceable based on the present record Plaintiff requests to conduct limited discovery on the issue of whether the arbitration agreement is valid. Opp'n (dkt 20) at 17. For reasons discussed below Plaintiff's proposed discovery requests are beyond the scope allowed by the FAA and are denied.

The FAA calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses. *Moses H Cone Mem'l Hosp* 460 U S at 29. It was Congress's clear intent in the [FAA] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible. *Bell v Koch Foods of Miss LLC* 358 Fed Appx 498 500-01 (5th Cir 2009) (quoting *Moses H Cone Mem'l Hosp* 460 U S at 22). As part of the FAA's strong policy favoring arbitration the statute provides for discovery and a full trial in connection with a motion to compel arbitration only if the making of the arbitration agreement or the failure neglect or refusal to perform the same be in issue. *Simula Inc* 175 F 3d at 726 (quoting 9 U S C § 4). Courts may only consider issues relating to the making and performance of the agreement to arbitrate. *Id.* at 726. District courts in the Ninth Circuit and the Ninth Circuit itself have allowed a party opposing a motion

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to compel arbitration to conduct discovery relevant to the issue of unconscionability *See Hoffman v Citibank (South Dakota) NA* 546 F 3d 1078 1085 (9th Cir 2008) (remanding case to district court to expand the record on the issue of procedural unconscionability) *see also Coneff v AT & T Corp* No C06-0944RSM 2007 U S Dist LEXIS 20502 at *8-10 2007 WL 738612 (W D Wash Mar 9 2007) (allowing discovery requests related to the issue of unconscionability but not the merits of the parties underlying dispute) *Hamby v Power Toyota Irvine* No 11cv544-BTM (BGS) 2011 WL 2852279 at *1 (S D Cal July 18 2011) (citing *Coneff* in granting plaintiff's ex parte application for arbitration-related discovery)

*10 Most of Plaintiff's discovery requests do not relate to the validity of Plaintiff's arbitration agreement with T-Mobile. Instead they concern all agreements disputes arbitrations and lawsuits relating to T-Mobile customers in California *other than Plaintiff* for the entire seven year relevant time period. *See id* Ex G (First Set of Requests to Produce Documents) ¶ 9 (requesting DOCUMENTS showing the highest median and mean monetary awards in arbitrations involving T-MOBILE and CUSTOMERS during the RELEVANT TIME PERIOD) *id* ¶ 11 (requesting DOCUMENTS showing the amounts paid to CUSTOMERS or the outcomes of all lawsuits filed against T-MOBILE in any small claims state or federal court during the RELEVANT TIME PERIOD) Plaintiff's remaining discovery requests concern T-Mobile's past T & C and arbitration procedures. *See id* ¶ 2 (All DOCUMENTS RELATING TO ARBITRATION PROCEDURES including without limitation all originals and revisions that were in effect during the RELEVANT TIME PERIOD) *id* ¶ 3 (The TERMS AND CONDITIONS used by T-MOBILE including all originals and revisions that were in effect during the RELEVANT TIME PERIOD) However the only arbitration agreement at issue is the 2008 agreement and the documents relevant to determining the validity of that arbitration agreement the 2008 Service Agree-

ment T & C and arbitration agreement—are already accessible by the parties and the Court. *See Baca Decl* (dkt 17) Ex C (2008 Service Agreement) *id* Ex D (2008 T & C) *Rivas Decl* (dkt 20-1) Ex J (AAA Supplementary Procedures for ConsumerRelated Disputes) Because Plaintiff's proposed discovery requests are either overly broad or irrelevant to the disposition of the pending Motion Plaintiff is not entitled to discovery.

III CONCLUSION

For the foregoing reasons T-Mobile's Motion to Compel Arbitration is GRANTED and the case is STAYED.

IT IS SO ORDERED

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United States District Court
N D California
Kip NELSON Plaintiff
v
AT & T MOBILITY LLC Defendant

No C10-4802 TEH
Aug 18 2011

Eric H Gibbs A J De Bartolomeo David K Stein
Girard Gibbs LLP San Francisco CA for Plaintiff

John Nadolenco Steven Edward Rich Mayer
Brown LLP Los Angeles CA Donald M Falk
Mayer Brown LLP Palo Alto CA for Defendant

*ORDER GRANTING DEFENDANT'S MOTION TO
COMPEL ARBITRATION AND STAY CASE*
THELTON E HENDERSON District Judge

*1 This matter comes before the Court on a motion to compel arbitration brought by Defendant AT & T Mobility LLC (ATTM or AT & T). After carefully reviewing the parties written arguments the Court finds oral argument to be unnecessary and hereby VACATES the hearing scheduled for August 22 2011. For the reasons set forth below ATTM's motion is GRANTED.

BACKGROUND

Plaintiff Kip Nelson seeks to represent a class of persons who have an AT & T wireless account with both a California area code and a California billing address. First Am Compl (FAC) ¶ 29. He contends that ATTM has overbilled him and members of the proposed class by improperly calculating certain surcharges on their monthly bills. Nelson's original complaint sought damages under 47 U.S.C. § 206 and equitable and injunctive relief under California's unfair competition law (UCL) Cal. Bus. & Prof. Code §§ 17200 *et seq.*

Following the United States Supreme Court's April 27 2011 decision in *AT & T v. Concepcion* — U.S. — 131 S.Ct. 1740 179 L.Ed.2d 742 the parties stipulated that Nelson could file an amended complaint. The FAC removed prayers for damages and equitable relief and now seeks only injunctive relief—namely an order enjoining AT & T from continuing to engage in unlawful business practices as alleged under the UCL and the Consumers Legal Remedies Act (CLRA) Cal. Civil Code §§ 1750 *et seq.* FAC at 11.

Nelson does not dispute that his contract with ATTM includes a clause that requires arbitration of “all disputes and claims” between Nelson and ATTM. Ex. 1 to Bennett Decl. at 2 ECF No. 10 (emphasis in original). The agreement specifically waives the right to a jury trial and the right to participate in a class action *id.* and further provides that

The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. **YOU AND AT & T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.** Further unless both you and AT & T agree otherwise the arbitrator may not consolidate more than one person's claims and may not otherwise preside over any form of a representative or class proceeding. If this specific proviso is found to be unenforceable then the entirety of this arbitration provision shall be null and void.

Id. at 3 (emphasis in original).

DISCUSSION

ATTM now moves to compel arbitration under the agreement. Nelson opposes the motion on the

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grounds that a request for issuance of a public injunction is inarbitrable. Opp'n at 1 and relies on two California Supreme Court decisions for support: *Broughton v. Cigna Healthplans of California*, 21 Cal 4th 1066, 90 Cal Rptr 2d 334, 988 P 2d 67 (1999) and *Cruz v. PacifiCare Health Systems Inc.*, 30 Cal 4th 303, 133 Cal Rptr 2d 58, 66 P 3d 1157 (2003). The *Broughton* court held that public injunctive relief claims under the CLRA are inarbitrable and that this conclusion did not violate the Federal Arbitration Act (FAA). *Broughton*, 21 Cal 4th at 1079–84, 90 Cal Rptr 2d 334, 988 P 2d 67. After considering intervening United States Supreme Court decisions, the *Cruz* court concluded that *Broughton* remained good law and extended *Broughton* to bar arbitration of public injunctive relief claims under the UCL. *Cruz*, 30 Cal 4th at 311–16, 133 Cal Rptr 2d 58, 66 P 3d 1157. Public injunctive relief claims are designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff. *Id.* at 316, 133 Cal Rptr 2d 58, 66 P 3d 1157. ATTM contends that the California Supreme Court's decisions barring arbitration of such claims under the CLRA and UCL cannot stand following *Concepcion*. This Court agrees with ATTM for the reasons discussed below.

*2 In *Discover Bank v. Superior Court*, the California Supreme Court held that an arbitration agreement containing a class action waiver is unconscionable under California law and should not be enforced where

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

Discover Bank, 36 Cal 4th 148, 162–63, 30 Cal Rptr 3d 76, 113 P 3d 1100 (2005). The court further held that the FAA does not prohibit a Cali-

fornia court from refusing to enforce a class action waiver that is unconscionable. *Id.* at 173, 30 Cal Rptr 3d 76, 113 P 3d 1100.

The United States Supreme Court disagreed and concluded that the *Discover Bank* rule was preempted by the FAA. *Concepcion*, 131 S Ct at 1753. Section 2 of the FAA permits agreements to arbitrate to be invalidated by generally applicable contract defenses such as fraud, duress, or unconscionability but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Id.* at 1746 (internal quotation marks and citation omitted). However, [a]lthough § 2's saving clause preserves generally applicable contract defenses nothing in it suggests an intent to preserve state law rules that stand as an obstacle to the accomplishment of the FAA's objectives. *Id.* at 1748. States cannot require a procedure that is inconsistent with the FAA even if it is desirable for unrelated reasons. *Id.* at 1753. The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms. *Id.* at 1748 (internal quotation marks alteration and citation omitted). Thus, [w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward. The conflicting rule is displaced by the FAA. *Id.* at 1747.

This is precisely the situation in this case. Nelson argues that *Broughton* and *Cruz* are not state law as contemplated by *Concepcion* and instead are interpretations of federal law but this Court is not so persuaded. The California Supreme Court made clear that it was interpreting state statutes. *E.g.* *Broughton*, 21 Cal 4th at 1082, 90 Cal Rptr 2d 334, 988 P 2d 67. (Nor do we believe that *this interpretation of the CLRA* contravenes the FAA (emphasis added)). *Broughton*, 30 Cal 4th at 315–16, 133 Cal Rptr 2d 58, 66 P 3d 1157 (focusing on the legislative intent behind the UCL in determining whether public injunctive relief claims under the statute were arbitrable). Although both courts considered federal case law, their ulti-

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mate conclusions were interpretations of state law—namely that two California statutory schemes the CLRA and UCL do not provide for arbitration of public injunctive relief claims. As another court in this district recently concluded, *Concepcion* compels preemption of such blanket bans under state law. *Arellano v T-Mobile USA, Inc.* No. C10-5663 WHA, 2011 WL 1842712 at *2 (N D Cal May 16, 2011) (holding that the Act preempts California's exemption of claims for public injunctive relief from arbitration at least for actions in federal court). This is true even though plaintiffs may argue that preclusion of injunctive relief on behalf of the class equates to preclusion of the ability to obtain effective relief [relief]—enjoining deceptive practices on behalf of the public in general. *Id.* (internal quotation marks and citation omitted) and in spite of public policy arguments thought to be persuasive in California. *Id.*

*3 Other district courts have reached the same conclusion. *E.g., In re Gateway LX6810 Computer Prods. Litig.* No. SACV 10-1563-JST (JEMx), 2011 WL 3099862 at *3 (C D Cal July 21, 2011) (holding that Plaintiffs' claims for injunctive relief [under the CLRA and UCL] must be resolved in arbitration pursuant to the DRP [dispute resolution provision of the limited warranty at issue]). *In re Apple & AT & T iPad Unlimited Data Plan Litig.* No. C10-2553 RMW, 2011 WL 2886407 at *4 (N D Cal July 19, 2011) (following *Arellano*). *Zarandi v Alliance Data Sys. Corp.* No. CV 10-8309 DSF (JCGx), 2011 WL 1827228 at *2 (C D Cal May 9, 2011) (rejecting plaintiffs' request to bifurcate the claims seeking injunctive relief because the FAA preempts state law to the extent it prohibits arbitration of a particular type of claim). *See also Cardenas v AmeriCredit Fin. Servs. Inc.* Nos. C09-4978 SBA & C09-4892 SBA, 2011 WL 2884980 at *3 (N D Cal July 19, 2011) (granting a motion to stay pending appeal in part because *Concepcion*'s straightforward analysis arguably compels the conclusion that the FAA preempts both [*Broughton* and *Cruz*]).

Nelson does not offer any authority directly holding to the contrary—i.e., post *Concepcion* cases holding that public injunctive relief claims under the UCL and CLRA cannot be arbitrated. Instead, he relies on three cases interpreting California's Private Attorney General Act (PAGA), the purpose of which is not to recover damages or restitution but to create a means of deputizing citizens as private attorneys general to enforce the Labor Code. *Brown v Ralphs Grocery Co.*, 197 Cal App 4th 489, 128 Cal Rptr 3d 854, 2011 WL 2685959 at *6 (2011) (citation omitted). First, a California appellate court analogized PAGA claims to UCL and CLRA public injunctive relief claims, citing *Broughton* and *Cruz*, and determined that representative actions under the PAGA do not conflict with the purposes of the FAA. If the FAA preempted state law as to the unenforceability of the PAGA representative action waivers, the benefits of private attorney general actions to enforce state labor laws would, in large part, be nullified. *Id.* The court concluded that

United States Supreme Court authority [including *Concepcion*] does not address a statute such as the PAGA, which is a mechanism by which the state itself can enforce state labor laws for the employee suing under the PAGA does so as the proxy or agent of the state's labor law enforcement agencies. And even if a PAGA claim is subject to arbitration, it would not have the attributes of a class action that the [*Concepcion*] case said conflicted with arbitration, such as class certification, notices, and opt outs. Until the United States Supreme Court rules otherwise, we continue to follow what we believe to be California law.

Id. at *7, 133 Cal Rptr 2d 58, 66 P 3d 1157 (internal quotation marks, citation, and footnote omitted). Second, a federal district court recently agree[d] with the *Brown* court's reasoning that class action waivers contained in arbitration agreements may not be used to divest plaintiffs of their right to bring representative actions under PAGA.

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Plows v Rockwell Collins Inc No SACV 10-01936 DOC (MANx) 2011 WL 3501872 at *5 (C D Cal Aug 9 2011) And third a California trial court independently reached a similar conclusion *Sheen v Lorre* Case No SC 111794 at 12-18 (Cal Super Ct June 15 2011) (Ex 1 to Gibbs Decl)

*4 However in a case decided before *Brown* a district court explained why *Concepcion* compelled enforcement of arbitration agreements even where the agreements barred an employee from bringing a representative PAGA claim

[R]equiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA. A claim brought on behalf of others would, like class claims make for a slower more costly process. In addition representative PAGA claims increase[] risks to defendants by aggregating the claims of many employees. See [*Concepcion* 131 S Ct] at 1752. Defendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would go uncorrected given the absence of multilayered review. See *id*. Just as [a]rbitration is poorly suited to the higher stakes of class litigation it is also poorly suited to the higher stakes of a collective PAGA action. See *id*. The California Court of Appeals decision in *Franco* [which was relied on by *Brown* 2011 WL 2685959 at *4-5] shows only that a state might reasonably wish to require arbitration agreements to allow for collective PAGA actions. See *Franco v Athens Disposal Co* 171 Cal App 4th 1277 90 Cal Rptr 3d 539 558 (2009)] *AT & T v Concepcion* makes clear however that the state cannot impose such a requirement because it would be inconsistent with the FAA. See *Concepcion* 131 S Ct at 1753.

For these reasons the Court concludes that Quevedo's PAGA claim is arbitrable and that the arbitration agreements provision barring him from bringing that claim on behalf of other employees is enforceable.

Quevedo v Macy's Inc No CV 09-1522 GAF MANX 2011 WL 3135052 at *17 (C D Cal June 16 2011) ^{FN1} This Court agrees with the *Quevedo* court's reasoning as to why *Concepcion* preempts California law holding that a PAGA claim is inarbitrable and the Court therefore does not find the PAGA cases relied on by Nelson to be persuasive.

FN1 Curiously, the *Brown* majority cited *Quevedo* only in a footnote on the issue of whether a PAGA claim can be arbitrated on an individual basis. *Brown* 197 Cal App 4th 489 128 Cal Rptr 3d 854 2011 WL 2685959 at *7 n 8. It did not otherwise attempt to refute the *Quevedo* court's conclusions. *Quevedo* was, however cited in dissent. *Id* at * 11 (Kriegler J concurring and dissenting).

In short the Court concludes that *Concepcion* compels arbitration in this case. The United States Supreme Court has made clear that a state cannot require a procedure that is inconsistent with the FAA regardless of how desirable that procedure may be. *Concepcion* 131 S Ct at 1753 nor can a state prohibit[] outright the arbitration of a particular type of claim. *id* at 1747. The FAA therefore preempts the holdings of the California Supreme Court in *Broughton* and *Cruz* that the CLRA and UCL respectively do not permit arbitration of public injunctive relief claims.

CONCLUSION

Accordingly with good cause appearing ATTM's motion to compel arbitration is GRANTED and this case is STAYED pending arbitration of Nelson's claims. The parties shall proceed immediately to arbitration and shall file a joint case management statement within one week of the completion of arbitration or on or before **December 12, 2011**, whichever is sooner. If the Court believes that the parties are not diligently pursuing arbitration it may subsequently order the parties to appear for a case management conference on **December 19, 2011, at 1:30 PM**.

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***5 IT IS SO ORDERED**

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Only the Westlaw citation is currently available

United States District Court
N D Illinois
TORY

v

FIRST PREMIER BANK et al

No 10 C 7326
Sept 26 2011

STATEMENT—OPINION

PHILIP G REINHARD J

*1 Plaintiff, Bruce Tory, brings this putative class action against defendants First Premier Bank Premier Bankcard and United National Corporation asserting several state law claims. Jurisdiction is alleged under the Class Action Fairness Act 28 U.S.C. § 1332(d). The complaint alleges a violation of the Illinois Consumer Fraud Act (Count I) breach of contract (Count II) and unjust enrichment (Count V). It also seeks injunctive relief and restitution (Count III) and a declaratory judgment (Count IV). Defendants move to compel arbitration and alternatively to dismiss for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). While these motions were pending the United States Supreme Court decided *AT & T Mobility LLC v. Concepcion* — U.S. — 131 S.Ct. 1740 179 L.Ed.2d 742 (2011). The court requested and received supplemental briefs on the impact of *Concepcion* on the motion to compel arbitration.

Plaintiff obtained a credit card from First Premier Bank. The credit card agreement (Agreement) contains an arbitration clause. The arbitration clause provides in part: Any claim arising out of or relating to this Contract or the breach of this Contract or your Credit Account shall be resolved and settled exclusively and finally by binding arbitration in accordance with this Provision. The arbitration clause also provided a

waiver of any right to pursue any claim as a class action. It further gave plaintiff a right to opt-out of the arbitration provision and to retain his rights to litigate in court by providing First Premier Bank with written notice within thirty days of the opening of his account. Plaintiff did not opt-out.

Plaintiff became enrolled in First Premier Bank's credit protection plan (Plan). The Plan provides some form of benefit related to the outstanding balances and minimum payments due on plaintiff's credit card with First Premier Bank on the occurrence of certain covered events (death, job loss, disability, family leave, and hospitalization). At the time plaintiff became enrolled in the Plan, he was unemployed. Plaintiff's credit card was billed each month at the rate of \$ 89 per \$100 of his outstanding credit card balance to participate in the Plan. Plaintiff made at least one claim under the Plan which was declined. Plaintiff has continued to pay for the Plan. The terms of the Plan are set out in a document entitled PREMIER Credit Protection Contract. This document does not contain an arbitration clause. This document apparently was not signed by plaintiff.

The threshold question is whether the arbitration provision in the Agreement applies to plaintiff's claims concerning credit protection and disputes arising under the Plan. The Agreement's arbitration clause states it applies to [a]ny claim arising out of or relating to this Contract, or the breach of this Contract or your Credit Account. The Agreement defines claim to mean any claim, dispute, or controversy by either you or us arising out of or relating in any way to this Contract, this Provision (including claims regarding the applicability, enforceability, or validity of this Provision), your Credit Account, any transaction on your Credit Account, and our relationship.

*2 It is apparent from reviewing the Plan that the Plan's very existence depends on the Agreement and the credit account the Agreement establishes.

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The Plan's benefits are exclusively tied to the outstanding balances and minimum payments due on the credit account created by the Agreement. The occurrence of certain events specified in the Plan obligates First Premier Bank to provide certain benefits concerning amounts owed or minimum payments due on the customer's credit account. The Plan is paid for by the customer via a periodic transaction on the customer's credit account. As the order of March 23, 2011, in *Marquez v First Premier Bank*, No. CV 10-6898, p. 2 (C.D. Cal. Mar. 23, 2011),^{FN1} observed in addressing the identical issue, "[t]he subject matter of Credit Protection is within the scope of arbitrable issues under this provision because Credit Protection is a completely derivative service. Claims relating to the Plan are subject to the Agreement's arbitration provision.

FN1 Plaintiff urges the court not to consider *Marquez* because he claims defendants were untimely in citing it and that it is irrelevant and nonauthoritative. However, any harm done by untimeliness was cured by the magistrate judge's order giving plaintiff time to respond to defendants' citation of this case. It is true that *Marquez* is not binding on this court but its interpretation of the identical contract provisions is consistent with this court's analysis and it is cited here for that reason.

While plaintiff particularly in his post *Concepcion* supplemental brief argues the Plan and the Agreement are separate, independent contracts, the Plan makes no sense apart from the Agreement and the credit account it creates. *Goodrich Cargo Systems v Aero Union Corp.*, No. C 06-06226, 2006 WL 3708065 (N.D. Cal. Dec. 14, 2006), relied on by plaintiff, is distinguishable. In *Goodrich*, an Asset Purchase Agreement (APA) set forth the structure for a transaction in which plaintiff bought a manufacturing business unit from defendant. The APA did not contain an arbitration provision. An attachment to the APA, a Manufacturing License Agree-

ment (MLA) did contain an arbitration provision. The MLA governed a licensing arrangement whereby Defendant agreed to continue operating a portion of the business unit it sold [to the Plaintiff]. *Id.* at *2. The court found that the arbitration provision only applied to disputes under the MLA because the language of the MLA unambiguously defined the term "this Agreement" to mean the MLA itself and the arbitration clause required submission to arbitration of all disputes, claims, and controversies that arise under or relate in any way to this Agreement. *Id.* at *3. Here, the arbitration language is in the credit card agreement and the language of the arbitration provision, as discussed above, is much broader and extends to claims and disputes arising out of the Agreement, the credit account transactions on the credit account and the relationship between the parties.

Plaintiff also argues that he never agreed to the Plan and does not admit that he is bound by its terms. He claims, in a nutshell, that defendants marketed and sold credit protection, charged him for credit protection, but that for a variety of reasons what they have been charging him for was and is worthless. These claims are likewise subject to the Agreement's arbitration provision. These claims arise out of the relationship between the parties and transactions on the credit account and therefore fall within the plain language of the Agreement's arbitration provision.

*3 Plaintiff also maintains the arbitration provision is unenforceable because it is unreasonable and unconscionable. Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate "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. *AT & T Mobility LLC v Concepcion* — U.S. — 131 S.Ct. 1740, 1744, 179 L.Ed.2d 742 (2011). This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that de-

rive their meaning from the fact that an agreement to arbitrate is at issue *Id* (Citations omitted)

The 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 *Id* at 1748 The question in *Concepcion* was whether section 2 of the FAA preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable *Id* at 1744 *Concepcion* held that such a rule is preempted by the FAA because [r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA *Id* at 1748 Therefore the arbitration provision in the Agreement cannot be found unconscionable simply on the basis that it requires individual arbitration and bars litigating or arbitrating as a class

Plaintiff argues that notwithstanding *Concepcion* the arbitration provision is still unenforceable Plaintiff contends that the relatively fair and reasonable terms of the arbitration clause at issue in *Concepcion* distinguishes it from the Agreement's arbitration provision which plaintiff maintains is still unenforceable as unconscionable under state law Plaintiff claims Illinois law applies and defendants argue South Dakota law applies because the Agreement has a provision choosing South Dakota law Each side argues however that no matter which state law is applied it wins

Both South Dakota and Illinois recognize two types of unconscionability-procedural and substantive Illinois requires one or the other to bar enforcement *See Kinkel v Cingular Wireless LLC* 223 Ill 2d 1 306 Ill Dec 157 857 N E 2d 250 263 (Ill 2006) South Dakota requires both *See Nygaard v Sioux Valley Hospitals & Health Sys* 731 N W 2d 184 195 (S D 2007) Analysis for procedural unconscionability focuses on whether the plaintiff can fairly be said to have been aware of what he was agreeing to while substantive unconscionability focuses on the actual terms of the con-

tract and their fairness

The arbitration provision appears in the Agreement under a heading in bold capital letters **"ARBITRATION AND LITIGATION"** It contains language in all capital letters PLEASE READ THIS PROVISION CAREFULLY IT PROVIDES THAT ALL DISPUTES ARISING OUT OF OR CONNECTED TO THIS CONTRACT SHALL BE RESOLVED BY BINDING ARBITRATION ARBITRATION REPLACES THE RIGHT TO GO TO COURT It contains language later in the provision in bold all capital letters **"YOU AGREE THAT YOU ARE VOLUNTARILY AND KNOWINGLY WAIVING ANY RIGHT YOU MAY HAVE TO GO TO COURT OR TO HAVE A JURY TRIAL FURTHERMORE, NEITHER YOU NOR WE MAY SERVE AS A REPRESENTATIVE, A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY SIMILARLY, NEITHER YOU NOR WE MAY PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS IN A LAWSUIT OF ANY CLAIM"** The first paragraph of the arbitration provision directly under the heading **"ARBITRATION AND LITIGATION"** states

You have the right to opt-out of this Provision which means you would retain your right to litigate your disputes in a court either before a judge or jury To exercise your right to opt out you must provide us with written notice no later than 30 days after your Credit Account is first opened If we do not receive your written notice within that time frame your rights to opt out will terminate and you agree that the provisions of this section will apply

*4 Reviewing the Agreement as a whole it cannot be said that the arbitration provision is hidden as plaintiff suggests in the middle of a small print multi page Agreement The arbitration provision is easy enough to find and read The use of bold typeface all capital letters, and the combination of bold typeface with all capital letters makes the arbitration provision relatively noticeable

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among the provisions of the Agreement The language “**YOU AGREE THAT YOU ARE VOLUNTARILY AND KNOWINGLY WAIVING ANY RIGHT YOU MAY HAVE TO GO TO COURT OR TO HAVE A JURY TRIAL**” is clear to understand as is “**NEITHER YOU NOR WE MAY PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS IN A LAWSUIT OF ANY CLAIM**” That he was agreeing to binding arbitration was readily accessible information to the plaintiff The arbitration provision is not procedurally unconscionable

Substantive unconscionability looks to the actual terms of the contract and their fairness The Agreement provides an opportunity to opt-out of the arbitration provision and retain all rights to litigate in court A class action waiver will not be found unconscionable if the plaintiff had a meaningful opportunity to reject the contract term *or* if the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner *O’Quinn v Comcast* No 10 C 2491 2010 WL 4932665 * 5 (N D Ill Nov 29 2010) (Lefkow J) quoting *Kinkel v Cingular Wireless LLC* 223 Ill 2d 1 306 Ill Dec 157 857 NE 2d 250 274 (Ill 2006) (emphasis added) As noted above the opt-out provision appears in the first paragraph directly under the heading “**ARBITRATION AND LITIGATION**” in the Agreement This is a meaningful opportunity to opt out of the arbitration provision and defeats any claim that the content of the arbitration provision is unconscionable

While the existence of the opt out option would obviate the need to determine whether the arbitration provision limits the ability of the plaintiff to obtain a remedy in a cost-effective manner (the test discussed above is set up in the disjunctive opt out *or* no limit on a cost effective remedy) in any case *Concepcion* moots any argument on the cost benefits to the plaintiff of a class action versus an individual arbitration *Concepcion* 131 S Ct at 1753

(The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system But States cannot require a procedure that is inconsistent with the FAA even if it is desirable for unrelated reasons)

The Agreement provides that defendants will pay all expenses of arbitration that exceed what plaintiff would have paid in filing a lawsuit and that each party otherwise will bear its own costs This is consistent with the allocation of costs in litigation and there is no showing plaintiff will be unable to pay the costs of arbitration *See Livingston v Associate Finance Inc* 339 F 3d 553 557 (7th Cir 2003)

*5 Based on the foregoing the arbitration provision is not unconscionable under either South Dakota or Illinois law The arbitration provision is enforceable Defendants' motion to submit additional authority is granted Defendants' motion to compel arbitration is granted This case is stayed pending arbitration Defendants motion to dismiss is denied as moot

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Tory v First Premier Bank

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United States District Court
C D California
Southern Division

John URBINO for himself and on behalf of other
current and former employees Plaintiffs

v

ORKIN SERVICES OF CALIFORNIA INC a
Delaware corporation Rollins Inc a Delaware cor-
poration and Does 1 Through 100 inclusive De
fendants

No 2 11-cv-06456-CJC(PJWx)
Oct 5 2011

Amber S Healy Kimberly Anne Westmoreland
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neth H Yoon Kenneth H Yoon Law Offices Los
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Christopher C Hoffman James C Fessenden Fish-
er and Phillips LLP San Diego CA John E Lattin
IV Fisher and Phillips LLP Irvine CA for De-
fendants

**ORDER DENYING PLAINTIFF'S MOTION
TO REMAND AND DENYING DEFENDANTS'
MOTION TO COMPEL ARBITRATION**

CORMAC J CARNEY District Judge

I INTRODUCTION

*1 Plaintiff John Urbino brought this represent-
ative action against Orkin Services of California
Inc and Rollins Inc (collectively Defendants)
for violations of the California Labor Code as an
aggrieved employee on behalf of himself and other
current and former employees under the Labor
Code Private Attorneys General Act of 2004
(PAGA) Cal Lab Code §§ 2698-2699 in Los
Angeles Superior Court Defendants subsequently
removed the action to this Court based on diversity
jurisdiction Defendants now move to compel arbi-
tration of Plaintiff's PAGA claim based on a written

arbitration agreement between Plaintiff and De-
fendants At the same time, Plaintiff moves to re-
mand the action alleging that there is no diversity
jurisdiction because the amount in controversy does
not exceed \$75 000

Because there is complete diversity of citizen-
ship and Defendants have shown more likely than
not that the projected total amount in controversy
exceeds \$75 000 as calculated by aggregating the
claims of the aggrieved employees under the
common and undivided exception to the anti-
aggregation rule Plaintiff's motion to remand is
DENIED Defendants motion to compel arbitration
is also DENIED because the arbitration agreement
contains an unconscionable PAGA arbitration
waiver rendering the agreement unenforceable un-
der California law

II BACKGROUND

Plaintiff worked for Defendants as a nonex-
empt hourly paid employee in Los Angeles from
June 2005 until July 2010 (Compl ¶¶ 4 8 Decl of
J Blandford in Supp Pet to Compel Arbit ¶ 3)
Defendants are incorporated in Delaware and
provide pest control services in the State of Califor-
nia including in Los Angeles County (Compl ¶¶
5-6) At the time of his hire Plaintiff signed an ar-
bitration agreement (the Agreement) which also
incorporated Defendants Dispute Resolution Policy
(DRP) (Decl of J Blandford in Supp Pet to
Compel Arbit ¶¶ 3-4 & Exh A Defs Notice of
Errata Re Decl J Blandford Exh 1) Under the
Agreement executed on June 17 2005 Plaintiff
agreed to arbitrate any dispute claim or contro-
versy regarding or arising out of [his] employ-
ment (Decl of J Blandford in Supp Pet to Com-
pel Arbit Exh A) The Agreement also stated that
the arbitral procedures would be governed by the
Federal Arbitration Act (FAA) (*Id*) The Agree-
ment further contains the following limitation on
arbitration proceedings

any arbitration proceeding under this Agreement

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will not be consolidated or joined with any action or legal proceeding under any other agreement or involving any other employees and will not proceed as a class action private attorney general action or similar representative action

(*Id*) The DRP also includes the same provision (*See* Defs ' Notice of Errata Re Decl J Blandford Exh 1 at 12) On June 21 2011, Plaintiff filed this instant PAGA action against Defendants in Los Angeles Superior Court alleging that Defendants deprived him and other current and former nonexempt employees of their rightful meal periods overtime and vacation wages and accurate itemized wage statements, in violation of various sections of the California Labor Code (Compl ¶¶ 1-4 16) Specifically, pursuant to California Labor Code § 2699(f) Plaintiff as an aggrieved employee on behalf of himself and other current and former employees seeks civil penalties for Defendants' purported violations of California Labor Code §§ 2699(f) 558 226 3 1174 5 and 1197 1 (*Id* ¶ 18) ^{FN1}

FN1 Plaintiff previously filed a similar complaint against Defendants on December 20 2010 in the Superior Court for the County of Orange but based as a class action PAGA claim (*See* Case No 8 11-cv-00117-CJC(PJWx) Notice of Removal Dkt No 1) Defendants removed the action to this Court under the Class Action Fairness Act of 2005 (CAFA) 28 U S C § 1332(d) which was unchallenged by Plaintiff As here Defendants moved the Court to compel arbitration Before the motion could be heard the parties filed a joint stipulation dismissing the action but preserving Plaintiff's right to refile the action as well as Defendants' right to compel arbitration pursuant to the parties' tolling agreement (Dkt No 25) The Court granted the parties' request for dismissal of the complaint without prejudice and granted the tolling agreement on June 13 2011

(Dkt No 27) Thereafter on June 21 2011 Plaintiff filed his complaint in the instant action in Los Angeles Superior Court

*2 On August 5 2011, Defendants removed the action to this Court based on diversity jurisdiction (Dkt No 1 Defs Notice of Removal ¶¶ 5-25) On August 15 2011 Defendants moved to compel arbitration (Dkt No 12) At the same time Defendants filed a counterclaim for declaratory relief against Plaintiff under 28 U S C § 2201 requesting a judicial declaration that Mr Urbino's claims are subject to the parties' Agreement and DRP that all of Mr Urbino's claims against Defendants be resolved in the arbitral forum and that Mr Urbino be prohibited from bringing any claims under PAGA (Defs CounterClaim ¶ 13 Dkt No 14) On September 2 2011 Plaintiff moved to remand the action based on lack of subject matter jurisdiction (Dkt No 21) The Court continued Defendants' motion to compel arbitration to coincide with Plaintiff's motion to remand scheduled for October 3 2011 (Ct Order Dkt No 28 Sept 15 2011) On September 29, 2011, the Court took Defendants' motion to compel arbitration and Plaintiff's motion to remand under submission (Ct Order Dkt No 31 Sept 29 2011)

III PLAINTIFF'S MOTION TO REMAND

The Court has proper subject matter jurisdiction over this action because there is complete diversity of the parties and the amount in controversy exceeds \$75 000 28 U S C § 1332(a)(1)

A Legal Standard

A civil action brought in a state court but over which a federal court may exercise original jurisdiction may be removed by the defendant to a federal district court 28 U S C § 1441(a) However [a] suit may be removed to federal court under 28 U S C § 1441(a) only if it could have been brought there originally *Sullivan v First Affiliated Sec Inc* 813 F 2d 1368 1371 (9th Cir 1987) *Infutura Global Ltd v Sequus Pharmaceuticals Inc* 631 F 3d 1133 1135 n 1 (9th Cir 2011) ([A] federal

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court must have both removal and subject matter jurisdiction to hear a case removed from state court) The burden of establishing subject matter jurisdiction falls on the party seeking removal and the removal statute is strictly construed against removal jurisdiction *Gaus v Miles Inc* 980 F 2d 564 566 (9th Cir 1992) (Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance) A federal court can assert subject matter jurisdiction over cases that (1) involve questions arising under federal law or (2) are between diverse parties and involve an amount in controversy that exceeds \$75,000 28 U S C § § 1331 1332 If it appears that the federal court lacks subject matter jurisdiction at any time prior to the entry of final judgment the federal court must remand the action to state court 28 U S C § 1447(c) FN2

FN2 Defendants did not seek removal based on CAFA Plaintiff agrees that CAFA does not apply because he is not bringing a putative class action claim Therefore the Court does not reach the issue of whether removal jurisdiction is proper under CAFA

B Diversity Jurisdiction

A district court has original diversity subject matter jurisdiction over all civil actions where the matter in controversy exceeds the sum or value of \$75 000 exclusive of interests and cost and the action is between citizens of different States 28 U S C § 1332(a)(1) The district court has jurisdiction only if there is complete diversity between the parties meaning that each plaintiff is a citizen of a different state than each defendant *See id Caterpillar Inc v Lewis* 519 US 61 68 (1996) (citing *Strawbridge v Curtiss* 3 Cranch 267 (1806))

*3 The parties do not contest that complete diversity of the parties exists The parties however disagree over whether the amount in controversy exceeds \$75 000 Plaintiff's Complaint does not allege a specific amount in controversy Although

Plaintiff alleges specific amounts per initial and subsequent violations under California Labor Code §§ 2699(f) 558(a)(1) 226 3 1174 5 1197 1 it is uncertain how many employees or pay periods are at issue Where as here the state court complaint is unclear as to whether the requisite amount of controversy is pled defendant bears the burden of establishing by a preponderance of the evidence that the amount in controversy exceeds \$75 000 *Guglielmino v McKee Foods Corp* 506 F 3d 696 699 (9th Cir 2007) FN3 To meet this standard the defendant needs to provide evidence establishing that it is more likely than not that the amount in controversy exceeds \$75 000 *Sanchez v Monumental Life Ins Co* 102 F 3d 398 404 (9th Cir 1996) The district court considers facts presented in the defendant's removal petition as well as summary judgment-type of evidence relevant to the amount of controversy at the time of removal but conclusory allegations regarding the amount in controversy are insufficient *Matheson v Progressive Specialty Ins Co* 319 F 3d 1089 1090–91 (9th Cir 2003) (per curiam)

FN3 In contrast where the state court complaint alleges on its face an amount in controversy that meets the jurisdictional threshold removing defendant must show to a legal certainty that the plaintiff actually cannot recover that amount *Guglielmino* 506 F 3d at 699

In this case Defendants have submitted a declaration by Tamera Roberson an employee of Rollins Inc , who provides system analysis and data retrieval services for Defendants attesting to the fact that there were 811 individuals employed by Orkin as nonexempt employees in California and that from June 21 2010 (the date Plaintiff filed this action) through the present Orkin issued at least 17 182 paychecks for the time worked by the 811 nonexempt employees in California (Decl of T Roberson in Supp Defs Removal ¶¶ 9–11 Defs Notice of Removal ¶ 6) Using these figures and the statutory penalty amounts Defendants cal-

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culate the total amount in controversy for the statutory penalties related to the alleged initial violations of the Labor Code § § 2699(f) 558(a)(1) 226 3 and 1197 1(a)(1) to be \$405 500^{FN4} and the total amount in controversy for subsequent violations of Labor Code §§ 2699(f) 558(a)(2) and 1197 1(a)(2) to be \$9 004 050 00^{FN5} (Notice of Removal ¶ 6) Under PAGA of the civil penalties recovered by the aggrieved employees 75 percent is allotted to the Labor and Workforce Development Agency (LWDA) while 25 percent goes to the aggrieved employees Cal Lab Code § 2699(i) Defendants claim that because 75 percent of \$9 004 050 00 is well over the jurisdictional amount and because a PAGA claim need not satisfy class action requirements under *Arias v Superior Court* 46 Cal 4th 969 980 (2009) this Court has subject matter jurisdiction over this action (Notice of Removal ¶¶ 8 10–11)

FN4 Defendants arrive at this number by multiplying the total civil penalties for initial pay period violations (\$100 for the initial violation of Cal Lab Code § 2699(f) ➡ \$50 for the initial violation of Cal Lab Code § 558(a)(1) ➡ \$250 for the initial violation of Cal Lab Code § 226 3 ➡ \$100 for violation of Cal Lab Code § 1197 1(a)(1) = \$500) by 811 (the number of initial paychecks for the 811 employees) for a total of \$405 500 (Notice of Removal ¶ 6)

FN5 Defendants arrive at this number by totaling the civil penalties for subsequent pay period violations (\$200 per pay period for each subsequent violation of Cal Lab Code § 2699(f) ➡ \$100 per pay period for each subsequent violation of Cal Lab Code § 558(a)(2) ➡ \$250 per pay period for each subsequent violation of Cal Lab Code § 1197 1(a)(2) = \$550) subtracting the initial pay checks for each employee (811) from the total pay periods of pay checks (17 182) leaving 16 371

subsequent pay periods for which there are alleged violations and multiplying the total civil penalties (\$550) by the subsequent pay periods (16 371) for a total of \$9 004 050 00 (*Id*) Defendants do not include penalties for alleged subsequent violations of Cal Lab Code § 226 3 in the calculation of the amount in controversy (*Id*)

Plaintiff does not take issue with Defendants final calculation and agrees that his PAGA claim is not being brought as a class action (Pl s Mem in Supp Remand at 3–4 Defs' Opp to Remand at 5) The parties also agree that as clarified in *Arias* a PAGA action is essentially a law enforcement action brought on behalf of the State and need not meet the requirements for a class action (Notice of Removal ¶ 10 Pl's Mem in Supp Remand at 3–4) However the parties disagree on the method of calculating damages for a nonclass PAGA action Plaintiff argues that under PAGA an individual has a separate and distinct claim such that the aggrieved employees' claims cannot be aggregated to meet the jurisdictional amount under the well established anti-aggregation rule (Pls Mem in Supp Remand at 5–6) Plaintiff further claims using Defendants figures that in this case no single individual employee's damages exceed \$75 000, as the damages entitled to each employee is approximately \$11 602 40 (\$9 409 550 00 / 811) (*Id* at 6) According to Plaintiff Defendants impermissibly aggregate the claims of all the aggrieved employees to meet the jurisdictional threshold (*Id*) Finally Plaintiff contends aggregation is not permitted under the common and undivided exception because a PAGA action consists of separate and distinct individual claims (*Id*) Defendants do not challenge the application of the anti aggregation rule or argue that the common and undivided exception to the anti-aggregation applies here Instead Defendants contend that the amount in controversy is not based on aggregating individual claims at all but on what the State—as a putative plaintiff in a PAGA action—is entitled to under PAGA (Notice of Re-

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moval ¶¶ 10–11 Defs ' Opp to Remand at 4–5)

*4 The Court disagrees with Plaintiff's analysis and finds that Defendants have met their burden of showing more likely than not that the amount in controversy exceeds \$75 000 The issue of how the amount in controversy is calculated in a PAGA action has not been addressed by the Ninth Circuit while recent district court decisions are divided The Court will first discuss the nature and purpose of a PAGA action and then examine the relevant rules for calculating the amount in controversy for diversity jurisdiction

1 Representative Actions under PAGA

The California Supreme Court in *Arias v Superior Court* discussed at length the distinctive features of a PAGA action Under PAGA a plaintiff brings a representative action as an aggrieved employee on behalf of himself and other current or former employees and seeks civil penalties for Labor Code violations by employers with 75 percent going to the LWDA and the remaining 25 percent to the aggrieved employees Cal Lab Code § 2699(a) (1) In 2003 the California Legislature enacted PAGA in response to staffing reductions for labor law enforcement agencies and to enable aggrieved employees to act as private attorneys general to recover civil penalties for Labor Code violations with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts *Arias* 46 Cal 4th at 980 (citing Cal Lab Code § 2698 *et seq* Stats 2003 ch 906 § § 1 2 eff Jan 1 2004) A private plaintiff asserting a PAGA claim is thus essentially bringing a law enforcement action designed to protect the public and not to benefit private parties *Id* at 986 (internal citation and quotes omitted) The plaintiff acts as a proxy or agent of the state's labor law enforcement agencies such that the plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely recovery of civil penalties that otherwise would have been assessed and collected by the [LWDA] *Id*

The California Supreme Court also distinguished a class action from a PAGA action noting that PAGA claims *may* but need not be brought as class action claims *Id* at 981 & n 5 *see also id* at 976 n 2 (stating that a representative action may be either class or nonclass actions) As a nonclass representative action a PAGA suit need not satisfy class action requirements *Id* at 975 981–87 *see also Sample v Big Lots Stores Inc* No C 10–03276 2010 WL 4939992, at *3 (N D Cal Nov 30 2010)

In this case the Complaint contains no allegations suggesting that the PAGA claim is being brought as a class action Thus Plaintiff's PAGA claim need not meet class action requirements and the issue of whether the case is removable under CAFA is irrelevant^{FN6} For a nonclass PAGA action as here the issue is whether the amount in controversy may be calculated by aggregating the civil penalties of all the aggrieved employees Plaintiff argues that civil penalties cannot be aggregated because claims in a PAGA action are separate and distinct not common and undivided (Pls ' Mem in Supp Remand, at 5–6) The Court disagrees and finds that the common and undivided exception applies to a PAGA claim

FN6 Defendants do not affirmatively state that removal is based on CAFA but only suggest that even were [sic] CAFA to apply the amount in controversy exceeds \$5 000 000 00 and therefore meets the minimal standards for a CAFA claim as well (Notice of Removal ¶ 11) Regardless of whether Defendants clearly state that CAFA is a basis for removal Plaintiff is not asserting a class action and thus CAFA cannot be a basis for removal

2 The Anti-Aggregation Rule

*5 As a general rule multiple plaintiffs who assert separate and distinct claims in a lawsuit may not aggregate their claims to satisfy the jurisdictional amount *Troy Bank of Troy Ind v G A Whitehead & Co* 222 U S 39 40 (1911) *Synder*

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v Harris 394 U S 332 335 (1969) *Gibson v Chrysler Corp* 261 F 3d 927 943-44 (2001) But when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest it is enough if their interests collectively equal the jurisdictional amount *Troy* 222 U S at 40-41 *see also Synder* 394 U S at 335

FN7 Although the distinction between distinct and separate versus common and undivided claims is not always clear the Ninth Circuit noted in *Eagle v American Telephone and Telegraph Co* that the character of the interest asserted depends on the source of plaintiffs claims If the claims are derived from rights that they hold in group status then the claims are common and undivided If not the claims are separate and distinct 769 F 2d 541, 546 (9th Cir 1985) FN8

FN7 The anti aggregation applies equally to class actions such that separate and distinct claims cannot be aggregated *Zahn v Int'l Paper Co* 414 U S 291 301 (1973) and at least one plaintiff in the putative class must satisfy \$75 000 threshold *Exxon Mobil Corp v Allapattah Servs Inc* 545 U S 546 549 (2005)

FN8 Another exception to the anti-aggregation rule is in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant *Synder* 394 U S at 335

The Ninth Circuit has not yet ruled on the issue of whether individual claims in a PAGA action are separate and distinct common and undivided or otherwise District courts within the Ninth Circuit are split on the issue Two district court decisions have recently interpreted claims in a PAGA action to be separate and distinct thereby precluding aggregation to meet the jurisdictional amount *See Zator v Sprint/United Mgmt Co* No 09cv2577 2011 U S Dist LEXIS 33383 at *3 (S D Cal Mar 29 2011) (The claim by one plaintiff must satisfy the \$75 000 amount in controversy requirement the claims of other aggrieved

employees cannot be aggregated to reach that threshold) *Pulera v TW Construction Co Inc* No 2 08-cv-00275 2008 WL 3863489, at *4 (E D Cal Aug 19 2008) (The amounts recoverable by Plaintiff based on his PAGA claims are separate and distinct from the amounts recoverable by the State of California via the LWDA and therefore these amounts may not be aggregated) Relying heavily on the *Zator* decision Plaintiff argues that the claims of the aggrieved employees cannot be aggregated because their claims are separate and distinct (Pls Mem in Supp Remand at 5)

In contrast to the *Pulera* and *Zator* decisions the district court in *Thomas v Aetna Health of California Inc* found a PAGA claim to be common and undivided because the right to pursue the action derives solely from the LWDA's interest in enforcement of the Labor Code while [a]ggrieved employees have no right to seek any individual recovery under PAGA and are precluded from bringing repeated PAGA suits No 1 10-cv-01906 2011 WL 2173715 at *19 (E D Cal June 2 2011) The *Thomas* court reasoned that aggrieved employees have no separate and individual rights to pursue under PAGA that would transform it from a law enforcement action that furthers the interests of the LWDA into a myriad of separate and distinct claims of the aggrieved employees *Id* Analogizing a PAGA action to a typical shareholders derivative suit the *Thomas* court held that the amount at stake in a PAGA claim is predicated on the *total amount of the penalties* that can be sought by the aggrieved employees as the proxy of the LWDA *Id*

*6 The Court disagrees with the analysis offered by the *Pulera* and *Zator* courts and finds the *Thomas* court's reasoning persuasive The decision in *Pulera* and *Zator* do not fully taken into account the purpose and nature of a PAGA claim In *Pulera* the plaintiff brought an action in federal court for PAGA civil penalties *Pulera* 2008 WL 3863489 at * 1 One of the defendants moved to dismiss the action for lack of subject matter jurisdiction on the

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grounds that the amount in controversy fell below \$75 000 as measured by the individual plaintiff's possible recovery *Id* at *1 *2 The court rejected the plaintiff's argument that the LWDA's recovery under PAGA should not be separated from his individual claim because instead of neither party being able to enforce the claim without the other which is characteristic of a common and undivided claim, either the plaintiff or LWDA could enforce the claim under PAGA *Id* at *3-*4 The court observed that because the aggrieved employees could adjudicate their own claims the amount in controversy should be determined by what is recoverable by the employee individually *Id* at *4 The court accordingly granted the defendant's motion to dismiss for lack of subject matter jurisdiction *Id* *5

But the *Pulera* court overlooked the fact that while an aggrieved employee may separately litigate a PAGA claim if the LWDA declines to do so, a PAGA action is essentially a representative action brought by a group of aggrieved employees on behalf of the State. The primary beneficiary is the public at large not the private individuals involved. As noted in *Arias v Superior Court* any direct financial benefit to those harmed by the employer's unlawful conduct is ancillary to the primary object of a PAGA claim—namely to further the reach of the LWDA and protect the public's interest 46 Cal 4th at 987 n 7 see also *Ochoa-Hernandez v Cjaders Foods Inc* No C 08-2073 2010 WL 1340777 at *4 (N D Cal April 2 2010) (unlike a class action the purpose of a PAGA suit is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies) Furthermore the PAGA statute does not enable a single aggrieved employee to litigate his or her claims but requires an aggrieved employee on behalf of herself or himself and other current or former employees to enforce violations of the Labor Code by their employers Cal Lab Code § 2699(a) (emphasis added) The statute also awards civil penalties to the aggrieved employees as a whole See *id* § 2699(i) (stating

that civil penalties recovered by aggrieved employees shall be distributed as follows 75 percent to the [LWDA] and 25 percent to the aggrieved employees) The statute therefore contemplates a common group action with civil penalties being awarded to the entire group

*7 The *Zator* case while more closely analogous to the facts in the instant action is still distinguishable In *Zator* the plaintiff brought a representative PAGA claim seeking civil penalties for violations of various sections of the Labor Code as well as attorneys' fees and costs 2011 U S Dist LEXIS 33383 at *4-*5 ^{FN9} As in *Pulera* the *Zator* court observed that individual claims in a PAGA action are separate and distinct and thus aggregation was not permitted to meet the jurisdictional amount However as support for this proposition the *Zator* court relied on *Bernal v Comerica Bank* No CV 10-04631 2010 U S Dist LEXIS 88688 (C D Cal July 30 2010) which involved a class-action PAGA claim In *Bernal* the court applied the rule that where federal jurisdiction is not invoked by CAFA in order for the court to exercise diversity jurisdiction over the putative class claims at least one of the named plaintiffs must independently satisfy the amount-controversy requirement 2010 LEXIS 88688 at * 10-* 11 But in contrast to *Bernal* the present PAGA action is not being brought as a class action Furthermore the defendant in neither *Bernal* nor *Zator* offered a calculation of the amount in controversy based on a total number of aggrieved employees Nor did the court in *Zator* wrestle with the question of whether PAGA claims may be aggregated because they are common and undivided but rather decided on the issue of whether attorney fees should be attributed to all aggrieved employees or solely to the representative plaintiff 2011 U S Dist LEXIS 3383 *8-*11 The *Zator* court also declined to explicitly resolve the issue of whether all the penalties sought by plaintiff should be counted in the amount in controversy or just those amounts he was eligible to receive although the court stated it was inclined to adopt the latter position consistent with *Pulera's*

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viewpoint *Id* at * 11

FN9 It is unclear whether the plaintiff in *Zator* was bringing a class or nonclass PAGA claim. The citations of the complaint by the *Zator* court, however, do not indicate that any class allegations were being asserted.

3 The Common and Undivided Exception

The common and undivided exception to the anti-aggregation rule applies to a PAGA action. The amount in controversy calculus used in *Pulera* and *Zator* is premised on the understanding that a PAGA claim consists of a collection of distinct and separate individual claims. But as the *Arias* court explained, a PAGA action is essentially a law enforcement action designed to benefit the public, not to compensate aggrieved employees. The district court in *Thomas v. AETNA Health of California* more recently opined at length on the issue of whether PAGA claims may be aggregated in light of the fundamental nature and purpose of a PAGA action. In that case, the plaintiff brought a nonclass PAGA action in state court, which was subsequently removed by defendants on the basis of diversity jurisdiction. *Thomas*, 2011 WL 2173715 at *2. The plaintiff moved to remand the action, claiming, as does the Plaintiff here, that there was no diversity jurisdiction because the penalties under PAGA attributable to her were less than \$75,000. *Id.* at *4. *9. The defendants argued that the jurisdictional amount was satisfied because all potential civil penalties as to the aggrieved employees could be aggregated and that the total penalties for the group exceeded \$75,000. *Id.* The defendants reasoned that the aggrieved employees do not hold separate and distinct claims, but an all-for-one and one-for-all claim for PAGA penalties. *Id.* at *13. FN10. The district court agreed with the defendants' argument and held that the amount at stake in a PAGA claim is predicated on the *total amount of the penalties* that can be sought by the aggrieved employees as the proxy of the LWDA. *Id.* at *19. Applying this calculus, the court found that the de-

fendants showed more likely than not that the PAGA penalties at issue amounted to more than \$75,000. *Id.* at *21. Accordingly, the court concluded that it had subject matter jurisdiction over the PAGA claim and denied the plaintiff's motion to remand the action. *Id.*

FN10. In contrast to the defendant's argument in *Thomas*, Defendants in the instant action argue not that the claims are common and undivided, but that aggregation principles do not apply at all. (See Defs' Opp. to Remand at 5 (stating that Defendants are not aggregating individual claims at all, but rather "[t]he State itself is entitled to 75% of the alleged penalties. . . .")) The Court disagrees. As noted by the *Thomas* court, a PAGA claim does not carve out a new hybrid exception to the long-settled anti-aggregation rule, and the prohibition against aggregation in multi-plaintiff cases and class actions applies uniformly to actions brought in a non-class representative capacity. *Thomas*, 2011 WL 2173715 at *15.

*8. The Ninth Circuit has considered the application of the common and undivided exception to permit aggregation in different contexts. See *Gibson*, 261 F.3d at 944. Of relevance here is the Ninth Circuit's allowance of aggregation of minority shareholders' claims in a class action suit against the majority shareholder of a corporation in *Eagle v. Chrysler Corp.*, 769 F.2d 541 (9th Cir. 1984). In that case, the plaintiff, minority shareholder of a telephone company, brought a class action in state court against a corporate majority shareholder for allegedly breaching its fiduciary duty by causing the company to forego certain tax breaks to the company's financial detriment, which in turn caused minority shareholders to lose approximately \$38 million. *Id.* at 544. The defendant successfully removed the class action to federal court after which the plaintiff amended the damage allegation in his complaint to be approximately \$4,200, which

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was below the then jurisdictional amount of \$10 000 *Id* At issue before the Ninth Circuit was whether plaintiff's action was improperly removed from state court based on the damages alleged in the complaint *Id* at 545 The Ninth Circuit held that plaintiff's claim was common and undivided and thus the total aggregated damages of \$38 million satisfied the jurisdictional threshold *Id* The *Eagle* court likened the action to a typical shareholder derivative suit under California law where the source of the shareholders' claim for the wrongful depletion of corporate assets is the common and undivided interest each shareholder has in a corporation's assets and a right to share in dividends *Id* at 546 The *Eagle* court found that the minority shareholders were in the same position as shareholders in a typical derivative action with respect to the source of their injury which was derivative of the injury to the corporation *Id* at 547 Thus, as the plaintiff's claim derive[d] wholly from an alleged injury to the corporation's assets the Ninth Circuit concluded that the minority shareholders' claims were common and undivided thereby permitting aggregation *Id*

The *Thomas* court specifically analogized a representative PAGA action to a shareholders derivative suit in *Eagle* observing that in a typical shareholders' derivative suit the corporation sustains the primary injury injury to the shareholders is only indirect and [a]s a result the shareholders step into the shoes of the corporation and assert its interests—they have no *individual* right to recovery *Id* at * 17 *see also Cotton v Expo Powers Systems Inc* 170 Cal App 4th 1371 1380 (2009) (a derivative suit is an equitable action in which the shareholder of a corporate sues on behalf of the corporation purporting to assert a claim that belongs to the corporation) *Grosset v Wenass* 42 Cal 4th 1100 1114 (2008) (the corporation is the ultimate beneficiary of the derivative suit) In light of the fundamental nature and purpose of a PAGA action the Court finds this analogy persuasive The aggrieved employees assert—as a unified group—a claim on behalf of the State in furtherance of the

LWDA's reach and ultimately for the benefit of the public The representative plaintiff in a PAGA action derives his or her right to sue from the statute and acts as proxy for the LWDA such that the aggrieved employees' claims are common and undivided rather than separate and distinct The fact that the aggrieved employees receive 25 percent of the total civil penalties while the LWDA receives 75 percent does not render the individual claims in a PAGA action separate and distinct *See Eagle* 769 F 2d at 547 n 4 (noting that the shareholders intended *pro rata* division of the total fund did not render their claims separate and distinct as it is proper to aggregate the value of jointly held rights when several plaintiffs sue to enforce a common and undivided interest which is separate and distinct as between themselves) (internal citation and quotes omitted) The division of the civil penalties only highlights the primary public focus of a PAGA action *See Thomas* 2011 WL 2173715 at *18

*9 This Court agrees with the *Thomas* court and finds that the amount in controversy in a PAGA claim is predicated on the total amount of civil penalties sought by the aggrieved employees^{FN11} Consequently the Court finds that the claims by the aggrieved employees in this action may be aggregated and Defendants have shown more likely than not that the total civil penalties in the amount of \$9 409 550 00 well exceeds the jurisdictional threshold^{FN12}

FN11 This calculus does not consider PAGA's apportionment of 75 percent to LWDA and 25 percent to aggrieved employees Rather the amount in controversy turns on the total civil penalties

FN12 Defendants do not state in their removal papers that removal is based on anything other than diversity jurisdiction yet assert for the first time in their Opposition that Defendant's cross-complaint presents a clear federal question (Defs Opp to Remand at 6) Because there is diversity subject matter jurisdiction the Court declines

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to reach the issue of whether this action implicates a clear federal question for removal jurisdiction under 28 U S C § 1441(b). Nevertheless, the Court notes that the cross complaint is not relevant to the issue of federal question jurisdiction because jurisdiction must be analyzed on the basis of the *plaintiff's* well-pleaded complaint at the time of removal. *Metro Life Ins Co v Taylor*, 481 U S 58, 63 (1987), not Defendants' cross-complaint.

IV DEFENDANTS' MOTION TO COMPEL ARBITRATION

Having determined that this action was properly removed, the Court now turns to Defendants' motion to compel arbitration. The issue before the Court is whether the Agreement, which includes a PAGA arbitration waiver, is enforceable under federal and California law. The Court finds that because the PAGA arbitration waiver contradicts the fundamental purpose of a representative enforcement action under PAGA, it is unconscionable and unenforceable.

A Legal Standard

The Federal Arbitration Act (FAA) provides that a written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract. 9 U S C § 2. The FAA reflects both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract. *AT & T Mobility LLC v Concepcion* — U S — 131 S Ct 1740, 1745 (2011), *see also Circuit City Stores Inc v Adams*, 279 F 3d 889, 892 (9th Cir 2002) (the FAA not only places arbitration agreements on equal footing with other contracts but also establishes a federal policy in favor of arbitration).

In deciding whether to enforce an arbitration agreement, the court must determine (1) whether a

valid agreement to arbitration exists and (2) whether the agreement encompasses the dispute. *Cox v Ocean View Hotel Corp*, 533 F 3d 1114, 1119 (9th Cir 2008) (internal citation and quotes omitted), *see also* 9 U S C § 2. Determining the validity of an arbitration agreement is a question of contract interpretation and thus governed by state law. *Circuit City Stores*, 279 F 3d at 892. Nevertheless, the FAA only permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract. *AT & T*, 131 S Ct at 1746 (quoting 9 U S C § 2). When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward. The conflicting rule is displaced by the FAA. *Id.* at 1747. But when a doctrine normally thought to be generally applicable, such as duress or unconscionability, is alleged to have been applied in a fashion that disfavors arbitration, the inquiry becomes more complex. *Id.* [A] court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable for this would enable the court to effect what the state legislature cannot. *Id.* at 1747 (quoting *Perry v Thomas*, 482 U S 483, 493 n 9 (1987)).

B Unconscionability of the PAGA Arbitration Waiver

*10 The parties do not dispute that both the FAA and California contract law apply to the instant action or that they executed a written arbitration agreement. Defendants, however, contend that Plaintiff agreed to resolve all claims arising under his employment in binding arbitration pursuant to the Agreement, which Defendants claim is valid under California law. Defendants further contend that the PAGA arbitration waiver in the Agreement and DRP are not unconscionable in light of the recent United States Supreme Court decision in *AT & T Mobility LLC v Concepcion*. The Court disagrees.

Under California law, courts may refuse to enforce a contract where, at the time of its formation,

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it was unconscionable or may limit the application of any unconscionable clause Cal Civ Code § 1670.5(a). A finding of unconscionability has both a procedural and substantive component. See *Armenian v Found Health Psychcare Servs Inc*, 24 Cal 4th 83, 114 (2000). While procedural unconscionability focuses on the element of oppression or surprise due to unequal bargaining power, substantive unconscionability centers on an overly harsh or one-sided result. *Id.* Defendants argue that the PAGA arbitration waiver in the Agreement is not unconscionable under *AT & T*, which Defendants claim invalidates *Franco v Athens Disposal Co.*, 171 Cal App 4th 1277, 1303 (2009), holding that PAGA waivers are unenforceable. In *Franco*, plaintiff, a nonexempt hourly employee, brought a class action suit against his former employer, seeking civil penalties under PAGA, among other things. 171 Cal App 4th at 1283. The defendant moved to compel arbitration pursuant to a written arbitration agreement, which provided, as in this case, that the parties waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity. *Id.* at 1284. In other words, the parties could arbitrate their individual claims, but not any class-action or representative PAGA claims. The California appellate court held that the waiver clause was unconscionable because, *inter alia*, the provision expressly prohibited the plaintiff's ability to collect civil penalties in a representative capacity, thereby preventing plaintiff from performing the core function of a private attorney general, and undermining the very purpose and nature of a PAGA enforcement action aimed at protecting the public and penalizing the employer for past illegal conduct. *Id.* at 1300, 1303. The court found the arbitration agreement, which contained the invalid PAGA arbitration, tainted with illegality, and thus unenforceable. *Id.* at 1303. The court subsequently denied defendant's motion to compel arbitration and ordered the action to proceed in a court of law. *Id.*

Here, Defendants argue that the *Franco* decision is invalid under *AT & T Mobility v Concepcion*. However, the *Franco* court did not outright prohibit arbitration of a PAGA claim, but instead ruled that a PAGA waiver was unconscionable because it undercut the fundamental purpose of a PAGA action. A PAGA waiver is unconscionable because it both deprives the individual of the right to bring a representative action and deprives the LWDA the benefits of the enforcement action brought by aggrieved employees. Thus, to the extent that the *Franco* court invalidated the PAGA waiver on the basis of unconscionability, the decision is consistent with the rule applied in *AT & T*. Furthermore, the facts upon which the Supreme Court based its decision in *AT & T* are readily distinguishable from those in the instant action. In *AT & T*, customers brought a putative class action in federal court against a telephone company, alleging, among other things, that the company engaged in false advertising and fraud in connection with the sale and service of cellphones. 131 S Ct at 1744. The cellphone contract between the plaintiffs and the company contained a class action waiver clause, which required that all claims be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding. *Id.* (internal citation and quotes omitted). The telephone company moved to compel arbitration, which was denied by the district court because it found the cellphone agreement unconscionable under *Discovery Bank v Superior Court*, 36 Cal 4th 148, 162–63 (2005), holding class action arbitration waivers in contracts of adhesion involving disputes over small amounts of money to be unconscionable. *Id.* at 1744–45. The Ninth Circuit affirmed the district court's decision, finding that the class action waiver was unconscionable under California law, and that the *Discovery Bank* rule was not preempted by the FAA, because that rule was simply a refinement of the unconscionability analysis applicable to contracts generally in California. *Id.* at 1745 (quoting *Laster v AT & T Mobility LLC*, 584 F 3d 849, 857 (9th Cir 2009)). The Supreme Court reversed, hold-

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ing that the *Discovery Bank* rule to the extent that it allowed for and mandated the availability of class arbitration was inconsistent with the FAA which was designed to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings *Id* at 131 S Ct at 1748 1750–51 Specifically the Supreme Court found that requiring class arbitration is inconsistent with the FAA because (1) class arbitration sacrifices the informality characteristic of arbitral proceedings thereby rendering arbitration slower and more costly (2) class arbitration requires procedural formality to the extent not envisioned by Congress when it passed the FAA and (3) class arbitration greatly increases risks to defendants in high-stakes class proceedings because errors would not be subject to appellate review *Id* at 1751–52

*11 In the instant case however Defendants do not explain how *AT & T* applies to a nonclass PAGA claim at issue here Although not cited by Defendants the district court's recent decision in *Quevedo v Macy's Inc* — F Supp 2d — No CV 09–1522 2011 WL 3135052 at *17 (C D Cal June 16 2011) affords some support for Defendants' position In *Quevedo* the district court found *Franco* no longer tenable under *AT & T* concluding that the arbitration of a representative PAGA action would like a class claim require a more cumbersome and costlier process in contravention to the streamlined informal arbitral process envisioned by the FAA and because there is also the increased risk that erroneous decisions on a PAGA claim would go uncorrected 2011 WL 3135052 at *17 Just as arbitration is inappropriate for high-stakes class action claims arbitration is *a fortiori* ill-suited for a representative action which is intended to protect the public's interest *See id*

But as Plaintiff correctly notes *AT & T* concerned the enforceability of a consumer class action arbitration waiver rather than a representative PAGA claim waiver (Pls ' Opp at 21 (citing *Brown v Ralphs Grocery Co* 197 Cal App 4th 489 500 (2011) *Plows v Rockwell Collin Inc* No SACV

10–01936 2011 U S Dist LEXIS 88781 at * 14–* 15 (C D Cal Aug 9 2011))) In *Brown* the California appellate court refused to extend *AT & T* to a PAGA action in light of the fundamental nature and purpose of a PAGA claim *Brown* 197 Cal App 4th at 500–03, *see also Plows* 2011 U S Dist LEXIS 88781 at * 14–* 15 Specifically the *Brown* court explained that the purpose of PAGA contrasts with the private individual right of a consumer to pursue class action remedies in court or arbitration which right according to *AT & T* may be waived by agreement so as not to frustrate the FAA—a law governing private arbitration *AT & T* does not provide that a public right such as that created under the PAGA can be waived if such a waiver is contrary to state law *Brown* 197 Cal App 4th at 500 Furthermore as noted by the *Brown* court the *Quevedo* court failed to take into account that there are no separate individual claims in a PAGA action rather the individual must bring a PAGA claim as a representative action on behalf of himself and other aggrieved employees *See id* at 503 n 8^{FN13} The Court finds the reasoning offered by the *Brown* court persuasive *See also Plows* 2011 U S LEXIS 88781 at * 14–* 15 (agreeing with the *Brown* court's reasoning of why class action waivers in arbitration agreements may not be used to divest plaintiffs of their right to bring representative actions under PAGA and denying defendant's motion to compel arbitration of plaintiffs' PAGA claims) Because the PAGA arbitration waiver in the Agreement is unconscionable and the waiver taints the entirety of the Agreement with illegality, the Court deems the Agreement unenforceable^{FN14}

FN13 Defendants only cite in cursory fashion *Maiorano v Professional Community Management Inc* 2010 Cal App Unpub LEXIS 7804 (Cal App 2d Dist Sept 30, 2010) a case ordered not to be published for the proposition that a plaintiff must arbitrate his PAGA claim on an individual basis (Defs ' Reply in Supp Mot to Compel at 6) But a PAGA claim

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is fundamentally a representative enforcement action meant to be brought on behalf of the plaintiff *and* other aggrieved employees See *Arias* 46 Cal 4th at 980 986 *Machado v M A T & Sons Landscape Inc* No 2 09-cv-00459 2009 U S Dist LEXIS 63414 at *7 (E D Cal July 23 2009) (PAGA s language explicitly states that the representative action must include other current or former employees)

FN14 As the PAGA arbitration waiver in the Agreement is sufficient for finding the Agreement unconscionable under *Franco v Athens Disposal Co* and *Brown v Ralphs Grocery Co* the Court declines to reach Plaintiff's other grounds for finding the Agreement unconscionable

V CONCLUSION

*12 For the foregoing reasons Plaintiff's motion to remand is DENIED and Defendants' motion to compel arbitration is also DENIED

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 Urbino v Orkin Services of California Inc
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Only the Westlaw citation is currently available

United States District Court
N D California
Catherine Jane VALLE and Don Perolino Cristobal
individuals on behalf of themselves and all persons
similarly situated Plaintiffs
v
LOWES HIW INC a Washington corporation
Defendant
No 11-1489 SC
Aug 22 2011

Norman B Blumenthal Aparajit Bhowmik Kyle
Roald Nordrehaug Ruchira Priya Mukherjee Blu-
menthal Nordrehaug & Bhowmik La Jolla CA for
Plaintiffs

Phillip J Eskenazi Jason Jonathan Kim Hunton &
Williams LLP Los Angeles CA for Defendant

*ORDER GRANTING DEFENDANT'S MOTION TO
COMPEL ARBITRATION*

SAMUEL CONTI District Judge

I INTRODUCTION

*1 This is a putative class action in which Plaintiffs Catherine Jane Valle (Valle) and Don Perolino Cristobal (Cristobal) (collectively, Plaintiffs) allege that Defendant Lowe's HIW Inc (Defendant) failed to pay them proper over time compensation and provide them with accurate itemized wage statements ECF No 1 (Compl) On May 17 2011 Defendant filed an amended motion to compel arbitration and to strike portions of Plaintiffs Complaint ECF No 15 (Def s Mot) After the Court denied Plaintiffs' ex parte motion to continue the deadline to respond to Defendant's Motion ECF No 20 Plaintiffs filed their Opposition and Defendant filed its Reply ECF Nos 23 (Pls Opp'n) 25 (Def s Reply) Plaintiffs also filed a motion to file a first amended complaint which is now fully briefed ECF Nos 22 (Pls '

Mot) 27 (Def's Opp'n) 29 (Pls ' Reply) For the following reasons the Court GRANTS Defendant's motion to compel arbitration STAYS this action pending arbitration and DENIES Defendant's motion to strike and Plaintiffs' motion for leave to file an amended complaint

II BACKGROUND

The following facts are taken from Plaintiffs' Complaint Defendant is a corporation organized under the laws of the state of Washington with its principal place of business in North Carolina Compl ¶ 1 It operates a chain of more than seventeen hundred home improvement retail stores throughout the United States and Canada Id ¶ 2 In managing its stores, it hires individuals as zone managers Id ¶ 7 Zone managers are tasked with opening and closing the store assisting cashiers and providing customer service Id Defendant treats the position of zone manager as an exempt and salaried position Id ¶ 6

Plaintiffs are California residents Id ¶¶ 4 5 Valle was employed by Defendant as a zone manager from August 2007 to January 2011 Cristobal is currently employed as a zone manager and has been so employed since December 2007 Id Plaintiffs allege that in addition to the above responsibilities zone managers are required to engage in so called impact hours during which they would work alongside and perform similar work as non exempt employees Id ¶ 8 Plaintiffs allege that zone managers do not have the authority to train hire fire or discipline hourly employees Id ¶ 8 Plaintiffs allege that Defendant set the work schedule for zone managers with each zone manager working ten to twelve hours each workday and ten to twenty hours of overtime each workweek Id ¶¶ 11-12 Plaintiffs allege that as a consequence Defendant misclassified them as exempt employees and improperly denied them payment for their overtime work Id ¶ 9

Defendant alleges that both Plaintiffs signed ar-

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bitration agreements when they were hired and it attaches copies of what it claims are the Agreements Seelye Decl Exs A & B (Agreements)
FN1 Both Agreements are nearly identical two page form documents They state

FN1 Blake Seelye (Seelye) filed a declaration in support of Defendant's Motion Seelye declares that he is the human resources manager of the Lowe's store in which Plaintiffs worked ECF No 16

*2 [A]ny controversy between you and Lowe's arising out of your employment or the termination of your employment shall be settled by binding arbitration (at the insistence of either you or Lowe's HIW Inc) in accordance with the arbitration procedures of the American Arbitration Association under its National Rules for the Resolution of Employment Disputes Should the AAA decline to administer the arbitration for any reason the parties will select an arbitrator using the procedures employed by the AAA who will employ the rules and procedures set up in the AAA National Rules for the Resolution of Employment Disputes
Agreements at 1

The Agreements note that they are intended to be broad and to cover to the extent otherwise permitted by law disputes under

Title VII of the Civil Rights Act of 1964 as amended the Civil Rights Act of 1866 the Equal Pay Act the Fair Labor Standards Act the Pregnancy Discrimination Act the Age Discrimination in Employment Act the Family and Medical Leave Act the Americans with Disabilities Act and any similar federal state and local laws

Id at 2 The Agreements state that they do not cover Workers' Compensation or ERISA disputes
Id at 2

The Agreements require the initiator of arbitration to pay a filing fee equivalent to the fee that

would be paid to file a complaint in federal court, with this fee waivable by the arbitrator if financial hardship is proven *Id* They provide that if the signee does not prevail in the arbitration you will bear the full amount of any attorney fees and expenses that you incurred in regard to this arbitration *Id* While the Agreements provide that Defendant shall be responsible for arbitration fees beyond the filing fee the employee may be responsible for payment of Defendants' reasonable fees or expenses if the arbitrator finds the employee's initiation of arbitration was unreasonable under the circumstances or in bad faith *Id* at 2

Plaintiffs bring four causes of action First they bring a claim for unlawful unfair and/or deceptive business practices pursuant to section 17200 of California Business and Professions Code (UCL), alleging that Defendant had a uniform policy of misclassifying its zone manager employees as exempt *Id* ¶ 31 Second they allege Defendant failed to pay overtime compensation under sections 510 1194 and 1198 of the California Labor Code *Id* ¶ 70 Third they allege Defendant failed to provide accurate itemized wage statements in violation of section 226 of the California Labor Code *Id* ¶ 86 Fourth they allege Defendant failed to pay overtime compensation under the Fair Labor Standards Act (FLSA) 29 U S C § 201 *Id* ¶ 90 Plaintiffs seek leave to amend their Complaint to add a fifth claim under California's Private Attorney General Act Cal Lab Code § 2698 (PAGA) See Pls Mot They allege that they have complied with the procedural prerequisites to bringing a PAGA claim and they have filed a draft of their proposed amended complaint Mukherjee Decl Ex 1 (Prop FAC)
FN2

FN2 Priya Mukherjee (Mukherjee) counsel for Plaintiffs filed a declaration in support of Plaintiffs Motion ECF No 22-1

*3 In bringing their first claim Plaintiffs seek to represent a class of all individuals who are or previously were employed by Defendant as a zone

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manager in California during the period beginning four years before the filing of this action *Id* ¶ 28 In bringing their second and third causes of action Plaintiffs seek to represent a subclass of all members of the above class who performed work in excess of eight hours per day or forty hours in a week and did not receive overtime compensation *Id* In bringing their fourth cause of action, they seek to represent a subclass of all class members who during the period beginning three years prior to the filing of the Complaint performed work in excess of forty hours per workweek *Id* ¶ 92 They seek to bring their PAGA action on behalf of themselves and all individuals who are or previously were employed by DEFENDANT as 'Zone Managers' in California during the applicable statutory period as determined by the Court Prop FAC ¶ 110

Defendant moves to compel arbitration under the Agreements and to strike portions of Plaintiffs Complaint See Def's Mot at 1 Defendant alleges that because both Plaintiffs signed arbitration agreements the Federal Arbitration Act (FAA) requires the Court to dismiss their action and compel arbitration *Id* Defendant argues that under the U S Supreme Court's recent decision in *Stolt-Neilsen NA v AnimalFeeds International Corp* — U S — 130 S Ct 1758 176 L Ed 2d 605 (2010) all references to class action in the Complaint should be stricken and that Plaintiffs should be forbidden from seeking arbitration of their claims on behalf of a class *Id* Defendant argues that Plaintiffs Motion to amend their Complaint should be denied as futile alleging that Plaintiffs effectively waived the right to bring PAGA actions when they signed the arbitration agreement See Def's Opp'n

III LEGAL STANDARD

The FAA requires a district court to stay judicial proceedings and compel arbitration of claims covered by a written and enforceable arbitration agreement 9 U S C § 3 In determining whether to compel arbitration under the FAA the court must determine whether (1) there is an agreement

between the parties to arbitrate (2) the claims at issue fall within the scope of the agreement and (3) the agreement is valid and enforceable *Lifescan Inc v Pernaier Diabetic Servs Inc* 363 F 3d 1010 1012 (9th Cir 2004) While generally applicable defenses to contract such as fraud, duress or unconscionability invalidate arbitration agreements the FAA preempts state-law defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue *AT & T Mobility LLC v Concepcion* — U S — — — — 131 S Ct 1740, 1745–47 179 L Ed 2d 742 (2011) Because of the strong policy favoring arbitration doubts are to be resolved in favor of the party moving to compel arbitration *Moses H Cone Mem Hosp v Mercury Const Corp* 460 U S 1 24 103 S Ct 927 74 L Ed 2d 765 (1983)

IV DISCUSSION

*4 Defendant alleges that Plaintiffs signed Agreements to arbitrate that the claims at issue fall within the scope of these Agreements and that the Agreements are enforceable See Def's Mot at 1 While Plaintiffs do not challenge the existence of the Agreements or dispute that the claims at issue are within the scope of the Agreements they allege that the Agreements are invalid or unenforceable

Defendant also asks the Court to strike portions of Plaintiffs' Complaint referencing class-wide arbitration Def's Mot at 1 Defendant argues that under the Supreme Court's recent opinion in *Stolt-Neilsen* the arbitration provisions should be read to require bilateral arbitration and bar all collective class or representative actions Def's Mot at 1 In *Stolt-Neilsen* pursuant to an arbitration agreement between the parties that was silent on the issue of class arbitration the plaintiff and the defendant agreed to arbitrate their dispute but disagreed as to whether the plaintiff could arbitrate on behalf of a class 130 S Ct at 1765–66 The arbitration panel concluded that the plaintiff could pursue class arbitration *Id* The Court vacated the arbitration panel's ruling finding that the arbitration panel

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had failed to look to federal maritime or state law to determine whether class arbitration was appropriate and had instead based its decision on public policy considerations *Id* at 1768–69 The Court concluded 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 *Id* at 1775

Defendant argues that under *Stolt-Nielsen* because the Agreements are silent on class arbitration, Plaintiffs should be barred from any collective class or representational arbitration Def's Mot at 1 Defendant argues that as a consequence Plaintiffs effectively waived their PAGA claim when they signed the Agreements and so Plaintiffs' motion for leave to amend should be denied as futile *Id* Plaintiffs vigorously dispute Defendant's interpretation Pls ' Mot at 1

Because a court must stay an action pending arbitration if it determines that the parties have agreed to arbitrate an issue and the issue is arbitrable 9 U S C § 3 the Court first addresses Defendant's Motion to Compel Arbitration Plaintiffs make four arguments that the arbitration provisions in the Agreements are invalid or unenforceable First they argue that the arbitration provisions violate section 7 of the National Labor Relations Act (NLRA) by denying employees the right to bring collective class or representative actions Pls Opp'n at 1 Second they argue that Defendant's interpretation of the arbitration provisions unlawfully prohibits Plaintiffs from bringing claims for violations of the Private Attorney General Act *Id* Third they argue that the arbitration provisions are unenforceable under *Gentry v Superior Court* 42 Cal 4th 443 64 Cal Rptr 3d 773 165 P 3d 556 (2007) Fourth they argue that the arbitration provisions are unconscionable

1 NLRA

*5 Defendant argues that the Agreements bar Plaintiffs from pursuing arbitration on a collective class or representative basis Def's Mot at 1 Plaintiffs dispute this contention, however they

also argue that it renders the Agreements unenforceable because if adopted, it would bar collective class or representational actions by employees against their employer in violation section 7 of the NLRA Pls ' Opp'n at 8

Section 7 provides

Employees shall have the right to self-organization to form join or assist labor organizations to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title

29 U S C § 157

Plaintiffs essentially argue that if the arbitrator adopts Defendant's proposed interpretation of the Agreements and bars all collective class and representative arbitrations, section 7 would be violated As such they ask the Court to preemptively invalidate an arbitration agreement due to the possibility of a future ruling by an arbitrator This is nonsensical Plaintiffs section 7 argument may possibly provide grounds to vacate or modify an arbitration award but Plaintiffs cite no law for their proposition that it preemptively renders the arbitration agreement unenforceable As such the Court rejects this argument

2 PAGA

Plaintiffs argue that the Agreements should not be interpreted to bar arbitration of all class representative and collective actions because that would bar Plaintiffs from asserting representative PAGA claims Pls ' Opp'n at 10

PAGA provides that certain civil penalties that can be assessed and collected by California's Labor

and Workforce Development Agency can be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees if certain procedural requirements are met Cal Lab Code § 2699(a) It is fundamentally a law enforcement action designed to protect the public and not to benefit private parties wherein the aggrieved employee's action functions as a substitute for an action brought by the government itself *Arias v Super Ct* 46 Cal 4th 969 986–87 95 Cal Rptr 3d 588 209 P 3d 923 (2009)

California's legislature enacted PAGA in part because [s]taffing levels for state labor law enforcement agencies have in general declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future Cal Lab Code § 2698(c) Because in some cases the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties PAGA serves the public interest by insuring that violating employers will not benefit from decreased labor law enforcement staffing levels *Id* § 2698(d)

*6 If the aggrieved plaintiff is successful in its PAGA action any judgment against the employer for civil penalties is split between the state of California and the aggrieved employees with the state receiving seventy five percent and the employees receiving twenty-five percent Cal Lab Code § 2699(i) A prevailing employee is also entitled to an award of reasonable attorney's fees and costs *Id* § 2699(g)(1)

To the extent that Plaintiffs argue that no PAGA claim is arbitrable the Court rejects this argument as unsupported by the law Plaintiffs' PAGA claim is a state-law claim, and states may not exempt claims from the FAA *Doctor's Associates Inc v Casarotto* 517 US 681 687, 116 S Ct 1652 134 L Ed 2d 902 (1996) To the extent Plaintiffs argue that the Agreements are unenforceable due to the mere possibility that an arbitrator may interpret the agreement to bar Plaintiffs from

representing others in bringing a PAGA claim the Court also rejects this argument Even if an arbitrator found that *Stolt-Nielsen* prohibited Plaintiffs from representing other zone managers in bringing their PAGA claim this would not bar Plaintiffs from bringing its PAGA action on behalf of themselves and the state of California

3 *Gentry*

Plaintiffs argue that to the Agreements are unenforceable under *Gentry* which holds that a class action waiver is unenforceable if (1) individual awards tend to be modest (2) suing poses a risk of retaliation (3) claimants do may not bring individual claims because they are unaware that their legal rights have been violated and (4) even if some individual claims are sizable enough to provide an incentive for individual action it may be cost effective for a defendant to pay those judgments and continue the allegedly violative conduct 42 Cal 4th at 459–62 64 Cal Rptr 3d 773 165 P 3d 556

Defendant argues that *Gentry* was effectively overruled by *Concepcion* — U S — 131 S Ct 1740 179 L Ed 2d 742 *Concepcion* explicitly overruled the California's Supreme Court's holding in *Discover Bank v Superior Court* 36 Cal 4th 148 30 Cal Rptr 3d 76 113 P 3d 1100 (2005) *Discover Bank* provided that in consumer disputes arbitration clauses in non-negotiable contracts of adhesion are unenforceable when the damages at issue are small and when the plaintiff alleges a scheme to cheat consumers of small sums of money *Concepcion* held that while arbitration agreements may be invalidated by generally applicable contract defenses such as fraud duress or unconscionability state-law defenses like the one provided by *Discover Bank* that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue are preempted 131 S Ct at 1745–47

Like *Discover Bank* *Gentry* provides a rule of enforceability that applies only to arbitration provisions Both opinions rely on the same California precedent and logic Because of these similarities

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many courts have found that *Concepcion* overrules or abrogates *Gentry*. *E.g. Murphy v DIRECTV* No 07-6465 2011 WL 3319574 at *4 (C D Cal Aug 2 2011) (holding that *Concepcion* overruled *Gentry*) *Morse v ServiceMaster Global Holdings Inc* No 10-0628 2011 WL 3203919 at *3 n 1 (N D Cal July 27 2011) (noting that even if *Concepcion* did not explicitly overrule *Gentry* it rejected the reasoning and precedent behind it) As such the Court concludes that in light of *Concepcion* *Gentry* is no longer good law and rejects Plaintiffs' argument

4 Unconscionability

*7 To be unenforceable a contract must be both procedurally and substantively unconscionable. *Armendariz v Found Health Psychcare Servs Inc* 24 Cal 4th 83 114, 99 Cal Rptr 2d 745 6 P 3d 669 (2000) Procedural unconscionability concerns the manner in which the agreement was negotiated and it is present if the contract was the product of oppression or surprise. *Stirlen v Supercuts Inc* 51 Cal App 4th 1519, 1532 60 Cal Rptr 2d 138 (Ct App 1997) A contract is oppressive if there is an inequality of bargaining power which denies the weaker party an opportunity to negotiate the terms of the contract. *Id* Substantive unconscionability concerns terms of the agreement specifically the imposition of harsh or oppressive terms on one who has assented freely to them. *Id* at 1532-33 60 Cal Rptr 2d 138 A term is considered substantively unconscionable if it is so one sided as to shock the conscience. *Id* (quoting *Cal Grocers Ass'n v Bank of America* 22 Cal App 4th 205 214 27 Cal Rptr 2d 396 (Ct App 1994)) While the party challenging the enforceability must prove both procedural and substantive unconscionability, California uses a sliding scale wherein the more procedural unconscionability is present the less substantive unconscionability is required. *Olvera v El Pollo Loco Inc* 173 Cal App 4th 447 454 93 Cal Rptr 3d 65 (Ct App 2010)

Plaintiffs filed an ex parte motion seeking a

lengthy continuance of Defendant's motion to compel arbitration arguing that discovery into the negotiation of the Agreements was necessary in order for Plaintiffs to prove procedural unconscionability. ECF No 17 The Court denied Plaintiffs' motion. ECF No 20 It stated that because Plaintiffs must prove both procedural and substantive unconscionability and because substantive unconscionability can be determined from the face of the Agreements Plaintiffs' ex parte motion would be rendered moot if Plaintiffs failed to establish that the Agreements were substantively unconscionable. *Id*

Plaintiffs make four arguments in favor of substantive unconscionability. First they argue that the Agreements provide[] for a punitive provision which requires the employee to pay attorneys' fees and arbitration expenses to Defendant on grounds that are not consistent with California and Federal law. Pls' Opp'n at 21 The Agreements provide

[I]f you fail to prevail in the arbitration you will bear the full amount of any attorney fees and expenses that you incurred in regard to this arbitration. In addition the arbitrator will have the authority to award some or all of the fees and expenses Lowe's paid if the arbitrator finds that your pursuit of arbitration was unreasonable under the circumstances or in bad faith.

Agreements at 2 Plaintiffs allege that this is inconsistent with state law because section 1194 of California Labor Code provides a one way fee-shifting arrangement. Pls' Opp'n at 21 The Court finds this argument to be unavailing it is hardly unconscionable to sanction parties for bringing arbitration actions that are in bad faith or unreasonable under the circumstances. Indeed state and federal courts have similar power to engage in fee shifting to punish such bad faith conduct. *E.g.* 28 U.S.C. § 1927 Cal Civ Proc Code § 128.5(a) (Every trial court may order a party the party's attorney or both to pay any reasonable expenses including attorney's fees incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary

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delay)

*8 Second Plaintiffs argue that discovery limitations also make the agreements unconscionable *Id* at 22 93 Cal Rptr 3d 65 The Agreements are silent on discovery but incorporate the AAA's National Rules for the Resolution of Employment Disputes (Rules) *See* Agreements at 1 These Rules provide The arbitrator shall have the authority to order such discovery by way of deposition interrogatory document production or otherwise as the arbitrator considers necessary to a full and fair exploration of the issues in dispute consistent with the expedited nature of arbitration Nordrehaug Decl Ex 2 (Rules) ¶ 7 ^{FN3}

FN3 Kyle Nordrehaug (Nordrehaug) counsel for Plaintiffs filed a declaration in support of Plaintiffs Opposition ECF No 23-1

Plaintiffs argue that this discovery rule is one sided in favor of Defendant because Defendant already has access to all witnesses documents and information required to litigate the action and settled law holds that such limitations unfairly prevent the vindication of important statutory rights *Id* at 22-23 93 Cal Rptr 3d 65 The Court rejects this argument The cases Plaintiffs cite concern arbitration agreements with specific limitations on discovery *E.g. Fitz v NCR Corp* 118 Cal App 4th 702 716-17 13 Cal Rptr 3d 88 (Ct App 2004) (finding arbitration agreement expressly limiting discovery to two depositions to be substantively unconscionable) Plaintiffs cite no cases in support of their argument that the AAA's necessary standard for discovery is substantively unconscionable

Third Plaintiffs allege that according to Defendant the agreement waives Plaintiffs' substantive rights and remedies under the Labor Code to bring a PAGA claim to redress unlawful working conditions Pls' Opp'n at 23-24 Plaintiffs cite *Davis v O'Melveny & Myers* 485 F 3d 1066 1082 (9th Cir 2007) for the proposition that an arbitra

tion agreement may not function so as to require employees to waive potential recovery for substantive statutory rights in an arbitral forum especially for statutory rights established for a public reason

The Agreements contain no explicit waivers of substantive statutory rights rather Plaintiffs argue that Defendant's interpretation of the Agreements—if adopted by the arbitrator—would have the effect of waiving Plaintiffs' PAGA claim Again Plaintiffs put the cart before the horse The cases Plaintiffs cite involve arbitration agreements with specific provisions in which statutory rights are waived *See id* The mere fact that Defendant advances a specific interpretive argument does not render the Agreements to be facially substantively unconscionable

Fourth Plaintiffs argue that the Agreement effectively imposes one sided confidentiality Pls Opp'n at 24 The Agreements are silent on the issue of confidentiality Plaintiffs allege that arbitration rules expressly incorporated into the provision impose confidentiality which unfairly favors Defendant *Id* at 24-25 The relevant rule provides The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality unless the parties agree otherwise or the law provides to the contrary Rules ¶ 18 Again Plaintiffs' argument is without merit Plaintiffs may argue during arbitration that maintaining the confidentiality of the arbitration proceedings is unfair or contrary to the law and the arbitrator may agree The mere possibility that the arbitration is kept confidential does not render the Agreements substantively unconscionable

*9 In summary Plaintiffs essentially ask the Court to find that the AAA's National Rules for the Resolution of Employment Disputes are substantively unconscionable The Court rejects Plaintiffs' argument and finds that the Agreements contain no elements of substantive unconscionability Because there is no evidence of substantive unconscionability the Court need not address the issue of proced-

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ural unconscionability

For the above reasons the Court concludes that Plaintiffs have failed to establish that the arbitration provisions in the Agreements are unenforceable and it GRANTS Defendant's Motion to Compel Arbitration Pursuant to the FAA the Court STAYS this action pending completion of the arbitration proceedings Because Plaintiffs' motion for leave to file an amended complaint and Defendant's motion to strike both concern issues the parties have agreed to arbitrate, it DENIES both motions without ruling on the merits of either motion If they wish the parties may seek resolution of these issues before the arbitrator

V CONCLUSION

For the foregoing reasons the Court GRANTS Defendant Lowe's HIW Inc s Motion to Compel Arbitration and STAYS this action pending resolution of arbitration proceedings In light of this stay and without reaching the merits of either motion the Court DENIES Defendant s Motion to Strike and DENIES the Motion for Leave to File a First Amended Complaint brought by Plaintiffs Catherine Jane Valle and Don Perolino Cristobal

IT IS SO ORDERED

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A Early, III, Circuit Court Judge

Circuit Court Case No 2006-CP-02-1230

Heather Herron Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts,
Alison Dannert, Michael Blease, Michael Watts, individually and for the benefit of all car
buyers who paid "administrative fees as described below to Defendants,
Respondents,

v

Century BMW d/b/a Sonic Automotive, Dick Dyer & Associates, Inc , Galeana Chrysler
Plymouth, Inc , a/k/a Galeana Chrysler Jeep, Inc , J L H Investments LP a/k/a Hendrick
Honda, Overland, Inc , d/b/a Land Rover of Columbia, Taylor Toyota a/k/a Taylor
Investments, and Toyota of Greenville, Inc , **Defendants**

of whom Century BMW d/b/a Sonic Automotive is the

Appellant

CERTIFICATE OF SERVICE

The undersigned employee of RICHARDSON PLOWDEN & ROBINSON, P A ,
attorneys for Appellant, does hereby certify that service of the foregoing
SUPPLEMENTAL AUTHORITY, dated October 27, 2011, in the above-captioned
matter was made upon all counsel of record this 27th day of October 2011, by hand
delivery to

A Camden Lewis, Esq
LEWIS & BABCOCK, LLP
P O Box 11208
Columbia, SC 29211

and was made upon the following counsel of record this 27th day of October, 2011, by
depositing a copy of same in the U S Mail, postage prepaid, addressed as follows

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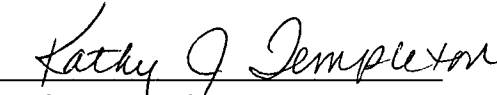
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October 27, 2011
Columbia South Carolina