UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KARTIK PATEL, on behalf of himself and all others similarly situated, Plaintiff, v. JACK IN THE BOX INC., Defendant.	Case No.: 3:16-cv-02561-H-JLB **ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION** [Doc. No. 27]

On October 13, 2016, Plaintiff Kartik Patel ("Plaintiff") filed a putative class action against Defendant Jack in the Box, Inc. ("Defendant"), alleging Defendant violated various state and federal laws regulating the treatment of employees. (Doc. No. 1.) On December 21, 2016, Defendant filed a motion to compel arbitration, alleging that Plaintiff had signed a binding arbitration agreement covering all claims. (Doc. No. 27.) Plaintiff filed on opposition on January 13, 2017. (Doc. No. 47.) Defendant replied on January 23, 2017. (Doc. No. 48.)

BACKGROUND

Plaintiff began working for Defendant in 1990. (Doc. No. 27-3 ¶ 5; accord Doc. No. 47-2 ¶ 2.) In 2001, Plaintiff was promoted to Restaurant Manager, a title he held until leaving Jack in the Box in 2016. (Id.) In 2005, the Restaurant Manager position was described by internal Jack in the Box documents as follows:

> Responsible for managing the overall operations of a Jack in the Box unit. Uses discretion in daily management decisions with accountability for ensuring effective execution of the Service Profit Chain (SPC) and Brand Promise. Develops team to provide excellent internal service, and build restaurant sales and profit while ensuring compliance with policies, procedures, and regulatory requirements.

(Doc. No. 27-3 at 15.) As of April 2015, this description was virtually unchanged. (Compare id. with id. at 9.)

On March 11, 2004, Plaintiff signed a document titled "Receipt and Acknowledgment" that stated Plaintiff had reviewed and agreed to be bound by the Jack in the Box Dispute Resolution Agreement ("Agreement"). (Doc. No. 27-3 at 24.) The Agreement bound the parties to arbitrate all of the claims currently before the Court. (See id. at 18-23.)

DISCUSSION

I. LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides a clear preference for enforcing arbitration agreements. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements."); accord Mortensen v. Bresnan Comm., LLC, 722 F.3d 1151, 1160 (9th Cir. 2013) ("the FAA's purpose is to give preference (instead of mere equality) to arbitration provisions"). Accordingly, 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." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis in original). This preference, however, is not without limit. Arbitration is a matter of contract and the existence of a contract must be established before arbitration is ordered. AT&T Tech., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 648 (1986); accord Sanford v. MemberWorks, Inc., 483 F.3d 956, 962 (9th Cir. 2007) ("Issues 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 prior to ordering arbitration.") (emphasis in original). Arbitration is also not required where "generally applicable contract defenses" invalidate the arbitration agreement. 9 U.S.C. § 2 ("[an arbitration agreement] shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements."). Federal courts apply state contract law to determine whether a valid arbitration agreement exists. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1121 (9th Cir. 2008).

A motion to compel arbitration mirrors a motion for summary judgment. Cox, 533 F.3d at 1119 ("denial of a motion to compel arbitration has the same effect as a grant of partial summary judgment") (citing Craft v. Campbell Soup Co., 117 F.3d 1083 (9th Cir. 1999)); accord Hancock v. Am. Tel. & Tel. Co., 701 F.3d 1248, 1261 (10th Cir. 2012) (applying summary judgment standard to motion to compel). The party seeking to enforce an arbitration agreement bears the burden of showing that the agreement exists and covers the dispute in question. Cox, 533 F.3d at 1119. A party opposing arbitration bears the burden of showing any facts necessary to its defenses. Engalla v. Permanente Medical Group, Inc., 15 Cal.4th 951, 972 (1997). The Court will view the evidence in the light most favorable to the opposing party, Cox, 533 F.3d at 1119, and where there are material questions of fact as to the "making of the arbitration agreement . . . the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts" in assessing whether a genuine issue of material fact exists. Scott v. Harris, 550 U.S. 372, 380 (2007). Furthermore, "[a] conclusory, self-serving affidavit, lacking detailed facts

and any supporting evidence, is insufficient to create a genuine issue of material fact." F.T.C. v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1997).

II. ANALYSIS

Defendant has satisfied its initial burden of showing an arbitration agreement exists and covers the dispute in question. Cox, 533 F.3d at 1119. Defendant has produced an arbitration agreement signed by Plaintiff.[1] (Doc. No. 27-3 at 18-23.) The Agreement contains a section entitled "Claims Covered by the Agreement" listing the various actions the parties have agreed to arbitrate, (id. at 23-24), and Plaintiff does not dispute that his claims are covered by this list, (see Doc. No. 47). Plaintiff's lack of recollection of the Agreement, (Doc. No. 47-2 ¶ 25), has no impact on the validity of a signed agreement under California law, Randas v. YMCA of Metropolitan Los Angeles, 17 Cal.App.4th 158, 163 (1993) ("one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.").

Plaintiff asserts various defenses. First, Plaintiff argues the Agreement's collective action waiver is unenforceable under the National Labor Relations Act ("NLRA") because it interferes with employees' collective action. Second, Plaintiff argues the Agreement's waiver of representative claims is invalid because it prevents the filing of California Private Attorneys General Act ("PAGA") claims. Finally, Plaintiff argues the Agreement is unconscionable. These arguments fail. Under the NLRA, Plaintiff is a supervisor and, thus, can waive his collective action rights. Furthermore, because

[1] Plaintiff's argument that the Agreement is not enforceable by Defendant, (Doc. No. 47 at 12), is without merit. The Agreement is between Plaintiff and "Jack in the Box and its affiliates." (Doc. No. 27-3 at 18.) Plaintiff argues that "Jack in the Box" is different from Defendant's name, "Jack in the Box, Inc.," and thus Defendant was not a party to the Agreement. This flies in the face of common sense and Plaintiff has not provided any indication which other legal entity "Jack in the Box" refers to, other than "Jack in the Box, Inc." Defendant filed a declaration stating that the two entities are the same, (Doc. No. 48-3 ¶ 2), and, absent any evidence to the contrary from Plaintiff, this satisfies Defendant's burden. See Espejo v. So. Cal. Permanente Medical Group, 246 Cal.App.4th 1047, 1057 (2016).

Plaintiff's complaint does not include any PAGA claims, the Court need not address whether they have been waived. Finally, the Agreement is not unconscionable.

A. CLASS ACTION WAIVER

The Agreement states that Plaintiff waived his rights to pursue a collective action against Defendant. (Doc. No. 27-3 at 19) ("Neither Employee nor Company shall be entitled to join or consolidate in arbitration claims not covered by this Agreement or arbitrate action or a claim as a representative or member of a class."). In Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016) (cert. granted, January 13, 2017), the Ninth Circuit held that employees' mandatory arbitration clauses were unenforceable because they infringed on the employees' substantive rights established by Section 7 of the NLRA.[2] The NLRA provides that "Employees shall have the right to . . . bargain collectively through representatives of their own choosing, and to engage in concerted activities." 29 U.S.C. § 157. The Ninth Circuit held this was a substantive right and, thus, a mandatory arbitration agreement waiving these rights was illegal. Morris, 834 F.3d at 988. Plaintiff argues that the reasoning in Morris renders his Agreement illegal as well. But this is not so.

The NLRA's substantive right to collective action extends only to "employees." The term employee, however, explicitly excludes "any individual employed as a supervisor." 29 U.S.C. § 152(2). Supervisors include:

> "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employee, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[2] At the outset, the Court notes that the United States Supreme Court has granted *certiorari* to review the decision in Morris. However, the Morris decision is still binding on this Court.

29 U.S.C. § 152(11).

Section 152(11) can be broken into three separate elements: an employee is a supervisor if (1) he engages in any one of the twelve listed functions, (2) in so doing he exercises independent judgment, and (3) does so in the interest of the employer. N.L.R.B. v. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001). Plaintiff does not dispute that he engaged in some of the supervisory functions, nor that he did so in the interest of Defendant. (See Doc. No. 47 at 14-23.) Thus the only question before the Court is whether he exercised independent judgment in his role as Restaurant Manager.

Plaintiff was employed as a Restaurant Manager and qualifies as a supervisor with independent judgment. The official description of a Restaurant Manager states that a manager "[u]ses discretion in daily management decisions" and regularly "[r]ecruits, selects, develops, and evaluates restaurant employees," "[m]onitors staffing levels to ensure sufficient development and talent," "takes accountability for motivating and inspiring employees," "regularly recognizes and rewards employees," "reviews practices and modifies as needed," and "identifies trends and implements action plans for improvement." (Doc. No. 27-3 at 9-16.) As a Restaurant Manager, Plaintiff regularly acknowledged engaging in all of these tasks. Defendant provided numerous Manager Statements dating back to 2012. In these statements, Plaintiff acknowledged performing at least 19 separate managerial tasks, including making hiring decisions, training employees, terminating employees, monitoring employees, and "making decisions concerning the day to day restaurant operations." (Doc. No. 27-2 at 5-12.) The Manager Statements show that Plaintiff worked approximately 45 hours per week and spent approximately 80% of his time engaged in "management duties or responsibilities." Id. At the end of each Manager Statement, Plaintiff verified that:

> I responded truthfully and accurately to the above questions about my work. No one pressured me about how to respond and no one told me what to say. By signing below, I agree that my answers (including my job functions and

> weekly hours) are based on my own work experience. I understand that I can call the Ethics Help Line to report any pressure for me to give false information.

(E.g., Doc. No. 27-2 at 5.)

In addition to documentary evidence, Defendant submitted declarations from Plaintiff's supervisors providing specific examples of Plaintiff's exercise of managerial discretion in hiring new employees, disciplining and terminating employees, making staffing decisions, and effectively recommending employees for promotion. (Doc. No. 27-1 at 21-26; Doc. No. 27-3 at 1-3; Doc. No. 27-5 at 1-4; Doc. No. 27-6 at 1-6.) The declarations state that Plaintiff exercised independent judgment in taking these actions.

Greg Kopczyk, Plaintiff's supervisor since 2015, described how Plaintiff regularly hired new employees to staff the restaurants Plaintiff managed. (Doc. No. 27-6 ¶¶ 3-4.) Plaintiff determined when new employees were needed, reviewed available applications in a centralized database, and ultimately made the decision of whom to hire. Id.

Similarly, Kopczyk explained that Plaintiff regularly disciplined employees, even terminating them. (Doc. No. 27-6 ¶ 8.) Kopczyk recalled at least two employees terminated by Plaintiff without any instruction from Kopczyk or any other supervisor. Id. Kopczyk provided written documentation of these terminations. (Doc. No. 27-6 at 8-9.) The written records of the termination are signed by Plaintiff on the line labeled "Manager Approval." Id.

Kopczyk also stated that Plaintiff made regular staffing decisions such as assigning employees to shifts and determining the total number of labor hours for the restaurant. Id. at ¶ 5. These decisions were made by Plaintiff in consideration of various factors. For example, one of Plaintiff's restaurants is near the Rose Bowl, and Plaintiff adjusted staffing levels depending on the event schedule. Id. Defendant provided Plaintiff with staffing guidelines, but Plaintiff regularly staffed his restaurants above the guidelines in light of other factors. (Doc. No. 48-1 ¶ 7.) On one notable occasion, Plaintiff significantly exceeded the guidelines due to a Beyonce and Jay Z concert and set a sales

record for the restaurant—which he could not have done by simply following the basic guidelines set by Defendant. Id.

Finally, Kopczyk stated that Plaintiff effectively recommended employees for promotion based on his independent judgment of their capacity. (Doc. No. 27-6 ¶ 7.) Kopczyk relied on Plaintiff's recommendation to begin the promotion process for Hugo Alvarado and Martin Cortez. Ultimately Mr. Cortez failed to complete the necessary training but Mr. Alvarado was promoted to Assistant Manager.

Each of these specific managerial duties described by Mr. Kopczyk independently establishes that Plaintiff was a supervisor. See N.L.R.B. v. Baja's Place, 733 F.2d 416, 421 (9th Cir. 1984) (finding someone a supervisor because "[t]wo dishwashers testified that Brown had hired them, told them when to report to work, and generally supervised their activities"); Metro Transport LLC, 351 NLRB 657, 660 (2007) (finding someone a supervisor where he imposed discipline without needing to consult his superior); N.L.R.B. v. Yuba Nat. Resources, Inc., 824 F.2d 706 (9th Cir. 1987) (affirming someone was not a supervisor because they did not have the authority to assign overtime).

Plaintiff argues that he never exercised independent judgment in his managerial duties because his actions were dictated by Defendant's policies and instructions from his superiors. The only evidence Plaintiff provides in support of this argument is his own declaration. (Doc. No. 47-2.) As this is the only evidence, it must set forth sufficiently detailed facts, rather than mere conclusions, in order to create a genuine issue of material fact. Publ'g Clearing House, Inc., 104 F.3d at 1171. It does not.

An employee's behavior does not require independent judgment "if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." In re Oakwood Healthcare, Inc., 348 NLRB 686, 693 (2006). However, "the mere existence of company policies does not eliminate independent judgment for decision-making if the policies allow for discretionary choices." Id. The record clearly establishes that Plaintiff made discretionary choices as Restaurant Manager.

To begin with, Plaintiff acknowledged his use of discretion in "mak[ing] decisions concerning the day to day restaurant operations" when he verified his routine Manager Statements. (See Doc. No. 27-2 at 5-12.) And Plaintiff's duties as Restaurant Manager—which he admits to doing—demonstrate his exercise of discretion. For example, Plaintiff's hiring, scheduling, and recommending employees for promotion demonstrates this discretion.

Plaintiff acknowledges that he hired employees for the two restaurants he managed. (Doc. No. 47-2 ¶ 16.) Defendant describes the hiring process as follows: When Plaintiff determined a restaurant needed additional employees he would access Defendant's centralized database, talentReef, where online applications were consolidated. After reviewing the available applications, Plaintiff would make a decision regarding who to hire and extend offers directly to the applicants. (Doc. No. 27-6 ¶ 5; Doc. No. 48-1 ¶ 13.) Plaintiff claims that this hiring was not discretionary because of the standardized policies and procedures. (Doc. No. 47-2 ¶ 16.) Plaintiff claims he could only hire from a list of "pre-approved applicants" and his District Manager would sometimes weigh in on hiring decisions. (Doc. No. 47-2 ¶ 16.) Plaintiff also claims new hires had to pass a background check. Id. Even assuming these facts are true, Plaintiff has not shown he did not have discretion. The fact remains that Plaintiff received a list of possible applicants, then used his independent judgment to decide amongst them, and ultimately made a decision about who to hire. Plaintiff cannot claim this task was "of a merely routine or clerical nature," 29 U.S.C. § 152(11), because he has offered no company policy dictating how he narrowed down the list of applicants. The fact that his power was not absolute does not mean he had no discretion. Plaintiff claims he notified his District Manager of all pending hiring decisions. (Doc. No. 47-2 ¶ 16.) Notably, however, he does not say this was required by company policy and he offers no specific instance in which the District Manager actually vetoed his hiring decision. Furthermore, lacking the ultimate authority to hire is not fatal to the supervisor analysis so long as Plaintiff had the ability to effectively recommend who to hire. Chandler Associates, 220

NLRB 730, 730-31 (1975) (finding a building superintendent met the definition of supervisor because he could effectively recommend individuals for hire).

Plaintiff also acknowledges that he was responsible for staffing his restaurants, deciding how to schedule employees in order to meet demand. (Doc. No. 47-2 ¶¶ 8-10.) Plaintiff claims that "Defendant set required staffing levels based on sales volume" but proceeds to acknowledge this was only an "estimate" and he could modify that estimate in light of information not available to Defendant. (Id. ¶ 8.) In particular, Plaintiff admits to having made modifications to the staffing levels for upcoming Rose Bowl events. This discretion to modify Defendant's estimate based on information available to Plaintiff is necessarily an exercise of independent judgment.

Finally, Plaintiff admits to facts establishing he effectively recommended employees for promotion. (Doc. No. 47-2 ¶¶ 17-19.) To qualify as a supervisor under the NLRA, Plaintiff need not have the ultimate authority to promote employees, but merely the ability to effectively recommend the promotion. 29 U.S.C. § 152(11) ("'supervisor' means any individual having authority . . . [to] promote . . . or effectively to recommend such action"); Spring City Knitting Co. v. N.L.R.B., 647 F.2d 1011, 1014 (9th Cir. 1981). Defendant claims Plaintiff had the ability to effectively recommend employees because his superiors accepted his recommendations 100% of the time. (Doc. No. 48-1 ¶ 14; Doc. No. 48-2 ¶ 13.) In particular, Mr. Kopczyk relied on Plaintiff's recommendation in promoting Mr. Alvarado and Mr. Cortez.[3] The parties dispute whether Plaintiff's recommendations were solicited but this is not dispositive. What is dispositive is whether the recommendations were effective. 29 U.S.C. § 152(11). Defendant has offered at least two examples of effective recommendations while Plaintiff has offered no examples of when his recommendations were rejected.

[3] Mr. Cortez ultimately chose not to complete the training necessary for his promotion and was not promoted. However, Mr. Kopczyk claims he did everything he could on his part to effect Plaintiff's recommendation. (Doc. No. 48-1 ¶ 14.) Plaintiff does not provide any facts to contradict Mr. Kopczyk. (See Doc. No. 47-2 ¶ 19.)

In light of the evidence, the Court concludes that Plaintiff was a supervisor during his time serving as Restaurant Manager. Plaintiff executed regular Manager Statements attesting to the fact he performed various supervisory tasks and made day-to-day decisions. Furthermore, Defendant has provided specific examples of Plaintiff's behaviors that corroborate his Manager Statements. At a minimum, Plaintiff hired employees, managed the staffing of his restaurants, and effectively recommended employees for promotion. These activities each involved independent judgment and the weighing of various factors. Thus, the arbitration agreement between Plaintiff and Defendant is not rendered illegal by the NLRA or Morris.

B. REPRESENTATIVE CLAIM WAIVER

Plaintiff asks the Court to ignore the arbitration agreement because he claims a waiver of his California Private Attorney General Act ("PAGA") rights. (Doc. No. 47 at 24.) Defendant argues that the Agreement does not require Plaintiff to waive his PAGA rights and, in any event, such a determination is irrelevant because Plaintiff has not alleged any PAGA claims. (Doc. No. 48 at 11.) The Court agrees with Defendant. Plaintiff has not asserted any PAGA claims and the Court need not determine whether such claims are waived.

C. UNCONSCIONABILITY

Plaintiff seeks to avoid arbitration by claiming the Agreement is unconscionable. Under California law, the party attacking the arbitration agreement as unconscionable bears the burden of proof. Sanchez v. Valencia Holding Co., LLC, 61 Cal.4th 899, 911 (2015); Tompkins v. 23andMe., Inc., 840 F.3d 1016, 1023 (9th Cir. 2016). To succeed, a party must show that the arbitration agreement is both procedurally and substantively unconscionable. Id. Procedural unconscionability focuses on oppression or surprise at the time the agreement was made. Substantive unconscionability assesses whether the terms of the agreement are "unreasonably favorable to the more powerful party." Sonic-Calabasas A, Inc. v. Moreno, 57 Cal.4th 1109, 1145 (2013); see also Baltazar v. Forever

21, Inc., 62 Cal.4th 1237, 1234-44 (2016). Unconscionable agreements are "so one-sided as to shock the conscience." Baltazar, 62 Cal.4th at 1234 (citations omitted).

Plaintiff has not satisfied his burden of showing unconscionability. By signing the Receipt and Acknowledgment, Plaintiff acknowledged receiving the Agreement and having the opportunity to read it. (Doc. No. 27-3 at 24.) Plaintiff also acknowledged the Agreement "requires all employment-related disputes involving my legally protected rights to be submitted to an arbitrator rather than a judge and jury in court. Id. The document is short, concise, and in plain English. And the Agreement is not deceptive. The Agreement clearly states "[n]either Employee nor Company shall be entitled to join or consolidate in arbitration claims not covered by this Agreement or arbitrate a representative action or a claim as a representative or member of a class." Moreover, Plaintiff had the option to opt out of the Agreement as evidenced by the fact that others at the time chose to opt out. (Doc. No. 48-2 ¶ 16.)

In sum, the agreement is not procedurally or substantively unconscionable. The Agreement and Receipt and Acknowledgment were short, concise, and in plain English and Plaintiff had the opportunity to opt out. Abdul Kaidr Mohamed v. Uber Tech. Inc., -- F.3d -- , 2016 WL 7470557 *5-6 (9th Cir. 2016) (holding that the right to opt out prevents a finding of procedural unconscionability); accord Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199-1200 (9th Cir. 2002); Kilgor v. KeyBank, Nat. Ass'n, 718 F.3d 1052, 1058-59 (9th Cir. 2013); compare Roman v. Superior Court, 172 Cal.App.4th 1462, 1472 (2009) (finding a 7-page agreement not procedurally unconscionable) with Higgins v. Superior Court, 140 Cal.App.4th 1238, 1252-53 (2006) (finding a 24-page agreement procedurally unconscionable). And the terms of the Agreement are not so one-sided as to shock the conscience. Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172 (2003); Baltazar, 62 Cal.4th at 1234.

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CONCLUSION

For the foregoing reasons, the Court grants Defendant's motion to compel arbitration. The Court continues all dates, if any, until the completion of arbitration but reserves the right to dismiss the action if the parties do not diligently pursue their claims before the arbitrator, or for any reason justifying dismissal.

IT IS SO ORDERED.

DATED: January 27, 2017

Hon. Marilyn L. Huff
United States District Judge