JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 15-1658-JLS (JCGx) Date: March 2, 2016
Title: Delani Taft v. Henley Enterprises, Inc. et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION (Doc. 28) AND STAYING THE MATTER PENDING ARBITRATION

Before the Court is Defendant Henley Pacific LA, LLC's Motion to Compel Arbitration of Individual Claims, Dismiss Class Claims and PAGA Claim, and Stay Action Pending Arbitration. (Mot., Doc. 28.) Plaintiff Delani Taft opposed, and Defendant replied. (Opp., Doc. 31; Reply, Doc. 36.) Having considered the parties' briefs and having taken the matter under submission, the Court GRANTS Defendant's Motion and STAYS the matter pending arbitration.

I. BACKGROUND

Plaintiff Delani Taft is a former employee of Defendant Henley Pacific LA, LLC. (Reply Bowditch Decl. ¶ 6, Doc. 36-1.) On or about September 4, 2014, Taft attended an orientation at Defendant's office and underwent the new hire onboarding process. (*Id.* ¶ 7.) The onboarding process occurs online and contains discrete steps for the incoming employee to complete. (*Id.*¶ 8.) After the employee has set up her unique profile, the employee is then asked to review and electronically sign ten separate documents, including an arbitration agreement. (*Id.*) Defendant uses the services of UltiPro Software, a third party vendor, to distribute and store onboarding documents. (*Id.* ¶ 4.)

The arbitration agreement is a standalone document entitled "Mutual Agreement to Arbitrate Claims." (*See* Sun Decl. Ex. A, Doc. 28-2.) The form states: "I understand that, by signing this Mutual Agreement . . . both the Company and I are agreeing to resolve any differences between us through the binding arbitration procedures explained below." (*Id*. at 3.) The agreement covers the following claims:

> [A]ll claims or causes of action that the Company may have against me or that I may have against the Company or [related entities] . . . includ[ing], but not limited to: claims for breach of any contract or covenant; tort claims; claims for discrimination or harassment . . .; claims for retaliation; claims for violation of public policy; and claims for violation of any federal, state, local or other law, statute, regulation, or ordinance . . . .

(*Id*. ¶ 1.) Certain claims are not subject to the agreement, such as any claims for workers' compensation, unemployment compensation benefits, or any other claims that "may not, as a matter of law, be subject to mandatory arbitration provisions." (*Id*. ¶ 2.) Moreover, the agreement provides that "[t]he arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." (*Id*. ¶ 5.) The agreement further indicates that the signee "understand[s] that [she] may only bring claims under this Agreement in [her] individual capacity and not as a plaintiff or class member in any purported class or representative proceeding." (*Id*. ¶ 2.)

The audit trail retrieved from UltiPro indicates that Plaintiff received an automatically generated email on August 18, 2014 with instructions to create an employee profile. (Reply Bowditch Decl. ¶¶ 10-12, Ex. A.) Each incoming employee must create a unique username and password to access and execute the onboarding materials. (Reply Bowditch Decl. ¶¶ 10-12.) Taft created her employee profile when she arrived at Defendant's office for her orientation on September 4, 2014. (*Id*. ¶ 14; Snow-Lerps Decl. ¶¶ 6-7, Doc. 36-2.) An incoming employee must complete each step of the onboarding process in order and cannot proceed to the next step until she has concluded

all the previous steps. (Reply Bowditch Decl. ¶ 18.) The audit trail reveals that upon creating her profile, Taft electronically signed the arbitration agreement and all other onboarding documents on September 4, 2014. (*Id.* ¶ 19, Ex. A.)

Taft asserts that when she underwent the onboarding process, she was taken to a computer terminal and left alone to complete her paperwork. (Taft Decl. ¶ 5, Doc. 31-1.) Taft believes she was not given the opportunity to thoroughly read and understand the documents before she signed them, nor was she given time to consult an attorney. (*Id.* ¶ 6.) She asserts that no documents were explained to her, and she does not remember signing an arbitration agreement. (*Id.* ¶ 7.) While Taft worked at Henley Pacific, no one discussed or gave her an option to opt out of arbitration. (*Id.* ¶ 8.)

On October 15, 2015, Taft filed a class action lawsuit for the following claims: (1) failing to provide a clear and conspicuous written disclosure in violation of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681b(b)(2)(A) and 1681d(a), (2) failing to provide written notice informing the applicant of the source of an employment-related consumer credit report in violation of the Consumer Credit Reporting Agencies Act, Cal. Civ. Code § 1785.20.5(a), (3) failing to provide a clear and conspicuous written disclosure in violation of the Investigative Consumer Reporting Agencies Act, Cal. Civ. Code § 1786.16(b), (4) failing to pay overtime wages, Cal. Lab. Code §§ 510, 1194, 1198, (5) failing to provide meal periods, Cal. Lab. Code §§ 226.7, 512, (6) failing to permit rest periods, Cal. Lab. Code § 226.7, (7) failing to provide accurate wage statements, Cal. Lab. Code § 226, (8) failing to pay all wages due upon separation, Cal. Lab. Code §§ 201-03, and (9) violating California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. (Compl. ¶¶ 54-134, Doc. 1.) On December 1, 2015, Taft filed a First Amended Complaint that added a claim for civil penalties under California's Private Attorneys General Act, Cal. Lab. Code § 2698 *et seq*. (FAC ¶¶ 133-143, Doc. 9.)

Defendant now moves to compel arbitration of Taft's individual, non-PAGA claims.

II. LEGAL STANDARD

Congress enacted the Federal Arbitration Act "in 1925 as a response to judicial hostility to arbitration." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012). The FAA provides that an agreement to arbitrate disputes arising from "a contract evidencing a transaction involving commerce" shall be "valid, irrevocable, and enforceable." 9 U.S.C. § 2. "The court's role under the Act is . . . limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc*., 207 F.3d 1126, 1130 (9th Cir. 2000). The "party seeking to compel arbitration has the burden under the FAA to show [these two elements]." *Ashbey v. Archstone Property Mgmt., Inc*., 785 F.3d 1320, 1323 (9th Cir. 2015). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983), *superseded by statute on other grounds*. However, "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 Techs., Inc. v. Commc'ns Workers of Am*., 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co*., 363 U.S. 574, 582 (1960)). Arbitration agreements may also "be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

In these analyses, a court may consider evidence outside of the pleadings, such as declarations and other documents filed with the court, using "a standard similar to the summary judgment standard of [Federal Rule of Civil Procedure 56]." *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d. 796, 804 (N.D. Cal. 2004); *see also Hadlock v. Norwegian Cruise Line, Ltd.*, No. 10-0187-AG (ANx), 2010 WL 1641275, at *1 (C.D. Cal. Apr. 19, 2010); *Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1104 n.1 (9th Cir. 2010) ("We take . . . facts from the First Amended Complaint, on file in the district court, and declarations filed in support of and in

opposition to the motion to dismiss. All are part of our record.").

III. DISCUSSION

A. Clear Agreement to Arbitrate

"The threshold issue in deciding a motion to compel arbitration is 'whether the parties agreed to arbitrate.'" *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1133 (C.D. Cal. 2011) (quoting *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 756 (9th Cir. 1988)). "When determining whether a valid contract to arbitrate exists, we apply ordinary state law principles that govern contract formation." *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1093 (9th Cir. 2014) (citing *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 782 (9th Cir. 2002)). Here, neither party disputes that the signed arbitration agreement, if properly authenticated, would evidence a clear agreement to arbitrate.[1] Rather, Taft argues in her Opposition that because Defendant failed to properly authenticate her electronic signature, the motion should be denied. (Opp. at 3-5.)

To the extent Taft argues that authentication is initially required in a party's motion to compel arbitration, the Court finds otherwise. The party moving to compel arbitration "is not required to authenticate an opposing party's signature on an arbitration agreement *as a preliminary matter* in moving for arbitration *or* in the event the authenticity of the signature is not challenged." *Ruiz v. Moss Bros. Auto Grp., Inc.*, 232 Cal. App. 4th 836, 846 (2014) (emphasis in original) (citing *Condee v. Longwood Mgmt. Corp.*, 88 Cal. App. 4th 215, 218-19 (2001)). Once the opposing party challenges the authenticity of the electronic signature, the moving party must then prove "by a preponderance of the evidence that the electronic signature was authentic." *Id*. (citing

[1] In California, the Uniform Electronic Transactions Act states: "A . . . signature may not be denied legal effect or enforceability solely because it is in electronic form," and "[a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." Cal. Civ. Code §§ 1633.7(a)-(b).

Cal. Evid. Code § 1401). Here, Taft has challenged the authenticity of the purported signature. (Opp. at 3-5.) We therefore address whether, in its reply, Defendant has satisfied its burden of authentication.

The Court finds that Defendant provides sufficient information to satisfy its burden. Defendant submits a declaration from its Human Resources Manager that explains the new hire onboarding process, which consists of discrete steps that must be completed in order. (Reply Bowditch Decl. ¶ 8.) An audit trail documents the steps that Taft took in her onboarding process in reverse chronological order, and it demonstrates that she electronically reviewed and signed the arbitration agreement on September 4, 2014. (Reply Bowditch Decl. Ex. A.) A new hire can proceed to the next step only after completing all the previous steps of the process, and it is notable that Taft appears to have executed other onboarding documents before *and after* she signed the arbitration agreement. (*Id*.) Finally, Defendant provides evidence that each new hire creates a unique username and password that must be entered to access and execute the onboarding materials. (Reply Bowditch Decl. ¶ 15; Snow-Lerps Decl. ¶ 7.) Numerous district courts have found that similar evidence satisfies a moving party's burden to authenticate an electronic signature. *See, e.g.*, *Tagliabue v. J.C. Penney Corp.*, No. 1:15-CV-01443-SAB, 2015 WL 8780577, at *3 (E.D. Cal. Dec. 15, 2015); *Cortez v. Ross Dress for Less, Inc.*, No. EDCV 13-01298 DDP (DTBx), 2014 WL 1401869, at *3 (C.D. Cal. Apr. 10, 2014).

Taft asserts she does not remember signing the agreement. (Taft Decl. ¶ 7.) However, without more, the above assertion fails to adequately rebut Defendant's evidence. The Court therefore finds that Defendant satisfies its burden of authenticating the signed arbitration agreement. As a result, a clear agreement to arbitrate exists in this case.

B. Scope of the Agreement

Defendant must also demonstrate that the arbitration agreement encompasses the dispute at issue. *Chiron Corp.*, 207 F.3d at 1130. Here, Defendant moves to compel all

of Taft's individual, non-PAGA claims.[2] (*See* Mem. at 17, Doc. 28-1.) The agreement covers the following claims:

> [A]ll claims or causes of action that the Company may have against me or that I may have against the Company or [related entities] . . . includ[ing], but not limited to: claims for breach of any contract or covenant; tort claims; claims for discrimination or harassment . . .; claims for retaliation; claims for violation of public policy; and claims for violation of any federal, state, local or other law, statute, regulation, or ordinance . . . .

(Sun Decl. Ex. A ¶ 1.) Certain claims are not subject to the agreement, such as any claims for workers' compensation, unemployment compensation benefits, or any other claims that "may not, as a matter of law, be subject to mandatory arbitration provisions." (*Id*. ¶ 2.) The agreement further indicates that the signee "understand[s] that [she] may only bring claims under this Agreement in [her] individual capacity and not as a plaintiff or class member in any purported class or representative proceeding." (*Id*.)

All the individual, non-PAGA claims at issue in this action fall within the broad scope of the arbitration agreement. As for Taft's class claims, Defendant argues that by signing the arbitration agreement, Taft expressly waived her right to serve as a class representative or otherwise bring class claims against Henley Pacific. (Mem. at 17.) Taft does not address this argument in her Opposition, and "[s]uch a failure in an opposition brief constitutes abandonment of the [argument]." *Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1205 (N.D. Cal. 2014).[3] Accordingly, the Court finds that the agreement "encompasses the dispute at issue." *Chiron Corp.*, 207 F.3d at 1130.

[2] The Court addresses Taft's representative PAGA claim and the agreement's waiver of representative PAGA claims below in Subsection 2 of Section C and Section D.

[3] The Court also notes that in *Iskanian v. CLS Transportation Los Angeles, LLC,* the California Supreme Court held that in light of the Supreme Court's holding in *AT&T Mobility LLC v. Concepcion,* the FAA preempts both the *Discover Bank* and *Gentry* rule that class action

C. Validity of the Agreement

Although Defendant adequately demonstrates a clear agreement to arbitrate that encompasses the dispute at issue, Taft argues that the agreement is unconscionable. (Opp. at 5-15.) "[A]rbitration agreements are valid, irrevocable and enforceable except upon grounds that exist for revocation of the contract generally." *Serpa v. Cal. Surety Investigations, Inc.*, 215 Cal. App. 4th 695, 701-02 (2013) (citations omitted). The party challenging the validity of the arbitration agreement bears the burden of proof. *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1296 (9th Cir. 2006). Under California law,[4] a contract is not enforceable if it is found to be unconscionable.

"Unconscionability under California law 'has both a procedural and a substantive element,'" and "[c]ourts use a 'sliding scale' in analyzing these two elements." *Kilgore v. KeyBank, N.A.*, 673 F.3d 947, 963 (9th Cir. 2012) (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000)). "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz*, 24 Cal. 4th at 114. "No matter how heavily one side of the scale tips, however, *both* procedural and substantive unconscionability are required for a court to hold an arbitration agreement unenforceable." *Kilgore*, 673 F.3d at 963 (emphasis in original) (citing *Armendariz*, 24 Cal. 4th at 114).

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waivers are unconscionable and unenforceable under California law. *Iskanian*, 59 Cal. 4th 348, 362-66 (2014). Thus, "[u]nder *Concepcion* and *Iskanian* . . . [c]lass action waivers—even waivers that are obtained as a condition of employment and that limit employees' ability to vindicate statutory employee protections—are not categorically invalid or unenforceable." *Franco v. Arakelian Enters., Inc.*, 234 Cal. App. 4th 947, 956 (2015).

[4] The parties do not dispute that California law applies in this case.

1. Procedural Unconscionability

We first turn to procedural unconscionability. Under California law, "[p]rocedural unconscionability concerns the manner in which the contract was negotiated and the respective circumstances of the parties at that time, focusing on the level of oppression and surprise involved in the agreement." *Chavarria v. Ralphs Grocery Co*., 733 F.3d 916, 922 (9th Cir. 2013) (citing *Ferguson v. Countrywide Credit Indus., Inc*., 298 F.3d 778, 783 (9th Cir. 2002)). "Oppression addresses the weaker party's absence of choice and unequal bargaining power that results in 'no real negotiation.'" *Id*. (quoting *A & M Produce Co. v. FMC Corp*., 135 Cal. App. 3d 473, 486 (1982)). "Surprise involves the extent to which the contract clearly discloses its terms as well as the reasonable expectation of the weaker party." *Id*. (citing *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1571 (2009)). Here, Taft argues that the arbitration agreement is procedurally unconscionable for the following four reasons: (1) it is a contract of adhesion, (2) it did not attach any rules of arbitration, (3) the agreement fails to identify which version of the arbitration rules applies, and (4) it was buried in new hire materials. (Opp. at 6-9.)

Generally, where an "arbitration agreement was presented to [an employee] on a take-it-or-leave-it basis, and [her] signature was a condition of employment with [the employer]," the contract is "a standard contract of adhesion imposed and drafted by [the employer]." *Sanchez v. Carmax Auto Superstores Cal., LLC*, 224 Cal. App. 4th 398, 402 (2014) (citing *Armendariz*, 24 Cal. 4th at 113). Here, as in *Sanchez*, Taft "had no real choice whether to sign." *See Sanchez*, 224 Cal. App. 4th at 402. Defendant's Human Resources Manager explains that an incoming employee must complete each step of the onboarding process in order, and the employee cannot proceed to the next step of the process unless she completes all the previous steps. (Reply Bowditch Decl. ¶ 18.) Thus, to complete the onboarding process, Taft "had to complete and sign the Arbitration Agreement." (*Id*.) "An employee may complete the onboarding [process] before her first day of work or on her first day of work," (*id*. ¶ 9), suggesting that the onboarding process must occur before employment formally begins and is a condition of employment. Consistent with this finding, Taft understood she needed to sign all the onboarding

documents on her first day of work. (Taft Decl. ¶¶ 5-6.) Moreover, Taft was never provided an opportunity to opt out of arbitration during the onboarding process or during her employment. (*Id*. ¶ 8.) In response, Defendant argues that Taft was provided sufficient time to review and execute her onboarding paperwork. (Reply at 7.) However, providing time to review required paperwork is not equivalent to providing a meaningful opportunity to negotiate or refrain from signing the agreement. Finally, Defendant does not dispute that it had superior bargaining power as a corporate employer. California courts have observed that bargaining power is generally unequal in most employer-employee relationships. *See Armendariz*, 24 Cal. 4th at 115 ("[I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement."); *Roman v. Superior Court*, 172 Cal. App. 4th 1462, 1470 (2009) ("[A]dhesion contracts in the employment context typically contain some measure of procedural unconscionability."). In light of these facts, we conclude that the agreement is properly characterized as a contract of adhesion.

This conclusion, however, "is not dispositive" for the purposes of this inquiry. *Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 981 (2010) (quoting the trial court with approval). Courts have consistently found that "where the arbitration provisions presented in a contract of adhesion are highlighted for the employee, any procedural unconscionability [resulting from the adhesion] is 'limited.'" *Serafin v. Balco Props. Ltd., LLC*, 235 Cal. App. 4th 165, 179 (2015) (citing *Roman*, 172 Cal. App. 4th at 1470-71). Although Taft argues that the arbitration agreement was "[b]uried in [n]ew [h]ire [m]aterials" and Defendant "fail[ed] to make the terms prominent" (Opp. at 8-9), the record before the Court demonstrates otherwise. The agreement was "unquestionably highlighted for [Taft]" as a "freestanding document" with a clear title that informed her it "relat[ed] solely to arbitration." *See Serafin*, 235 Cal. App. 4th at 179; (Sun Decl. Ex. A). The agreement is "'not overly-long and is written in clear, unambiguous language." *See Dotson*, 181 Cal. App. 4th at 981. Moreover, as a standalone document that constituted

an independent step in the onboarding process, the agreement "was not hidden, but prominently featured as part of the employment [process]." *See Sanchez*, 224 Cal. App. 4th at 403. Taft asserts she "was not given the opportunity or time to thoroughly read and understand the documents before [she] signed them," but she also states she was left alone to complete her paperwork and that the store manager, rather than imposing any deadline or exerting any influence, told her "to go find him when [she] was done." (Taft ¶¶ 5-6.) Moreover, Taft was given the opportunity to access and review the documents any time after August 18, 2014, when she was initially emailed the onboarding instructions. (*See* Reply Bowditch Decl. ¶¶ 11, 12, Ex. B.) Thus, although the agreement constitutes a contract of adhesion, the resulting degree of procedural unconscionability is minimal.

Taft also argues that Defendant's failure to (1) attach the referenced arbitration rules and (2) specify which version of the rules applies sustains an additional finding of procedural unconscionability. (Opp. at 7-8.) A party's "failure to attach [the referenced arbitration rules], standing alone, is insufficient grounds to support a finding of procedural unconscionability." *Peng v. First Republic Bank*, 219 Cal. App. 4th 1462, 1472 (2013). However, "[t]he failure to attach a copy of arbitration rules could be a factor supporting a finding of procedural unconscionability where the failure would result in surprise to the party opposing arbitration." *Lane v. Francis Capital Mgmt. LLC*, 224 Cal. App. 4th 676, 690 (2014).

Here, the arbitration agreement states in relevant part:

> **Arbitration Procedures**. The Company and I agree that, except as provided in this Agreement, any arbitration shall be in accordance with and under the auspices and rules of the Judicial Arbitration and Mediation Services, Inc. ("JAMS") for the resolution of employment disputes. The JAMS Employment Arbitration Rules and Procedures are available at www.JAMSadr.com or through the Company's Human Resources Department.

(Sun Decl. Ex. A ¶ 5.) The above provision eliminates much of the surprise that might otherwise result from Defendant's failure to attach the arbitration rules. This provision clearly identifies the relevant arbitration rules, and these rules "were easily accessible to the parties—the [JAMS] rules are available on the Internet," the agreement expressly directed Taft to the relevant website, and all of Defendant's offices had internet access. *See Lane*, 224 Cal. App. 4th at 691; (Reply Bowditch Decl. ¶ 20). Moreover, the agreement informed Taft she could obtain the rules through the company's Human Resources department. "[T]hese additional facts mitigate against a finding that the agreement was procedurally unconscionable simply because a copy of the applicable arbitration rules [was] not affirmatively provided to [Taft]." *Serafin*, 235 Cal. App. 4th at 180. Notably, the provision here does not state that the most recent version of the arbitration rules will apply, regardless of when those rules become effective. Rather, given that the provision expressly directs Taft to the relevant website or to the company's HR department, Taft had an opportunity to review the rules actually referenced and incorporated into the agreement. The Court notes that Taft does not even allege that the referenced rules have, in fact, changed since she signed the arbitration agreement. In light of the above facts, the Court finds that Defendant's failure to affirmatively provide a copy of the rules or to specify which version of the rules applies does not support a finding of procedural unconscionability.

As a result, Taft has shown a minimal degree of procedural unconscionability resulting only from the adhesive nature of the agreement. "Under the sliding-scale approach, [Taft] is [therefore] obligated to make a strong showing of substantive unconscionability to render the arbitration [agreement] unenforceable." *Serafin*, 235 Cal. App. 4th at 181 (citing *Ajamian v. CantorCO2E, L.P.*, 203 Cal. App. 4th 771, 796 (2012)).

2. Substantive Unconscionability

"Substantive unconscionability addresses the fairness of the term in dispute." *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010) (quoting *Szetela v. Discover*

Bank, 97 Cal. App. 4th 1094, 1100 (2002)). Under California law, "[a] provision is substantively unconscionable if it 'involves contract terms that are so one-sided as to "shock the conscience," or that impose harsh or oppressive terms.'" *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1573 (2009) (quoting *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1322 (2005)). "Thus, mutuality is the 'paramount' consideration when assessing substantive unconscionability." *Pokorny*, 601 F.3d at 997-98 (quoting *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 657 (2004)). Here, Taft argues that the arbitration agreement is substantively unconscionable for four reasons: (1) it requires impermissible fee-shifting, (2) the agreement does not permit judicial review, (3) the pre-arbitration dispute resolution provision provides Defendant an unfair advantage at arbitration, and (4) the agreement impermissibly requires arbitration of representative claims under PAGA. (Opp. at 10-14.)

To support its argument that the agreement imposes impermissible fee-shifting, Taft points to paragraph 8 of the arbitration agreement. Paragraph 8 provides:

> Should any party to this Agreement pursue any arbitrable dispute by any method other than arbitration, the responding party shall recover from the initiating party all damages, costs, expenses and attorneys' fees incurred as a result of such action.[5]

[5] In her opposition, Taft argues that this provision would allow Defendant to recoup "the costs and fees incurred in state court before Defendant removed the case, the costs and fees incurred by the other Defendants in filing their Motion to Dismiss, the costs and fees of litigating the instant motion, and any other 'damages' resulting from Plaintiff filing her claims in court." (Opp. at 11.) Defendant notes that Taft initiated this action before this Court, not in state court, so no costs were incurred in removal. (Reply at 13 n.11.) Moreover, Defendant acknowledges that "Henley Pacific is the only party that may seek to recover costs associated with this Motion, given that the Motion was only brought by Henley Pacific, the party to the Arbitration Agreement, and not by any of the other Defendants." (*Id.*)

(Sun Decl. Ex. A. ¶ 8.) Taft argues that although this provision entitles Defendant to attorneys' fees, costs, expenses, and damages should it prevail on a motion to compel arbitration, it does not entitle an employee to the same benefits should she prevail in invalidating the arbitration agreement. (Opp. at 11.) Although this argument is not raised by either party, the Court notes that Taft incorrectly interprets this provision under California law. Section 1717 of the California Civil Code provides:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Cal. Civ. Code § 1717(a). Section 1717 "thereby ensur[es] mutuality of remedy . . . when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation 'by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract.'" *Santisas v. Goodin*, 17 Cal. 4th 599, 611 (1998) (quoting *N. Assocs. v. Bell*, 184 Cal. App. 3d 860, 865 (1986)). "[I]t has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed." *Id.* (citations omitted). Thus, under California law, this provision does not support a finding of unconscionability for lack of mutuality.

Taft also argues that the arbitration agreement impermissibly limits judicial review. (Opp. at 12.) Taft points to paragraph 5 of the arbitration agreement, which provides in relevant part:

> The arbitration shall provide . . . for a written decision by the arbitrator that includes the essential findings and conclusions upon which the decision is based. The arbitrator's decision must be issued no later than thirty (30) days after a dispositive motion is heard and/or an arbitration hearing has been completed. The arbitrator's decision regarding the claims shall be final and binding upon the parties and shall be enforceable in any court having jurisdiction thereof.

(Sun Decl. Ex. A ¶ 5.) Taft argues that by deeming the arbitrator's decision "final and binding," the agreement unconscionably forecloses judicial review of the decision. (Opp. at 12.) Defendant counters that Taft's interpretation of this provision is unsupported. (Reply at 14.)

"Limited judicial review is a well-understood feature of private arbitration, inherent in the nature of the arbitral forum as an informal, expeditious, and efficient alternative means of dispute resolution." *Corona v. Amherst Partners*, 107 Cal. App. 4th 701, 705 (2003) (quoting *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 831 (1999)). "Accordingly, the parties, simply by agreeing to arbitrate, are deemed to accept limited judicial review by *implication*, particularly where their agreement specified that the award would be 'final' and 'binding' upon them." *Id*. (emphasis in original) (quoting Vandenberg, 21 Cal. 4th at 831). As a result, California courts have consistently held that "the 'final and binding' language of . . . arbitration agreement[s] do[] not preclude judicial review of an arbitration award . . . ." *See, e.g.*, *Serafin*, 235 Cal. App. 4th at 184. Thus, contrary to Taft's assertions, this provision does not establish any degree of substantive unconsionability.

Taft also argues that the pre-arbitration dispute resolution provision gives Defendant an impermissibly unfair advantage at arbitration. (Opp. at 12-13.) Paragraph 4 of the arbitration agreement provides in relevant part:

> **Required Notice of All Claims**. The Company and I agree that if a dispute arises, the party who wants to arbitrate the dispute must give written notice

> of any claim to the other party . . . The written notice must describe the nature of all claims asserted and must detail the facts upon which the claims are based.

(Sun Decl. Ex. A ¶ 4.) To support her argument that this provision is unconscionably "employer controlled," Taft cites two cases: *Pokorny v. Quixtar, Inc.*, 601 F.3d 987 (9th Cir. 2010), and *Nyulassy v. Lockheed Martin Corp.*, 120 Cal. App. 4th 1267 (2004). (Opp. at 12-13.) However, these cases are inapposite. Both *Pokorny* and *Nyulassy* involved non-mutual mechanisms expressly favoring the employer that required an employee to resolve claims through an employer-controlled dispute resolution process before engaging in arbitration. *Pokorny*, 601 F.3d at 998-99; *Nyulassy*, 120 Cal. App. 4th at 1282-83. For these reasons, the provisions in those cases provided the employer a "free peak" at an employee's claims and evidence before engaging in the arbitration process. Here, the provision is mutual and applies to any party who wants to arbitrate a dispute. Moreover, the provision requires only written notice of the anticipated claims. That the notice requires a party to "detail the facts upon which the claims are based" does not unfairly prejudice that party, as it appears to provide no more information than a plaintiff's initial complaint in a judicial proceeding. Generally, a mutual arbitration provision requiring only notice of the dispute is not substantively unconscionable. *See Sanchez*, 224 Cal. App. 4th at 406 (finding that a mutual requirement that a party initiating arbitration must "complete a two-page arbitration request . . . stating the basis of his claim and listing the names of witnesses and the name of the employee's attorney, if any" was not substantively unconscionable). Accordingly, this provision does not support a finding of substantive unconscionability.

Finally, Taft argues that the agreement illegally requires arbitration of representative claims under PAGA. (Opp. at 13-14.) Paragraph 2 of the arbitration agreement provides in relevant part: "I also understand that I may only bring claims under this Agreement in my individual capacity and not as a plaintiff or class member in any purported class *or representative proceeding*." (Sun Decl. Ex. A ¶ 2 (emphasis added)). In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 382-89

(2014), the California Supreme Court held that (1) an agreement to waive representative claims under the PAGA is contrary to public policy and unenforceable, and (2) this rule against PAGA waivers is not preempted by the FAA. Recently, in *Sakkab v. Luxottica Retail North America, Inc*., 803 F.3d 425, 429 (9th Cir. 2015), the Ninth Circuit held that the FAA does not preempt the *Iskanian* rule against representative PAGA waivers. In light of this authority, Defendant expressly acknowledges that the waiver of representative claims contained in the arbitration agreement "is no longer enforceable with respect to Plaintiff's PAGA claim." (Mem. at 10 n.3.) However, Defendant requests that the Court sever this provision rather than invalidating the arbitration agreement as a whole. (Reply at 15.)

"Under California law, a court has discretion to either sever an unconscionable provision from an agreement, or refuse to enforce the agreement in its entirety." *Pokorny*, 601 F.3d at 1005 (citing *Ingle v. Circuit City Stores, Inc*., 328 F.3d 1165, 1180 (9th Cir. 2003)). "In exercising this discretion, courts look to whether the central purpose of the contract is tainted with illegality or the illegality is collateral to [its] main purpose." *Id*. (internal quotation marks omitted) (alteration in original) (quoting *Ingle*, 328 F.3d at 1180). "An arbitration agreement can be considered permeated by unconscionability if it 'contains more than one unlawful provision . . . . Such multiple defects indicate a systemic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage.'" *Serafin*, 235 Cal. App. 4th at 184 (quoting *Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 398 (2010)). The arbitration agreement also includes a severance provision providing that "[i]f any provision of this Agreement is found to be unenforceable . . . such finding shall not affect the validity of the remainder of this Agreement," which "shall be reformed . . . to ensure that the resolution of all conflicts between the parties are resolved by neutral, binding arbitration." (Sun Decl. Ex. A ¶ 7.)

Taft argues that because unconscionable terms permeate the agreement, "severance cannot save it." (Opp. at 14.) Contrary to Taft's assertions, the Court finds that the sole substantively unconscionable element here is the PAGA waiver. This isolated provision does not implicate "multiple defects" that suggest the arbitration

agreement is "permeated" by unconscionability. Following *Iskanian* and *Sakkab*, most district courts in this circuit faced with a similar situation have chosen to sever the unenforceable waiver provision. *See Levin v. Caviar, Inc*., No. 15-CV-01285-EDL, 2015 WL 7529649, at *9 (N.D. Cal. Nov. 16, 2015) (severing the representative PAGA waiver); *Tagliabue*, 2015 WL 8780577, at *7-9 (same). In light of the facts of this case, we also sever the PAGA waiver provision.

Because the Court severs the PAGA waiver provision, Taft fails to show that the arbitration agreement is substantively unconscionable. Accordingly, even though Taft demonstrates a minimal degree of procedural unconscionability, the arbitration agreement remains valid and enforceable. The Court therefore compels arbitration of Taft's individual non-PAGA claims.

D. The PAGA Claim and Defendant's Requested Stay

As for Taft's PAGA claim, Defendant requests that the Court either dismiss the PAGA claim or stay the claim pending arbitration. (Mem. at 18-21.) Taft opposes this first request. (Opp. at 15.)

As a preliminary matter, we address whether the PAGA claim is itself arbitrable. In this case, the arbitration agreement expressly provides that "[t]he arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." (Sun Decl. Ex. A ¶ 5.) Taft's representative PAGA claims are therefore non-arbitrable and shall remain here in this judicial forum.

To support its request for dismissal, Defendant asserts that Samuel Gordon, another former employee, commenced an earlier action against Defendant in Los Angeles Superior Court that includes a representative PAGA claim. (Mem. at 3-4, 19.) Defendant notes that an employee's representative PAGA claim "binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government." (Mem. at 19, quoting *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009)). Defendant thereby argues that "the state has already 'deputized' Gordon to pursue PAGA penalties for much of the conduct alleged in

Plaintiff's complaint," and that allowing both claims to remain pending in court would "create an improper risk of inconsistent results." (*Id*.) First, Defendant fails to establish that the claims asserted in the Gordon case are adequately similar or identical to create a "risk" of inconsistent results. Second, Defendant provides no legal support and cites no cases for the contention that courts must dismiss a representative PAGA claim in light of an earlier filed action. Given the wholly inadequate and unsupported nature of this request, the Court declines to dismiss Taft's representative PAGA claim on this basis.

We next address Defendant's alternative request to stay the action, including the non-arbitrable PAGA claim, pending arbitration of Taft's individual claims. Taft does not argue against this request in her Opposition, and "[s]uch a failure in an opposition brief constitutes abandonment of the [argument]." *Moore v. Apple, Inc*., 73 F. Supp. 3d 1191, 1205 (N.D. Cal. 2014). Accordingly, the Court orders a stay of the instant proceedings.

IV. CONCLUSION

For the reasons stated above, the Court GRANTS Defendant's Motion to compel arbitration of Taft's individual non-PAGA claims. The proceedings are STAYED pending arbitration, including Taft's non-arbitrable representative PAGA claim, and the parties are hereby ORDERED to file a joint status report within ten (10) days of completion of the arbitration proceedings.

Initials of Preparer: tg