UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

**CIVIL MINUTES - GENERAL**

| Case No. | **CV 16-3486 FMO (JCx)** | Date | **June 30, 2017** |
|---|---|---|---|
| Title | **Susana Garcia de Alba, et al. v. Brinker International, Inc., et al.** | | |

| Present: The Honorable | Fernando M. Olguin, United States District Judge | |
|---|---|---|
| Vanessa Figueroa | None | None |
| Deputy Clerk | Court Reporter / Recorder | Tape No. |
| Attorney Present for Plaintiffs: | Attorney Present for Defendants: | |
| None Present | None Present | |

**Proceedings: (In Chambers) Order Re: Motion to Compel Arbitration**

Having reviewed and considered all the briefing filed with respect to defendants Brinker International, Inc., Brinker International Payroll Company, L.P., and Brinker Restaurant Corporation's Motion to Compel Arbitration of Plaintiffs' Claims (Dkt. 14, "Motion"), the court finds that oral argument is not necessary to resolve the Motion, see Fed. R. Civ. P. 78; Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

## INTRODUCTION

On April 20, 2016, plaintiffs Susana Garcia de Alba ("Garcia de Alba"), Lindsey Gutierrez ("Gutierrez"), Tristan Henderson ("Henderson"), and Gabrielle Ratcliff ("Ratcliff") (collectively, "plaintiffs") brought an action in the Los Angeles County Superior Court for: (1) discrimination in violation of the California Fair Employment and Housing Act, Cal. Gov't Code §§ 12900, et seq. ("FEHA"); (2) failure to prevent unlawful discrimination in violation of the FEHA; (3) hostile work environment; (4) violation of California Labor Code § 6310; (5) retaliation; (6) wrongful termination in violation of public policy; (7) failure to provide accurate wage statements; and (8) failure to pay wages. (See Dkt. 1, Notice of Removal ("NOR") at ¶¶ 2-3; Dkt. 1-8, Complaint at ¶¶ 60-116). On May 19, 2016, defendants Brinker International, Inc., Brinker International Payroll Company, L.P., and Brinker Restaurant Corporation (collectively, "defendants") removed the action based on diversity jurisdiction, 28 U.S.C. § 1332. (See Dkt. 1, NOR at ¶¶ 1 & 8-33). Defendants now move to compel arbitration claiming that plaintiffs each signed valid arbitration agreements. (See Dkt. 14, Motion; Dkt. 14-1, Defendants [] Memorandum of Points and Authorities in Support of Motion to Compel Arbitration ("Defs.' Memo.")).

## PLAINTIFFS' ALLEGATIONS

Plaintiffs were all employees at a Chili's restaurant ("Chili's") in Los Angeles County owned and operated by defendants. (See Dkt. 1-8, Complaint at ¶¶ 7 & 27-30). In May 2014, plaintiffs sent a letter to Chili's senior regional management stating that the general manager of their restaurant, Raul Elia ("Elia"), permitted various public health and safety violations to occur at their location. (See id. at ¶¶ 31-32). In response to the letter, Chili's held an off-site meeting for its

employees – including Ratcliff, Henderson, and Gutierrez – during which the employees were encouraged to communicate openly and were told that their communications would be kept confidential. (See id. at ¶ 33). At the meeting, Ratcliff, Henderson, and Gutierrez expressed their concerns regarding Elia and the public health issues. (See id.).

In 2015, Ratcliff, Gutierrez, along with Garcia de Alba, again voiced their concerns to Chili's regional management but Chili's still took no action. Instead, Elia and Chili's senior management began to retaliate against plaintiffs which ultimately led to their termination. (See Complaint at ¶ 34). On May 31, 2015, Garcia de Alba, Gutierrez and Ratcliff were terminated because they were allegedly "unhappy." (See Complaint at ¶ 54). Plaintiffs allege that Garcia de Alba was terminated because she reported a work-related injury and because of her previous complaints to management. (See id. at ¶¶ 48-50). According to plaintiffs, Gutierrez and Ratcliff were terminated for complaining about the use of racial slurs at the restaurant and for their prior complaints to Chili's management. (See id. at ¶¶ 43-44).

Finally, Henderson was terminated on April 21, 2015, for using profanity even though other employees at the same location had previously used profanities and racial slurs without being terminated. (See Dkt. 1-8, Complaint at ¶¶ 36-45). Plaintiffs allege that this was merely a pretext, and that Henderson was instead terminated for complaining about the conditions at the restaurant and because of his race. (See id. at ¶¶ 40-43).

## LEGAL STANDARD

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, et seq., provides that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA reflects "both a liberal federal policy favoring arbitration[] and the fundamental principle that arbitration is a matter of contract[.]" AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740, 1745 (2011) (citations and internal quotation marks omitted). "The basic role for courts under the FAA is to determine (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." Kilgore v. KeyBank, Nat'l Ass'n, 718 F.3d 1052, 1058 (9th Cir. 2013) (en banc) (internal quotation marks omitted). "If the response is affirmative on both counts, then the Act 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 "calls on courts to 'rigorously enforce agreements to arbitrate.'" Samson v. NAMA Holdings, LLC, 637 F.3d 915, 923 (9th Cir. 2010) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242 (1985)). It creates "a body of federal substantive law of arbitrability," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983), which "preempts contrary state law." Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151, 1158 (9th Cir. 2013). "In other words, a court cannot enforce state laws that apply to agreements to arbitrate but not to contracts more generally." Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1260 (9th Cir. 2017); Perry v. Thomas, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 2527

(1987) ("[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.") (emphasis in original). "[E]ven generally applicable state-law rules are preempted if in practice they have a 'disproportionate impact' on arbitration or 'interfere[] with fundamental attributes of arbitration and thus create [] a scheme inconsistent with the FAA.'" Mortensen, 722 F.3d at 1159 (quoting Concepcion, 563 U.S. at 342-44, 131 S.Ct. at 1747-48). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp., 460 U.S. at 24-25, 103 S.Ct. at 941; see Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1022 (9th Cir. 2016) ("Any doubts about the scope of arbitrable issues, including applicable contract defenses, are to be resolved in favor of arbitration."); see also Nguyen v. Applied Medical Resources Corp., 4 Cal.App.5th 232, 247 (2016) ("In keeping with California's strong public policy in favor of arbitration, any doubts regarding the validity of an arbitration agreement are resolved in favor of arbitration.").

"The party seeking to enforce an arbitration agreement bears the burden of showing that the agreement exists and that its terms bind the other party." Gelow v. Cent. Pac. Mortg. Corp., 560 F.Supp.2d 972, 978 (E.D. Cal. 2008); see Sanford v. MemberWorks, Inc., 483 F.3d 956, 963 n. 9 (9th Cir. 2007) ("The district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise.") (internal quotation marks omitted). Once the moving party has met this initial burden, "the party resisting arbitration bears the burden of establishing that the arbitration agreement is inapplicable." Wynn Resorts, Ltd. v. Atl.-Pac. Capital, Inc., 497 F.App'x 740, 742 (9th Cir. 2012); see Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC, 55 Cal.4th 223, 236 (2012) ("[T]he party opposing arbitration bears the burden of proving any defense, such as unconscionability."). "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." Totten v. Kellogg Brown & Root, LLC, 2016 WL 316019, *3 (C.D. Cal. 2016) (internal quotation marks omitted); see Geoffroy v. Wash. Mut. Bank, 484 F.Supp.2d 1115, 1119 (S.D. Cal. 2007) ("Courts have employed a summary judgment approach for such hearings [on motions to compel arbitration], ruling as a matter of law where there are no genuine issues of material fact."); Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc., 925 F.2d 1136, 1141 (9th Cir. 1991) ("Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement[, and the court] should give to the opposing party the benefit of all reasonable doubts and inferences that may arise.").

## DISCUSSION

There are three different versions of the arbitration agreement at issue in this case. (See Dkt. 14-1, Defs.' Memo. at 2-3). Defendants claim that Ratcliff, Gutierrez, and Henderson each signed the 2006 version of the arbitration agreement ("2006 Agreement"). (See Dkt. 14-14,

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Declaration of Tammy Collas in Support of Defendants[’] Motion to Compel Arbitration of Plaintiffs’ Claims (“Collas Decl.”) at ¶¶ 4-6; Dkt. 14-15, Collas Decl., Exh. H (Henderson); Dkt. 14-16, Collas Decl., Exh. I (Gutierrez); Dkt. 14-17, Collas Decl, Exh. J at ECF 443 (Ratcliff)).[1] Defendants also claim that in 2012, Ratcliff signed the 2008 version of the arbitration agreement (“2008 Agreement”). (See Dkt. 14-17, Collas Decl., Exh. J at ECF 444). Finally, defendants claim that Garcia de Alba signed the 2011 version of the arbitration agreement (“2011 Agreement”). (See Dkt. 14-20, Loeffler Decl., at Exh. L). Plaintiffs contend that the subject arbitration agreements are unenforceable under California’s unconscionability doctrine. (See Dkt. 21, Plaintiffs’ Opposition to Defendants’ Motion to Compel Arbitration of Plaintiffs’ Claims (“Opp.”) at 5-12).

California’s “unconscionability standard is, as it must be, the same for arbitration and nonarbitration agreements.” Sanchez v. Valencia Holding Co., LLC, 61 Cal.4th 899, 912 (2015). “[T]he core concern of the unconscionability doctrine is the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” Sonic-Calabasas A, Inc. v. Moreno, 57 Cal.4th 1109, 1145 (2013) (internal quotation marks omitted).

Under California law, “unconscionability has both a procedural and a substantive element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.” Armendariz v. Found. Health Psychcare Servs., Inc., 24

[1] The court overrules plaintiffs’ objections to the declarations of Collas (see Dkt. 14-14, Collas Decl.), and Brandon Loeffler (“Loeffler”), (see Dkt. 14-18, Declaration of Brandon Loeffler in Support of Defendants’ [] Motion to Compel Arbitration of Plaintiffs’ Claims (“Loeffler Decl.”)), and the attached arbitration agreements. (See Dkt. 22, Plaintiffs’ Objections to Evidence Offered in Support of Defendants’ Motion [] (“Objections”) at 2-15). First, with respect to authentication, “the declaration of the human resource employee[] [is] sufficient to authenticate [] signatures.” Tagliabue v. J.C. Penney Corp., Inc., 2015 WL 8780577, *2 (E.D. Cal. 2015). In addition, Gutierrez, Henderson, and Ratcliff each admit signing the arbitration agreements at issue as part of their employment paperwork or application packet. (See Dkt. 21-3, Declaration of Lindsey Gutierrez in Support of Plaintiffs’ Opposition to Defendants’ [Motion] (“Gutierrez Decl.”) at ¶ 7; Dkt. 21-4, Declaration of Tristan Henderson in Support of Plaintiffs’ Opposition to Defendants’ [Motion] at ¶ 6; Dkt. 21-6, Declaration of Gabrielle Ratcliff in Support of Plaintiffs’ Opposition to Defendants’ [Motion] at ¶ 6). Garcia de Alba has not presented any evidence calling into question Loeffler’s detailed declaration. (See, generally, Dkt. 22, Objections at 9-10); see also Nanavati v. Adecco USA, Inc., 99 F.Supp.3d 1072, 1076 (N.D. Cal. 2015) (“In the absence of evidence raising any doubts as to the provenance of the electronic signature on the Agreement, the detailed Watson declaration easily satisfies Defendant’s low burden to authenticate Plaintiff’s electronic signature and establish the existence of a valid arbitration agreement.”). Finally, the arbitration agreements are not hearsay. See Martinez v. Leslie’s Poolmart, Inc., 2014 WL 5604974, *1 n. 3 (C.D. Cal. 2014) (“the arbitration agreement is not hearsay, since it is the record of a regularly conducted business activity”).

Cal.4th 83, 114 (2000), abrogated on other grounds by Concepcion, 563 U.S. at 333, 131 S.Ct. at 1740 (internal quotation marks omitted). "[P]rocedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract[, b]ut they need not be present in the same degree." Id. (citation and internal alteration marks omitted; emphasis in original); Baltazar v. Forever 21, Inc., 62 Cal.4th 1237, 1243 (2016) (same). Courts use a "sliding scale" in analyzing these two elements: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." Armendariz, 24 Cal.4th at 114. "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." Sanchez, 61 Cal.4th at 912.

I. PROCEDURAL UNCONSCIONABILITY.

"The procedural element of unconscionability focuses on oppression or surprise due to unequal bargaining power." Poublon, 846 F.3d 1260 (internal quotation marks omitted). "The oppression that creates procedural unconscionability arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 232 Cal.App.4th 1332, 1347-48 (2015).

A. Adhesion Contract.

An adhesion contract is presented on a "take it or leave it" basis with no opportunity for an employee to negotiate its terms. See Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 922 (9th Cir. 2013). "It is well settled that adhesion contracts in the employment context, that is, those contracts offered to employees on a take-it-or-leave-it basis, typically contain some aspects of procedural unconscionability." Serpa v. California Surety Investigations, Inc., 215 Cal.App.4th 695, 704 (2013); see Pokorny v. Quixtar, Inc., 601 F.3d 987, 996 (9th Cir. 2010) ("[A] contract is procedurally unconscionable under California law if it is a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it.") (internal quotation marks omitted). "The adhesive nature of the employment contract requires [the court] to be particularly attuned to [a former employee's] claim of unconscionability[.]" Baltazar, 62 Cal.4th at 1245 (internal quotation marks omitted).

Plaintiffs argue that the arbitration agreements are adhesive contracts that are procedurally unconscionable. (See Dkt. 21, Opp. at 6-8). According to plaintiffs, defendants "do not provide any evidence about what explanation was provided to Plaintiffs regarding their arbitration agreements, what bargaining power Plaintiffs had in signing their arbitration agreements, and the manner in which the document was provided to Plaintiffs, i.e., as part of a large packet of documents when Plaintiffs applied to be hired."[2] (Id. at 7). Plaintiffs' assertions are unpersuasive.

[2] For instance, Gutierrez states that when she applied for a job at Chili's, nothing in the application packet was explained to her, she did not have an opportunity to ask questions, she

As an initial matter, defendants concede that the agreements are at least "minimally adhesive." (See Dkt. 23, Defendants' [] Reply to [Motion] ("Reply") at 5). Nevertheless, plaintiffs' self-serving assertions are insufficient to undermine the enforceability of the agreements. See, e.g., Giuliano v. Inland Empire Personnel, Inc., 149 Cal.App.4th 1276, 1292 (2007) ("[T]he compulsory nature of a predispute arbitration agreement does not render the agreement unenforceable on grounds of coercion or for lack of voluntariness."); Cornejo v. Spenger's Fresh Fish Grotto, 2010 WL 1980236, *6 (N.D. Cal. 2010) (employee's signature on arbitration agreement was sufficient evidence that he was provided with opportunity to review the agreement, notwithstanding protestations to the contrary). Plaintiffs received the subject arbitration agreements as part of a packet of documents prior to being hired. Thus, they cannot claim to be surprised by the arbitration agreements, even if the agreements were included in a packet of employment-related documents. See Sanchez, 61 Cal.4th at 914 (business "was under no obligation to highlight the arbitration clause . . . nor was it required to specifically call that clause to [the plaintiff's] attention"). Further, plaintiffs were "not lied to, placed under duress, or otherwise manipulated into signing the arbitration agreement[s]." Baltazar, 62 Cal.4th at 1245. In short, without more, the adhesive nature of the subject agreements "give[s] rise to a low degree of procedural unconscionability at most." Poublon, 846 F.3d at 1262.

B. Appeal and Jury Trial Waivers.

Plaintiffs contend that they were never told that they were giving up their right to appeal or their right to a jury trial.[3] (See Dkt. 21, Opp. at 8). Neither contention is persuasive. With respect to plaintiffs' appeal rights, the California Supreme Court has explained that "[b]ecause the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement. Thus, an arbitration decision is final and conclusive because the parties have agreed that it be so." Moncharsh v. Heily & Blase, 3 Cal.4th 1, 10 (1992) (italics omitted). As for plaintiffs' second contention, it is well-settled that an arbitration agreement does not need to contain an express waiver of the right to a jury trial because "[p]ersons entering into arbitration agreements know and intend that disputes arising under such agreements will be resolved by arbitration, not by juries[.]" Madden v. Kaiser Found. Hosps., 17 Cal.3d 699, 703 (1976); O'Donoghue v. Super. Ct., 219 Cal.App.4th 245, 257 (2013) ("We hold it would be anomalous to require such an express waiver [of a jury trial] in a predispute reference agreement[.]").

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was not allowed to take the application packet home to review it or to show it to an attorney for review, and she felt that she would not get a job at Chili's if she did not sign the application or if she tried to make changes. (See Dkt. 21-3, Gutierrez Decl. at ¶¶ 5-7).

[3] The 2011 Agreement, for example, provides in pertinent part: "The decision shall be final and binding on both parties[.]" (See Dkt. 14-20, Loeffler Decl., Exh. L at ECF 455).

C. Conclusion.

Although the arbitration agreements amount to adhesion contracts, "[w]hen, as here, there is no other indication of oppression or surprise, 'the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high.'" Serpa, 215 Cal.App.4th at 704 (quoting Ajamian v. CantorCO2e, L.P., 203 Cal.App.4th 771, 796 (2012)).

II. SUBSTANTIVE UNCONSCIONABILITY.

In determining substantive unconscionability, California courts "have held that the agreement must be 'overly harsh,' 'unduly oppressive,' 'unreasonably favorable,' or must 'shock the conscience.'" Poublon, 846 F.3d at 1261 (citing Sanchez, 61 Cal.4th at 911). "[T]hese formulations, used throughout [California] case law, all mean the same thing." Id. (alterations in original). "The 'central idea' is that 'the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain but with terms that are unreasonably favorable to the more powerful party.'" Id. (quoting Baltazar, 62 Cal.4th at 1244).

Plaintiffs assert that the arbitration agreements are substantively unconscionable because: (1) they are not reciprocal, (see Dkt. 21, Opp. at 9-10); (2) the agreements require them to pay their own attorney's fees and do not permit them to recover attorney's fees even when they would otherwise be entitled to attorney's fees under FEHA, (see id. at 10-11); and (3) the agreements are unclear as to the costs of arbitration and which party will pay for certain costs. (See id. at 11).

A. Reciprocity.

"Whether an arbitration agreement is sufficiently bilateral is determined by an examination of the actual effects of the challenged provisions." Delmore v. Ricoh Ams. Corp., 667 F.Supp.2d 1129, 1137 (N.D. Cal. 2009). Plaintiffs take issue with the following language set forth in the 2006 Agreement:

> Brinker International Payroll Company, L.P. ("Brinker") makes available certain internal procedures for amicably resolving any complaints or disputes you have relating to your employment. However, if you are unable to resolve any such complaints or disputes to your satisfaction internally, Brinker has provided for the resolution of all disputes that arise between you and Brinker through mandatory arbitration before a neutral arbitrator.

(See Dkts. 14-15, 14-16 & 14-17(2006 Agreements)). According to plaintiffs, the language of the 2006 Agreement requires employees to arbitrate claims that might be brought by employees but "there are no reciprocal statements in the agreement with regard to [defendants'] obligation[s] to

bring a claim pursuant to the arbitration rules and procedures."[4] (See Dkt. 21, Opp. at 10).

Plaintiffs' interpretation, however, ignores the express language of the 2006 Agreement, which provides that "any legal or equitable claims or disputes arising out of or in connection with the employment, terms and conditions of employment, or the termination of employment with Brinker will be resolved by binding arbitration instead of in a court of law or equity." (Dkts. 14-15, 14-16 & 14-17) (emphasis added). The 2006 Agreement applies "to all disputes involving legally protected rights (e.g., local, state and federal statutory, contractual or common law rights) regardless of whether the statute was enacted or the common law doctrine was recognized at the time this agreement was signed." (Id.). In addition, the 2006 Agreement explains that plaintiffs and Chili's have effectively "substitute[d] one legitimate dispute resolution form (arbitration) for another (litigation), thereby waiving any right to either party to have the dispute resolved in court." (Id.) (emphasis added). In short, a reading of the entire agreement leads to the conclusion that all claims related to plaintiffs' employment, including any claims that Chili's could or should have asserted against plaintiffs in connection with plaintiffs' employment, are subject to arbitration. See, e.g., Goff v. G2 Secure Staff LLC, 2013 WL 1773968, *7 (C.D. Cal. 2013) (finding arbitration agreement to be reciprocal where agreement provided that "you and the Company agree that in the event a dispute arises between you and the Company . . . regarding your employment such disputes shall be submitted to and determined exclusively by binding arbitration"); Larsen v. Reverse Mortg. Sols., Inc., 2016 WL 1223362, *4 (S.D. Cal. 2016) (finding arbitration agreement calling for arbitration of all claims arising out of "your employment with the Company or the termination of your employment" to be reciprocal).

B. Attorney's Fees and Costs.

Next, plaintiffs assert that the arbitration agreements require them to pay attorney's fees and costs they would not otherwise face if they litigated this action in court. (See Dkt. 21, Opp. at 10-12). "'[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.'" Ramirez-Baker v. Beazer Homes, Inc., 636 F.Supp.2d 1008, 1022 (E.D. Cal. 2008) (quoting Armendariz, 24 Cal.4th at 110) (alteration and emphasis omitted). Thus, a mandatory cost-shifting provision is substantively unconscionable when it requires the arbitrator to apportion costs equally between the employer and an employee regardless of any contrary state law. See Chavarria, 733 F.3d at 925 (rejecting "a system that requires the arbitrator to apportion the costs equally between [the employer] and the employee, disregarding any potential state law that contradicts [the employer's] cost allocation").

[4] Plaintiffs do not makes this argument with respect to the 2008 Agreement or the 2011 Agreement. (See, generally, Dkt. 21, Opp. at 9-10).

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1. **Gutierrez and Henderson**.

The 2006 Agreement provides that "[t]he fees and expenses of the arbitration shall be borne by the parties, pursuant to the schedule set forth in the [American Arbitration Association] National Rules [for the Resolution of Employment Disputes] unless otherwise awarded by the arbitrator in the final, written decision." (See Dkts. 14-15 & 14-16). Rule 14 of the 2004 AAA National Rules for the Resolution of Employment Disputes provides that the parties "may be represented by counsel or other authorized representative" and pursuant to Rule 34e,"[t]he arbitrator shall have the authority to provide for the reimbursement of representative's fees, in whole or in part, as part of the remedy, in accordance with the law." See National Rules for the Resolution of Employment Disputes (Including Mediation and Arbitration Rules) ("National Rules") available at https://www.adr.org/ArchiveRules) (last visited June 29, 2017). "Unless the employee chooses to pay a portion fo the arbitrator's compensation, such compensation shall be paid in total by the employer. Arbitrator compensation and administrative fees are not subject to reallocation by the arbitrator(s) except upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous." (See National Rules at Administrative Fee Schedule). The National Rules also provide that the arbitrator "may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court." (National Rules at ¶ 34d). As for expenses, the National Rules provide that, "[a]ll expenses of the arbitration . . . shall be borne by the employer, unless the parties agree otherwise or unless the arbitrator directs otherwise in the award as provided for in the Administrative Fee Schedule." (See National Rules at Administrative Fee Schedule).

Plaintiffs assert that under the 2006 Agreement, Gutierrez and Henderson may be required to split the arbitration fees. (See Dkt. 21, Opp. at 11). However, the 2006 Agreement provides that the fees and expenses of arbitration shall be borne by the parties as set forth in the National Rules, which require the employer to pay arbitration expenses, including the arbitrator's fees. (See National Rules at ¶ 34d). Further, while the National Rules require an employee to pay "a nonrefundable filing fee capped in the amount of $125," (see National Rules at Administrative Fee Schedule), courts have routinely upheld arbitration agreements requiring employees to pay a small filing fee. See, e.g., Mikhak v. University of Phoenix, 2016 WL 3401763, *11 (N.D. Cal. 2016) (noting that filing a lawsuit in federal court entails fees and therefore an arbitration fee equivalent to the court filing fee does not mean a plaintiff would bear expenses in arbitration that she would otherwise not have had to pay in court); Grabowski v. Robinson, 817 F.Supp.2d 1159, 1177 (S.D. Cal. 2011) (rejecting contention that a $260 filing fee was unconscionable given that the amount was less than the then $350 filing fee for bringing the action in federal court).

As for attorney's fees, Gutierrez and Henderson contend that they would be at risk of

paying defendants' attorney's fees which is contrary to the purposes of FEHA.[5] (See Dkt. 21, Opp. at 11-12). The court disagrees. Under the 2006 Agreement, the arbitrator may award attorney's fees only "in accordance with applicable law[,]" (see National Rules at ¶ 34e), and therefore plaintiffs' concerns "that they would be required to pay their employer's attorney's fees are unfounded." Collins v. Diamond Pet Food Processors of Cal., LLC, 2013 WL 1791926, *7 (E.D. Cal. 2013) (noting that the attorney's fees provision limited the arbitrator's authority to act only in accordance with the law); Ramirez-Baker, 636 F.Supp.2d at 1023 (rejecting an employee's concerns that she might be required to pay the employer's attorney's fees because the arbitrator was obligated to follow federal and state law). In addition, the National Rules authorize the arbitrator to "grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court." (See National Rules at ¶ 34d); see also Poublon, 846 F.3d at 1268 (arbitration agreement requiring "the arbitrator to comply with applicable California law" is not substantively unconscionable). Because plaintiffs are asserting claims under FEHA, "the fee-shifting provision allows the arbitrator to exercise his discretion and requires [] him to adhere to California law – which includes FEHA and Armendariz and its progeny." Khraibut v. Chalal, 2016 WL 1070662, *11 (N.D. Cal. 2016).

In sum, "the [arbitration agreements] do not require [plaintiffs] to incur any type of expense other than may similarly be paid in court" and the court concludes that the 2006 Agreement is not substantively unconscionable. See Moule v. United Parcel Service Co., 2016 WL 3648961, *8 (E.D. Cal. 2016) (emphasis omitted); Galvan v. Michael Kors USA Holdings, Inc., 2017 WL 253985, *7 (C.D. Cal. 2017) (finding that a plaintiff was not subject to unconscionable expenses because under AAA rules, defendant was obligated to pay all the expenses of the arbitrator and other arbitration-related costs and the plaintiff was only required to pay a $200 filing fee).

2. **Garcia de Alba and Ratcliff**.

Plaintiffs also argue that the 2008 and 2011 Agreements "do not provide any explanation that Brinker as the employer must pay for the cost of the arbitrator," and that requiring an employee to split the costs of arbitration renders the agreement unenforceable. (Dkt. 21, Opp. at

[5] "Under FEHA, a prevailing defendant is entitled to attorney's fees only if the action is deemed unreasonable, frivolous, or meritless. A prevailing plaintiff, in contrast, ordinarily is entitled to fees." Mangano v. Verity, Inc., 167 Cal.App.4th 944, 951 (2008). "California courts have interpreted [FEHA] in accordance with the principles developed by federal courts in employment discrimination claims, to the effect that a prevailing defendant in an employment discrimination action cannot recover attorney fees unless the action was unreasonable, frivolous, meritless or vexatious." Leek v. Cooper, 194 Cal.App.4th 399, 419 (2011); see also Earl v. VNU USA, Inc., 2010 WL 597069, *2 (E.D. Cal. 2010) ("California courts rarely grant fees, except in the most extreme cases.").

11). As defendants acknowledge, the provisions of the 2008 Agreement and the 2011 Agreement differ from the 2006 Agreement. (See Dkt. 23, Reply at 8). Specifically, the 2008 and 2011 Agreements provide that the parties shall "bear their own fees and expenses, unless otherwise awarded by the arbitrator in the final, written decision." (See Dkts. 14-17, Collas Decl., Exh. J at ECF 444 (2008 Agreement) & 14-20, Loeffler Decl., Exh. L (2011 Agreement)).

Here, defendants have agreed to pay for "all costs unique to arbitration." (See Dkt. 23, Reply at 8-9; Dkt. 14-2, Lynch Decl. at ¶ 10). Thus, there is no issue with requiring Garcia de Alba and Ratcliff to incur costs unique to arbitration. Further, even assuming the provision is unconscionable, it is easily severable. See Carmax Auto Superstores Cal, LLC v. Hernandez, 94 F.Supp.3d 1078, 1126 (C.D. Cal. 2015) (severance proper where arbitration agreement contained single unconscionable provision); McLaurin v. Russell Sigler, Inc., 155 F.Supp.3d 1042, 1047 (C.D. Cal. 2016) (severing a cost-splitting provision from an arbitration agreement because it was "plainly collateral to the main purpose of the contract" and concluding the arbitration agreement was "valid and must be enforced"). In other words, the arbitration agreement is enforceable even after severing the provision. See, e.g., Larsen, 2016 WL 1223362, at *6 (arbitration agreement enforceable after severing provision that potentially required the employee to pay arbitration fees and instead requiring the employer to bear such costs); Roman v. Super. Ct., 172 Cal.App.4th 1462, 1478 (2009) ("Once that [cost-splitting] provision is severed from the agreement, the costs of the arbitration are properly imposed on [the employer].").

## CONCLUSION

Having found a low degree of procedural unconscionability and having severed the cost-splitting provisions in the 2008 and 2011 Agreements, the court concludes that the arbitration agreements constitute valid agreements between the parties to arbitrate the disputes at issue in this case.[6]

**This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.**

Based on the foregoing, IT IS ORDERED THAT:

1. Defendants' Motion to Compel Arbitration **(Document No. 14)** is **granted**.

2. Defendants' Motion to Stay Case **(Document No. 30)** is **denied as moot**. Defendants'

[6] Plaintiffs argue that defendants have not fully complied with their discovery obligations. (See Dkt. 21, Opp. at 13-15). However, the court's review of the record indicates that this issue has been resolved as defendants have since produced all additional responsive documents. (See Dkt. 23-1, Declaration of Alison L. Lynch in Support of [] Reply at ¶¶ 4s-4u).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| Case No. | **CV 16-3486 FMO (JCx)** | Date | **June 30, 2017** |
|---|---|---|---|
| Title | **Susana Garcia de Alba, et al. v. Brinker International, Inc., et al.** | | |

Motion for Summary Judgment **(Document No. 51)** is **denied without prejudice**.

3. This action is **stayed** pending arbitration. The Clerk shall administratively close the case. See Dees v. Billy, 394 F.3d 1290, 1293-94 (9th Cir. 2005).

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