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No. 66137-0-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

GARDA CL NORTHWEST, INC.

Petitioner/Cross-Respondent,

v.

LAWRENCE HILL, ADAM WISE, and ROBERT MILLER,
on their own behalves and on behalf of all persons
similarly situated,

Respondents/Cross-Petitioners.

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT

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I. INTRODUCTION

This matter is before the Court on cross-appeal of the Superior Court's September 23, 2010 Order on Petitioner/Cross-Respondent Garda CL Northwest, Inc.'s ("Garda" or "the Company") Motion to Compel and/or for Summary Judgment. Respondents/Cross-Petitioners Lawrence Hill, Adam Wise, and Robert Miller (collectively "Plaintiffs") appealed the Order granting Garda's Motion to Compel the dispute to arbitration. Garda appealed the Order to the extent it directed the parties to submit to *class* arbitration. Garda filed its Opening Brief on March 10, 2011. Plaintiffs filed their Opening Brief on May 23, 2011. Garda submits this brief to (1) reply to Plaintiffs' response to Garda's appeal, and (2) respond to Plaintiffs' appeal.

II. REPLY TO PLAINTIFFS' RESPONSE TO GARDA'S APPEAL

Plaintiffs contend that Garda is merely asking for a "do-over" on class certification with an arbitrator. Plaintiffs misunderstand Garda's position. Garda is not seeking to have an arbitrator simply "reconsider" the Superior Court's earlier decision to certify a class in this case. Rather, consistent with the purposes and objectives of the Federal Arbitration Act ("FAA") as interpreted and applied by United States Supreme Court precedent, Garda asks that the appropriate decision-maker decide whether

the parties agreed to submit to class arbitration. Regardless of who decides that issue in this case, however, the inexorable conclusion is that the parties did not agree – and therefore cannot be compelled – to submit to *class* arbitration.

A. THE APPROPRIATE DECISION-MAKER ON THE ISSUE OF WHETHER THE PARTIES AGREED TO CLASS ARBITRATION IS AN ARBITRATOR.

In support of its position that the Superior Court erred in ordering *class* arbitration, Garda principally relies on *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), which held that procedural questions, such as whether an arbitration agreement forbids class arbitration, are for an arbitrator to decide. In their Opening Brief, Plaintiffs argue that *Bazzle* is distinguishable and does not represent binding authority. (Plaintiffs’ Opening Brief (“Pls.’ Br.”) 31-40.) As noted below, Plaintiffs’ arguments fail.

1. *Bazzle* is not distinguishable.

Plaintiffs first argue that *Bazzle* is distinguishable from the instant case because in *Bazzle* the arbitration provision delegated interpretation questions to the arbitrator, whereas in the current CBA’s, the only issue delegated to the arbitrator is one of “contract application.” (Pls.’ Br. 31-32.) Thus, they argue, the arbitration clause does not commit to the

arbitrator the “interpretation” issue of whether the parties agreed to class arbitration. Additionally, Plaintiffs argue *Bazzle* is distinguishable because unlike in *Bazzle*, forbidding class arbitration here would violate state law. Plaintiffs misread *Bazzle* and the arbitration clause in the CBA’s, and they discount recent United States Supreme Court precedent.

a. Plaintiffs misread *Bazzle* and the CBA’s.

Contrary to Plaintiffs’ suggestion, the *Bazzle* arbitration agreement did not expressly delegate interpretation questions to the arbitrator. Instead, “[t]he parties agreed to submit to the arbitrator ‘[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract.’” *Bazzle*, 539 U.S. at 451. Similarly here, all “grievances” – which expressly include disputes over “the interpretation or application of this Agreement,” CP 142-143, 206-207, 229-230 – are subject to arbitration.

Plaintiffs do not dispute that “grievance” includes disputes over the “interpretation or application” of the CBA’s. Instead, Plaintiffs misread the CBA’s as intending that not all “grievances” are to be submitted to an arbitrator. They claim that only disputes involving “contract application” are arbitrable, and, they continue, the issue of whether the parties agreed to class arbitration is one of contract “interpretation,” not “application.”

Plaintiffs' narrow reading of the CBA's as precluding an arbitrator from interpreting the contract is illogical and, ultimately, irrelevant.

Plaintiffs' position is grounded in a single phrase in the grievance/arbitration article that reads, "[i]f after such management-union meeting arbitration is still necessary *because a legitimate as well as significant issue of contract application remains open*, then both the Company and the Union shall prepare a written position statement for submission to the Arbitrator." CP 142-143, 206-207, 229-230 (emphasis added). Plaintiffs misread the selected sentence, leading to an illogical interpretation.

The sentence does not read, as Plaintiffs suggest, that an arbitrator can *only* decide issues involving "contract application." Rather, it plainly reads that if a grievance is not resolved at the management-union meeting, then the parties should submit written position statements to the arbitrator. In other words, the sentence is intended to outline the next step in the grievance/arbitration process, not to serve as a limitation on the scope of the arbitrator's power. Had the parties intended to limit the arbitrator to issues of contract application, they certainly would have done so through express language. Plaintiffs cannot read such a limitation into the CBA's where one does not otherwise exist.

Of course, such a construction would produce an absurd result in this context, as it would effectively prevent an arbitrator from doing precisely what arbitrators are expected to do: interpret the language of a contract to determine the parties' intent. Thus, it is clear that absence of the term "interpretation" in the sentence on which Plaintiffs rely is a distinction without difference.

Nevertheless, even accepting Plaintiffs' position that only issues of "contract application" are to be submitted to an arbitrator, their argument fails. The issue of whether the parties agreed to class arbitration *is* a matter of contract application; the arbitrator must look to the CBA to determine whether the parties agreed that the CBA's would apply to class actions.

b. Plaintiffs' argument is foreclosed by recent Supreme Court precedent.

Plaintiffs next argue that *Bazzle* is distinguishable because, unlike in *Bazzle*, forbidding class arbitration here would violate state law. This argument has been squarely foreclosed by the United States Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

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i. ***Concepcion* decision**

In *Concepcion*, the Supreme Court held that a California law classifying most class action waivers in arbitration agreements as unconscionable was preempted by the Federal Arbitration Act (“FAA”). The plaintiffs in that case brought a class action alleging that AT&T engaged in false advertising with respect to cell phone service. *Concepcion*, 131 S. Ct. at 1744. AT&T moved to compel individual arbitration of the plaintiffs’ claims under a provision in the sales contract that required claims be brought in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” *Id.* at 1744. The district court denied AT&T’s motion on the basis that the arbitration agreement was unconscionable under California law because it disallowed classwide procedures. *Id.* at 1745. The Ninth Circuit Court of Appeals affirmed the district court’s denial. *Id.*

The Supreme Court reversed the lower courts and found that California’s unconscionability law “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Concepcion*, 131 S. Ct. at 1748. The Court explained that the FAA “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by

defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Id.* at 1746 (quoting *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). In other words, the Court explained, state unconscionability law cannot be applied “in a fashion that disfavors arbitration.” *Id.* at 1747.

The Court then held that California’s law prohibiting class action waivers “disfavors” arbitration agreements.¹ *Concepcion*, 131 S. Ct. at 1750. The Court observed, “The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.” *Id.* at 1748 (internal quotations omitted). To that end, the Court recognized, parties may agree “to limit the issues subject to arbitration,” “to arbitrate according to specific rules,” and “to limit *with whom* a party will arbitrate its disputes.” *Id.* at 1748-49.

Accordingly, under *Concepcion*, any state unconscionability law that “interferes with fundamental attributes of arbitration” by

¹In reaching its conclusion, the Court offered some non-exclusive examples of state laws that would be preempted by the FAA inasmuch as they have a disproportionate impact on arbitration, including laws finding unconscionable arbitration agreements that fail to provide for judicially monitored discovery procedures, fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury. *Concepcion*, 131 S. Ct. at 1747.

“disfavoring” arbitration agreements is preempted by the FAA. *Concepcion*, 131 S. Ct. at 1747-48.

ii. Plaintiffs’ attempt to distinguish *Concepcion* fails.

Plaintiffs argue that *Concepcion* only invalidates state laws that ban class action waivers in arbitration agreements where class-wide treatment is not necessary to ensure the parties are able to vindicate their rights. (Pls.’ Br. fn. 10.) *Concepcion* cannot be read so narrowly. The Supreme Court’s decision was written in broad terms and not intended to be limited to its unique facts. Moreover, the Supreme Court expressly rejected this precise argument: “The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” *Concepcion*, 131 S. Ct. at 1753. In other words, the majority dismissed the notion that a state law *can* conflict with the FAA if a party will not otherwise be able to vindicate his or her rights.²

²Notably, beyond Plaintiffs’ pure speculation, there is absolutely no evidence that denial of class adjudication would prevent Plaintiffs from vindicating their rights. They could have filed their claims individually, and they could have recovered state law remedies under the CBA’s.

Plaintiffs also attempt to undermine *Concepcion* on the basis that only four justices would apply the FAA to proceedings in state court. This argument can easily be dismissed. Justice Thomas is the only justice who would not apply the FAA to proceedings in state court. Although the remaining justices dissented from the majority's view on whether the FAA preempted California's unconscionability law, those dissenters did not propose to hold that the FAA not apply in state court proceedings. Thus, *Concepcion* does not hold that the FAA is inapplicable in state court.

Accordingly, Plaintiffs' attempt to distinguish *Bazzle* is unpersuasive and should be rejected by the Court.

2. *Bazzle* represents binding authority.

Plaintiffs next argue that *Bazzle* is not binding in light of the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). The Court in *Stolt-Nielsen*, however, did not overrule *Bazzle*. Indeed, the Court observed, "[w]e need not revisit [the *Bazzle*] question here because the parties' supplemental agreement expressly assigned [the issue of class arbitration] to the arbitration panel." *Id.* at 1772. Regardless, *Stolt-Nielsen* is entirely consistent with *Bazzle*, as courts have repeatedly recognized. *See, e.g., Guida v. Home Savings of America, Inc.*, No. 11-cv-00009(JFB)(ARL), 2011 U.S. Dist. LEXIS

69159, at *13 (E.D.N.Y. June 28, 2011) (“[M]any courts since *Stolt-Nielsen* have continued to follow *Bazzle*’s conclusion that the ability to arbitrate on a class basis is a procedural question left for the arbitrator to decide.”) (unpublished opinion);³ *Vilches v. The Travelers Companies, Inc.*, No. 10-2888, 2011 U.S. Ct. App. LEXIS 2551, at *11 (3rd Cir. Feb. 9, 2011) (reconciling *Bazzle* and *Stolt-Nielsen* and holding that “[w]here contractual silence is implicated, the arbitrator and not a court should decide whether a contract [was] indeed silent on the issue of class arbitration, and whether a contract with an arbitration clause forbids class arbitration”) (internal quotations omitted) (unpublished opinion).

Plaintiffs also argue that the Court can decide what kind of arbitration the parties agreed to because the Court itself in *Stolt-Nielsen* decided the matter. Plaintiffs seriously misread *Stolt-Nielsen* in this regard. The parties in that case expressly agreed to have an arbitration panel decide the issue of whether the parties agreed to class arbitration. *See Stolt-Nielsen*, 130 S. Ct. at 1765. The only reason the Supreme Court did not remand the case for the arbitrators to decide whether the parties agreed to class arbitration was because under the Court’s new standard,

³Pursuant to Rule 14.1 of the Washington General Rules, copies of unpublished opinions cited in this brief are included in Appendix A.

discussed in more detail below, see *infra* pp. 12-13, silence cannot be construed as consent to class action waiver. Thus, the Court explained, the arbitration panel could not have concluded, consistent with that standard, that class arbitration was appropriate: “Because we conclude that there can be only one possible outcome on the facts before us, we see no need to direct a rehearing by the arbitrators.” *Id.* at 1770.

Accordingly, *Bazzle*’s plurality represents controlling authority on the issue of whether a court or an arbitrator must decide what kind of arbitration the parties agreed to.

B. THE PARTIES DID NOT AGREE – AND THEREFORE CANNOT BE COMPELLED – TO SUBMIT TO CLASS ARBITRATION.

Even if the Court disregards *Bazzle* and its progeny and undertakes to decide the issue of what kind of arbitration the parties agreed to, the only conclusion that can be reached in light of *Stolt-Nielsen*, as subsequently confirmed by *Concepcion*, is that there is no such agreement here.⁴ Consequently, class arbitration is not appropriate.

⁴In footnote 11 of their Opening Brief, Plaintiffs accuse Garda of ignoring *Stolt-Nielsen*. This is not true. Garda did not address *Stolt-Nielsen* in its Opening Brief because *Bazzle* controlled the argument, and, applying *Bazzle*, the Court need not reach *Stolt-Nielsen*. Now that Plaintiffs have challenged *Bazzle* as controlling authority, Garda presents the alternative argument that even if the Court can decide the question, *Stolt-Nielsen* directs that there can be no conclusion but that the parties did *not* agree to class arbitration. The Court should note, too, that Garda did raise this alternative argument to the Superior

1. ***Stolt-Nielsen* decision**

In *Stolt-Nielsen*, an arbitration panel compelled the parties to submit to class-wide arbitration despite the fact that the agreement was silent as to the handling of class disputes. *Stolt-Nielsen*, 130 S. Ct. at 1766. The Supreme Court reversed the panel, opining as follows:

[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached “no agreement” on that issue. . . . The panel’s conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

Id. at 1775. The Court explained that “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” *Id.*

In *Concepcion*, the Supreme Court reaffirmed *Stolt-Nielsen* and expanded on its discussion of some of the fundamental changes that class arbitration imposes:

Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while

Court. *See* CP 28 (Def.’s Mot. to Comp. or S.J. at 11 n.8).

it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.

Concepcion, 131 S. Ct. at 1750. In short, the *Concepcion* Court observed, “Arbitration is poorly suited to the higher stakes of class litigation.” *Id.* at 1752.

Thus, *Stolt-Nielsen* and *Concepcion* make clear that parties to an arbitration agreement cannot be compelled to submit to class arbitration unless there is a contractual basis for concluding they agreed to do so. To hold otherwise would ignore the fundamental differences between bilateral and class arbitration.

2. Plaintiffs cannot distinguish *Stolt-Nielsen*.

Plaintiffs obviously recognize the significance of *Stolt-Nielsen* on their case. If *Stolt-Nielsen* applies, their claims cannot be compelled as a class – regardless of who the decision-maker is. Consequently, Plaintiffs attempt to distinguish *Stolt-Nielsen* by arguing that under the CBA’s, there *is* a basis for the Court to conclude that the parties agreed to submit their statutory wage claims to class arbitration.

Plaintiffs offer two primary reasons why the Court should conclude the parties contractually agreed to submit this dispute to class arbitration. First, Plaintiffs argue the arbitration provision does not expressly preclude class arbitration and expressly contemplates group remedies. Second, Plaintiffs argue labor unions have a history of recognizing class arbitration of wage and hour disputes. Both of these arguments are easily rejected.

a. That the arbitration provision does not expressly preclude class arbitration and may contemplate group remedies is irrelevant.

Plaintiffs' suggestion that the parties agreed to class arbitration because the agreement does not "expressly preclude it" turns *Stolt-Nielsen* on its head. The Supreme Court explicitly held that, in an FAA proceeding, an implied agreement cannot be inferred from an arbitration clauses' failure to "preclude" class arbitration. *Stolt-Nielsen*, 130 S. Ct. at 1775. Indeed, the Supreme Court expressly dismissed "[t]he critical point, in the view of the arbitration panel, . . . that petitioners did not establish that the parties . . . intended to *preclude* class arbitration." *Id.* (internal quotations omitted).

Nor is it significant that the CBA's purportedly contemplate group remedies. As an initial matter, contrary to Plaintiffs' contention, the

grievance/arbitration provision does not expressly contemplate group remedies. It merely provides that an arbitrator's decision is binding on all parties subject to the Agreement. CP 142-143, 206-207, 229-230. Regardless, the mere fact that the arbitrator's decision is deemed final and binding upon the grievant and "all parties to this Agreement" does not equate to affirmative consent by Garda to submit to class arbitration.

Plaintiffs also erroneously read *Stolt-Nielsen* as holding that "whether class arbitration is appropriate depends on state law." (Pls.' Br. 38.) Plaintiffs base their interpretation on an incomplete reading of the case. Specifically, on page 37 of their Opening Brief, Plaintiffs cite *Stolt-Nielsen* as "reiterat[ing] the axiom that interpretation of an arbitration agreement, like any other type of contract, is 'generally a matter of state law.'" (Pls.' Br. 37.) Significantly, Plaintiffs insert a period in this quote where a comma resides in the *Stolt-Nielsen* opinion. In so doing, Plaintiffs omit key language that qualifies the general proposition for which they cite the case.

Stolt-Nielsen actually holds that "while the interpretation of an arbitration agreement is generally a matter of state law, . . . the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not cohesion." *Stolt-*

Nielsen, 130 S. Ct. at 1773 (emphasis added). Thus, as *Concepcion* confirms, *Stolt-Nielsen* holds that whether class arbitration is appropriate depends on what the parties agreed to – not what state law determines as a matter of policy judgment is appropriate: “Arbitration is a matter of contract, and the FAA requires courts to honor parties expectations.” *Concepcion*, 131 S. Ct. at 1752.

b. That there is a long history of class arbitration in the labor context is of no consequence.

Plaintiffs also unpersuasively argue that the parties agreed to class arbitration in light of the “long history of wage and hour claims” in labor agreements. According to Plaintiffs, the *Stolt-Nielsen* Court “found there was no contractual basis to conclude the parties consented to class arbitration because there was ‘no tradition of class arbitration in maritime law.’” (Pls.’ Br. 37.) Plaintiffs again misread *Stolt-Nielsen*.

The *Stolt-Nielsen* Court observed that the arbitration panel erroneously regarded the agreement’s silence on the question of class arbitration as dispositive notwithstanding that, *inter alia*, “there is no tradition of class arbitration under maritime law.” *Stolt-Nielsen*, 130 S. Ct. at 1775. The Courts’ reference to maritime law was merely used as an example to highlight why the panel should not have interpreted the silence as consent to class arbitration. The Supreme Court certainly did not hold

that if there is a tradition of class arbitration, silence on the issue should be regarded as consent to class arbitration.

Indeed, in *Concepcion*, the Supreme Court rejected the argument that a common practice of parties agreeing to class arbitration is evidence that they did so in the subject contract:

The *Concepcions* contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the *Concepcions* admit States may not superimpose on arbitration: Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation.

Concepcion, 131 S. Ct. at 1752.

Accordingly, *Concepcion* and *Stolt-Nielsen* make clear that even though parties can and do sometimes agree in labor collective bargaining agreements to submit disputes to class arbitration, that fact has no impact on what the parties agreed to in the case at hand.

III. RESPONSE TO PLAINTIFFS' APPEAL

Plaintiffs argue the Superior Court erred in ordering arbitration because Garda waived its right to demand arbitration, Plaintiffs did not “clearly and unmistakably” waive the right to have their statutory wage

claims heard in court, and the arbitration provision is unconscionable under Washington state law. Plaintiffs' arguments should be rejected.

A. GARDA DID NOT WAIVE ITS RIGHT TO ARBITRATE THIS DISPUTE.

Plaintiffs argue Garda waived its right to arbitrate this dispute by actively litigating this case for 19 months and failing to enforce any rights it possessed until a class had been certified and notified, discovery was nearly complete, and trial was a mere 14 weeks away. Plaintiffs' argument should be rejected because it misstates the record and is premised on inapposite case law.

1. The Record Shows the Parties Did Not Actively Litigate This Case Prior to June 2010.

Plaintiffs filed their Complaint on February 16, 2009, alleging wage and hour claims under Washington law. *See* CP 3-8. In its first appearance, Garda unambiguously asserted as an affirmative defense that "Plaintiffs' claims must be resolved by arbitration pursuant to arbitration agreements." CP 12.

As noted in a declaration from Plaintiffs' counsel, "[t]he parties [then] delayed significant investment in prosecuting and defending the case because trial was imminent in a very similar matter, *Pellino v. Brinks*, [King County Superior Court Case] No. 07-2-1346907-SEA." CP 841 ¶5.

Thus, not much was done in the case except for the exchange of written discovery. In fact, the first deposition was not taken until February 2010, when Plaintiffs took the deposition of a single manager. CP 841 ¶4.

After the decision was issued by the trial court in the *Pellino* matter in January 2010, “the parties . . . spent some time discussing the possibility of settlement, but nothing materialized, so Plaintiff filed their Motion for Class Certification on March 26, 2010.” CP 580. Throughout this time period the parties discussed the option of proceeding through arbitration, and, as late as April 1, 2010, Plaintiffs’ counsel indicated to Garda that Plaintiffs “are not prepared to make a decision on arbitration v. litigation prior to mediation, and prefer to spend [Plaintiffs’] immediate resources on that effort.” CP 626.

The parties unsuccessfully mediated this matter on May 6, 2010. CP 841 ¶7. While the parties placed the case on hold and assessed the merits of settlement, the hearing date for the Motion for Class Certification was renoted several times. CP 580-581.

Garda substituted counsel on June 1, 2010, CP 821, and the new defense counsel unsuccessfully moved to continue the Motion for Class Certification, CP 823. In preparation for the filing of a motion to compel arbitration, Garda took the depositions of the named Plaintiffs on June 15

and 22, 2010. CP 624 ¶¶4-6. Counting these depositions, there were only four depositions ever taken in this matter, CP 547 ¶7; again, the prior one being the sole manager deposition in February 2010, CP 841 ¶4.

Up until June 2010, Garda had only issued a single set of discovery requests as compared to four issued by Plaintiffs. CP 824:05-06. Setting aside the effort to continue the Motion for Class Certification, the sum total of motion practice that Garda was involved with up to this time was a *stipulated* motion for a protective order in September 2009, a *stipulated* motion (proposed by Plaintiffs) to continue the trial date in March 2010, and a motion to seal documents filed in violation of the protective order. *See* CP 612. Moreover, the March 2010 stipulated motion for a continuance expressly provided that “Plaintiffs and Garda agree that this stipulation and motion is made without prejudice to Garda’s position . . . that this matter is properly subject to arbitration under the applicable Labor Agreements.” CP 799.

Approximately *two months* after the failed mediation and *three weeks* after the depositions of the named Plaintiffs, and before the Superior Court could rule on the Motion for Class Certification, Garda filed its Motion to Compel Arbitration or for Partial Summary Judgment on July 1, 2010. CP 15. The Superior Court subsequently issued its Order

Granting Plaintiffs' Motion for Class Certification on July 23, 2010. CP 519. The Court then heard oral arguments on the Motion to Compel Arbitration or for Partial Summary Judgment on August 28, 2010, and, after allowing the parties to supplement the record, granted the Defendant's Motion in part by ordering class arbitration. CP 772. As part of its ruling, the Superior Court expressly found that "the motion to compel arbitration was timely" and, thus, there was no waiver. CP 773.

2. Garda Has Preserved Its Right to Compel Arbitration Pursuant to the CBA's.

The parties do not dispute the general legal standard concerning waiver: "Waiver is the voluntary and intentional relinquishment of a known right. It will not be found absent conduct inconsistent with any other intention but to forego that right." *Ives v. Ramsden*, 142 Wn. App. 369, 383, 174 P.3d 1231 (2008). Nor is there any dispute that Plaintiffs have the burden of showing that the arbitration agreements they entered into are unenforceable. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007). Any doubts concerning the scope of arbitrable issues, construction of the contract, or a defense of waiver or the like must be resolved in favor of arbitration. *Kinsey v. Bradley*, 53 Wn. App. 167, 170, 765 P.2d 1329 (1989) (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)); *Peninsula School v. Employees*,

130 Wn.2d 401, 414, 924 P.2d 13 (1996). The real issue is whether Plaintiffs met their burden, which they did not. As noted in the facts above and the argument below, the Superior Court properly decided that there had not been a waiver of the right to arbitrate.

In an effort to circumvent the strong presumption in favor of arbitration, Plaintiffs argue that Garda waived its right to arbitration by allegedly “litigating this case for nearly 19 months and failing to enforce any rights it possessed until a class had been certified . . . , discovery was nearly completed, and trial [imminent].” Pls.’ Br. 13. Plaintiffs misstate the record.

In passing, Plaintiffs note that, “[f]or a short period of time toward the end of 2009, both parties delayed significant investment in prosecuting and defending this case because trial was imminent in a very similar matter, *Pellino v. Brinks* (King County Superior Court No. 07-2-13469-7 SEA ...).” (Pls.’ Br. 7-8.) In reality, the “short period of time” reference is not part of the June 2010 declaration submitted by Plaintiffs’ counsel to the Superior Court. CP 841. Although he noted in that declaration that the parties had exchanged some limited written discovery, the declaration from Plaintiffs’ counsel confirms that not a single deposition was taken in all of 2009, and Plaintiffs waited an entire year before taking their one and only deposition of a manager in February 2010. CP 841 ¶4. The rational

offered in June 2010 for the lack of effort on either side to move this matter forward was that “[t]he parties delayed significant investment in prosecuting and defending the case” because they were waiting for the *Pellino* decision by the Superior Court that eventually came out in January 2010. CP 841 ¶¶5-6.

Plaintiffs’ counsel then goes on to explain in his declaration why there continued to be a lack of effort by the parties:

Thereafter, the parties in this case discussed settlement, and the Plaintiffs proposed mediation. Nothing materialized in settlement discussions, so Plaintiffs moved for class certification on March 26, 2010. Defendant then agreed to mediate, and the parties conducted mediation . . . on May 6, 2010.

...

At Defendant’s request, Plaintiffs re-noted their motion for class certification on May 28, 2010, on the express understanding that this would provide Defendant with sufficient time to respond should the mediation be unsuccessful. Defendant’s counsel then asked that the motion be re-noted again, to June 4th, due to a planned vacation, and Plaintiffs complied.

CP 841 ¶¶ 7, 9.

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In short, the record does not remotely support Plaintiffs' current argument that "[t]he parties actively litigated this case in Superior Court for 19 months." (Pls.' Br. 6.) The reality is that, from the very beginning of this matter, Garda asserted its right to arbitrate, and the parties largely placed this case on hold to try mediation and discuss settlement. That this matter was subject to arbitration was expressly raised as an affirmative defense in Garda's Answer at the outset. CP 12.

Again, the parties made a decision to place this case on hold to determine if resolution of *Pellino* would help them in resolving the current dispute. As late as April 2010, Plaintiffs recognized the need at that time to avoid active litigation through either arbitration or a civil action while the parties assessed mediation or talked settlement:

Plaintiffs are willing to postpone further briefing on class certification in order to attempt a class-wide settlement through mediation We also remain willing to give serious and good faith consideration to a comprehensive proposal for arbitration should mediation fail. However, we are not prepared to make a decision on arbitration vs. litigation prior to mediation, and prefer to spend our immediate resources on that effort.

CP 626 (April 1, 2010 Email from Plaintiffs' Counsel). They even acknowledged that one of the reasons they eventually filed a Motion for Class Certification in March 2010 was because "the parties . . . spent some

time discussing the possibility of settlement, but nothing materialized . . .
.” CP 580.

Any argument that this case was in “the final stages of litigation” is disingenuous, at best. Plaintiffs can hardly claim they were going to try a statewide wage and hour class action based on the sole deposition they took in February 2010. CP 841 ¶4. The reality is that once mediation and settlement talks fell through in May 2010, CP 841 ¶7, Garda took depositions of the named Plaintiffs in June, CP 624 ¶¶4-6, and moved to compel arbitration or for partial summary judgment on July 1, 2010, CP 15.

The Superior Court properly ruled there was no waiver. Based on these facts, there was no “voluntary and intentional relinquishment of a known right” or “conduct inconsistent with any other intention but to forego that right.” *Ives*, 142 Wn. App. 369, 383.

3. None of the Authorities Cited by Plaintiffs Establish That There Was a Waiver.

Plaintiffs rely heavily on the Washington Court of Appeals’ decision in *Steele v. Lundgren*, 85 Wn. App. 845, 935 P.2d 671 (1997), to support their waiver argument. This case does not help them.

In *Steele*, the plaintiff sued her former supervisor and employer alleging sexual discrimination. Although the court found that the defendants waived the right to arbitration by asserting it for the first time 10 months after the initiation of the lawsuit, the court noted that the defendants “did not express *any* intention to arbitrate the claim, either in his answer, or at the time [plaintiff] amended her complaint, or at the time of substitution of counsel, or at the time the case was assigned to an individual calendar.” 85 Wn. App. at 853 (emphasis added).

The Court further noted that defendants participated in mediation and “contentious discovery.” *Steele*, 85 Wn. App. at 853. In fact, the defendants discovery was so contentious in that case that

the court struck most of the discovery requests, characterizing them as “unduly burdensome, oppressive, overly broad, duplicative, and an abuse of the discovery process.” The court additionally ordered no further written discovery to plaintiff without court order, and levied a \$500 fine on [the defendants].

Id. at 855.

Here, Garda raised arbitration in its Answer and continued to discuss it while the parties considered mediation and settlement options. There is no history of contentious abusive litigation practices that convinced the court in *Steele* that the defendant “effectively chose to

litigate in superior court.”⁵ *Id.* at 856. Within two months of the failed mediation, Garda moved to compel arbitration.

The one set of discovery requests by Garda and depositions of the named Plaintiffs in preparation for the motion to compel arbitration does not amount to waiver. The “limited use of discovery [i]s not inconsistent with [the] right to compel arbitration,” *Lake Wash. School Dist. v. Mobil Modules*, 28 Wn. App. 59, 63, 64 621 P.2d 791 (1980) (finding no waiver where the right to arbitrate was raised in the Answer), especially in the present situation where that discovery was used to reinforce Garda’s position that arbitration was the proper forum that was agreed to by the parties, *see* CP 82-83 (Wise Depo. at 37:09-20; 40:05-23 and 41:22-42:01), CP 66-67 (Miller Depo. at 20:07-21:18), and CP 58-59 (Hill Depo. at 75:05-09 and 79:04-11).

⁵Citing CP 841, Plaintiffs make a reference to the Confirmation of Joinder form that they filed indicating that this case is not subject to mandatory arbitration. However, the court mandated process referenced here is set forth in the LMAR’s and governed by RCW 7.06.020(1), which clearly caps the program at \$15,000 or \$50,000 depending on the county. Plaintiffs claims for at least \$5 million clearly exceed the cap, CP 8 ¶33, and make the mandatory arbitration program inapplicable to this case. Moreover, in *Parry v. Windermere Real Estate East, Inc.*, 102 Wn. App. 920, 10 P.3d 506 (2000), the court rejected a similar waiver argument, finding that “[t]he confirmation of joinder is not a pleading; rather it is a case-management tool . . .” and holding that, “by signing the form, such a defendant does not intentionally abandon or relinquish a known right.”

The other authorities cited by Plaintiffs are equally unpersuasive. In *Ives v. Ramsden*, 142 Wn. App 369, 174 P.3d 1231 (2008), the defendant literally engaged in 3 years and 4 months of heavy litigation – Answer, extensive discovery, depositions, interrogatories, and “prepared fully for trial” – and “[t]hen, on the eve of trial, [the defendant] argued for the first time that the arbitration agreement foreclosed trial.” *Id.* at 384. Plaintiffs here knew about the arbitration since the Answer was filed, CP 12, and during the time period they “delayed significant investment in prosecuting [their] case,” CP 841 ¶5.

Similarly inapposite, in the *Otis Hous. Ass’n v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009), the defendant filed an action to compel arbitration after it already litigated and lost the issue of possession in an unlawful detainer action. The defendant could not, the court held, “relitigate the same issue in a different forum.” *Id.* at 588. Nothing in this case prevents Garda from staying the current unresolved matter in favor of arbitration as agreed to by the parties in their labor agreements.

In short, Garda never waived its right to compel arbitration, and none of the authorities cited by Plaintiffs indicate otherwise.

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B. THE COLLECTIVE BARGAINING AGREEMENTS CLEARLY AND UNMISTAKABLY REQUIRE UNION MEMBERS TO ARBITRATE STATUTORY WAGE CLAIMS.

Plaintiffs next argue that the Superior Court erred in ordering arbitration because they did not “clearly and unmistakably” waive the right to have their statutory wage claims heard in court. Plaintiffs’ argument ignores the plain language of the CBA’s, judicial presumptions that grievance/arbitration procedures are exclusive and mandatory, and their own admissions that they could and should have pursued the claims through the grievance/arbitration process. Further, Plaintiffs’ argument is again grounded in a narrow, illogical reading of the contract that ultimately proves irrelevant. Finally, Plaintiffs’ argument relies on case law that undermines, rather than supports, their position.

1. The parties plainly agreed to arbitrate this dispute.

The plain language of the CBA’s establishes a clear and unmistakable waiver of Plaintiffs’ right to pursue their statutory wage claims in court. Each of the CBA’s includes an entire article devoted to the grievance and arbitration process. The contract defines a grievance; it sets forth the procedure for presenting a grievance to the Company; and it establishes arbitration as the ensuing step for a grievance response that “is deemed inadequate by the Union.” CP 142-143, 206-207, 229-230. In

such situations, “the Union *shall* have fourteen (14) calendar days to request arbitration.” CP 142-143, 206-207, 229-230 (emphasis added). Further, the CBA’s provide, “The decision of the arbitrator *shall* be final and binding upon the grievant and all parties to this Agreement.” CP 142-143, 206-207, 229-230 (emphasis added).

The parties’ repeated use of the word “shall” compels the conclusion that arbitration of all unsatisfactory grievance responses by the Company is indeed mandatory. *See Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 289, 654 P.2d 712 (1982) (holding that use of the word “shall” in contracts is “usually understood to be mandatory, not permissive”).

Moreover, courts have recognized the presumption that “grievance procedures are mandatory unless otherwise expressly stated.” *AFSCME v. Highland Park Bd. of Ed.*, 457 Mich. 74, 85, 577 N.W.2d 79 (1998). And they presume that mandatory language renders a grievance/arbitration process exclusive. *See Minter v. Pierce Transit*, 68 Wn. App. 528, 532, 843 P.2d 1128 (1993), *rev. den.*, 121 Wn.2d 1023 (1993) (recognizing that Washington courts presume that “arbitration clauses are exclusive of other remedies”).

Finally, Plaintiffs Robert Miller and Adam Wise admit that the grievance and arbitration provision covers their statutory wage claims.⁶ See CP 66-67 (Miller testifying that it was “consistent with his understanding” that the grievance process “applied to any claims under any state, federal or local law, statute or regulations”); CP 79 (Wise testifying that a grievance is defined as including claims “concerning rates of pay, entitlement to compensation, benefits, hours or working conditions”). Further, Miller testified that it was “possible” his current issues with Garda would have fallen under the grievance policy. CP 67.

Accordingly, the record supports the Superior Court’s finding that Plaintiffs’ statutory wage claims are subject to binding arbitration.

2. Plaintiffs’ “contract application” argument is grounded in a narrow, illogical reading of the contract that ultimately proves irrelevant.

Notwithstanding that the grievance/arbitration article repeatedly uses the mandatory word “shall,” there is a presumption that grievance/arbitration procedures are mandatory and exclusive, and some of the plaintiffs acknowledge their claims were covered under, and could have been pursued through, the grievance/arbitration process, Plaintiffs

⁶Plaintiff Lawrence Hill neither confirmed nor denied this.

now argue their wage claims are not subject to arbitration because the CBA's do not require that *all* disputes be arbitrated, but only those involving a "legitimate as well as significant issue of contract application." Plaintiffs contend their statutory wage claims do not fall into that category.

Plaintiffs again ground their argument in a single phrase in the grievance/arbitration article that reads, "[i]f after such management-union meeting arbitration is still necessary *because a legitimate as well as significant issue of contract application remains open*, then both the Company and the Union shall prepare a written position statement for submission to the Arbitrator." CP 142-143, 206-207, 229-230 (emphasis added). And yet again Plaintiffs' narrow reading of this provision is illogical and, ultimately, irrelevant.

a. Plaintiffs' narrow interpretation is illogical.

First, as argued above, *supra* pp. 3-5, Plaintiffs misread the selected sentence to mean that *only* disputes involving "contract application" are to be submitted to arbitration. Had the parties intended to restrict the type of grievances that may advance to arbitration, they certainly would have done so through express language.

Second, Plaintiffs' argument ignores the grievance/arbitration article as a whole. *See Sales Creators v. Lit. Loan Shop, LLC*, 150 Wn. App. 527, 208 P.3d 1133 (2009) (observing that to determine the scope of an arbitration provision, the agreement must be read as a whole); *Feingold, Alexander & Associates, Inc. v. Setty & Associates, Ltd.*, 81 F.3d 206, 207-09 (D.C. Cir. 1996) (recognizing that contract must be read as a whole to determine scope of arbitration clause).

At the beginning of the article, a grievance is defined, in pertinent part, as including "any claim under any . . . state . . . law, statute or regulation . . . or any other claim related to the employment relationship." CP 142-143, 206-207, 229-230. Thus, the article plainly contemplates that statutory wage claims are subject to the grievance process.⁷ Further, the procedure mandates that, following an unsatisfactory grievance response by the Company, the Union "shall" have fourteen days to request arbitration. CP 142-143, 206-207, 229-230. Ignoring these provisions fails to give effect to the contract as a whole. *See Sheriff Suffolk v. AFSCME Council 93*, 75 Mass. App. Ct. 340, 914 N.E.2d 124 (2009) (question of whether grievance is arbitrable "is to be resolved by reading

⁷Plaintiffs do not challenge this fact, and, as discussed above, *see supra* p. 31, Plaintiffs Miller and Wise acknowledge as much. CP 66-67, 79.

and construing the whole contract in a reasonable and practical way, consistent with its language, background, and purpose”) (internal quotations omitted).

Third, at the very worst, Plaintiffs’ identify an ambiguity in the clause as to whether the instant claims are covered. The Supreme Court has made clear, however, that “any 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, 240 (1983). Thus, if, at worst, the provision is ambiguous, it must be interpreted as including the instant claims.

b. Plaintiffs’ narrow interpretation is irrelevant.

All of this, of course, is a mere academic exercise because even accepting Plaintiffs’ strained construction of the arbitration clause, their wage claims would still be subject to arbitration because they *do* involve a “legitimate and significant issue of contract application.” Moreover, Plaintiffs’ argument is irrelevant because if their claims are not subject to arbitration, they are at least subject to the grievance process, which they undisputedly failed to follow.

First, Plaintiffs’ claims do involve an issue of contract application. To be sure, Plaintiffs’ claims challenge the lawfulness of Garda’s meal

and rest break policy, which is set forth in the CBA's.⁸ Because Plaintiffs challenge the policy itself, an arbitrator must *apply* the contract to determine if the policy violates Washington state law. *See Medrano v. Excel Corp.*, 985 F.2d 230, 234 (5th Cir. 1993) (finding that where a plaintiff argued that a provision of a CBA itself violated a state law, the “claim, without a doubt, is substantially dependent upon the meaning of a term of the CBA *and its applicability*”), *cert. denied*, 510 U.S. 822 (1993).

Moreover, Plaintiffs' statutory right to a meal break is a waivable right under Washington law. *See Washington Dept. of Labor & Industries* (“L&I”) Administrative Policy ES.C.6 (“Employees may choose to waive the meal period requirements. . . . If an employee wishes to waive that meal period, the employer may agree to it.”). Consequently, an arbitrator must apply the CBA's to determine whether Plaintiffs waived their right to a meal period consistent with Washington law.

⁸In footnote 2 of their Opening Brief, Plaintiffs suggest that they do not challenge the lawfulness of the policy. However, Paragraph 28 of their Complaint alleges that a “[C]ommon issue[] of law and fact” among plaintiffs and the putative class includes “[W]hether defendant's *policy* providing its armored truck employees with only ‘on-duty’ meal breaks is consistent with Washington law.” (Compl. ¶ 28(c) (emphasis added).) Moreover, Paragraph 31 alleges, “Defendant's *policy* and practice under which plaintiffs and the class do not receive meal and rest breaks violates [Washington state law]” (Compl. ¶ 31 (emphasis added).) Thus, Plaintiffs' contention that they are not challenging the lawfulness of the policy is disingenuous.

Second, Plaintiffs' argument that only issues of "contract application" are subject to arbitration is irrelevant because it is undisputed that Plaintiffs' statutory wage claims are at least subject to the *grievance* procedure, and none of the plaintiffs filed a grievance here. CP 67, 79. Accordingly, Plaintiffs' claims fail as a matter of law. *See Davis v. Dep't of Trans.*, 138 Wn. App. 811, 825, 159 P.3d 427 (2007) ("It is undisputed that the employees in this case failed to seek a remedy . . . through the procedures established by the CBA. . . . Having failed to exhaust their contractual remedies . . . we hold that the employees are precluded from bringing this action.").

3. Plaintiffs rely on case law that undermines, rather than supports, their argument.

Plaintiffs finally argue that the CBA's do not make arbitration mandatory for their statutory wage claims because they do not mention private lawsuits or the public court system or state that employees cannot take legal action in order to enforce their legal rights. In support of this argument, Plaintiffs rely on *Brundridge v. Fluor Fed. Servs., Inc.*, 109 Wn. App. 347, 356, 35 P.3d 389 (2001), for the proposition that a "boilerplate arbitration provision is not sufficiently specific [when] it does not clearly and unmistakably waive the right to a judicial forum for . . . claims arising independently of the CBAs."

Plaintiffs' reliance on *Brundridge* undermines, rather than supports, their position. The *Brundridge* case is analogous to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which the Supreme Court in *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009), explicitly distinguished because the agreement in that case did not expressly provide for the arbitration of statutory claims. Conversely, in *14 Penn Plaza* and in the instant case, the grievance/arbitration procedure expressly covers statutory claims. See CP 142-143, 206-207, 229-230 (defining grievance as including "any claim under any . . . state . . . law, statute or regulation . . . or any other claim related to the employment relationship").

Plaintiffs' argument is further undermined by their mistaken assumption that an effective waiver can only exist where a collective bargaining agreement mentions private lawsuits or the public court system or states that employees cannot take legal action in order to enforce their rights. In *14 Penn Plaza*, 129 S. Ct. at 1481, however, the Supreme Court found a valid waiver of the right to pursue a statutory claim in court notwithstanding a lack of reference to private lawsuits, the public court system, or the covered employees' ability to take legal action in the CBA's.

Given that Plaintiffs clearly and unmistakably agreed through the CBA's to waive their right to pursue a statutory wage claim in court, the Court should uphold the Superior Court's determination that Plaintiffs "clearly and unmistakably" waived their right to pursue their state law wage claims in a judicial forum.

C. PLAINTIFFS' UNCONSCIONABILITY ARGUMENT FAILS UNDER UNITED STATES SUPREME COURT PRECEDENT.

Plaintiffs finally argue that the Superior Court erred in ordering arbitration because the arbitration provision is unconscionable under Washington state law. Once again, Plaintiffs' argument is squarely foreclosed by the United States Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

1. Plaintiffs' arguments fail under *Concepcion*.

Plaintiffs argue that the arbitration provision in the CBA's is substantively and procedurally unconscionable under Washington state law. Plaintiffs argue it is substantively unconscionable because it reduces the applicable statute of limitations for their claims, imposes prohibitive costs on employees, and severely limits any recovery they may be awarded. Moreover, Plaintiffs argue it is substantively unconscionable to the extent it is construed as a waiver of their right to proceed as a class.

Finally, Plaintiffs argue the provision is procedurally unconscionable because it is “one-sided” and “thrust” upon employees.

Assuming, *arguendo*, that Washington law would render the arbitration provision unconscionable, *but see infra* pp. 44-48, *Concepcion* precludes the Court from invalidating the provision on those grounds.

a. Shortened statute of limitations

First, relying on *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 356-57, 103 P.3d 773 (2004), Plaintiffs argue that the arbitration provision is substantively unconscionable under Washington state law because it substantially shortens the applicable statute of limitations for employees to file claims. To the extent *Adler* holds that an arbitration agreement that substantially shortens the applicable statute of limitations is substantively unconscionable, it is overruled by *Concepcion* because such a rule would have a disproportionate impact on arbitration agreements. *See, e.g., D’Antuono v. Service Road Corp.*, No. 3:11cv33(MRK), 2011 U.S. Dist. LEXIS 57367, at *55 (D. Conn. May 25, 2011) (assuming, without deciding, that an arbitration agreement that included a provision shortening the statute of limitations would likely be preempted by the FAA under *Concepcion*) (unpublished opinion).

b. Prohibitive costs

Second, relying on *Zuver v. Airtouch Comm's, Inc.*, 153 Wn. 2d 293, 309, 103 P.3d 753 (2004) and *Mendez v. Home Harbor Homes, Inc.*, 111 Wn. App. 446, 464, 45 P.3d 594 (2002), Plaintiffs argue that the arbitration provision is substantively unconscionable under Washington state law because it imposes prohibitive costs on Plaintiffs. As with *Adler*, to the extent *Zuver* and *Mendez* hold that an arbitration provision that imposes prohibitive costs on plaintiffs is substantively unconscionable, they are overruled by *Concepcion*. Indeed, as argued above, *see supra* p. 8, the Supreme Court in *Concepcion* expressly rejected this very argument: “The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” *Concepcion*, 131 S. Ct. at 1753.

Notably, at least two courts have already rejected Plaintiffs’ “prohibitive costs” argument post-*Concepcion*. *See Arellano v. T-Mobile USA, Inc.*, No. C 10-05663 WHA, 2011 U.S. Dist. LEXIS 52142, at *4-5 (N.D. Cal. May 16, 2011) (“[P]laintiff argues that . . . the arbitration clause in question would preclude an individual from ever bringing these

types of claims by foisting prohibitive costs on the individual plaintiff. Perhaps regrettably, this argument was rejected by *Concepcion*” (internal quotations omitted) (unpublished opinion); *Bernal v. Burnett*, Civil Action No. 10-cv-01917-WJM-KMT, 2011 U.S. Dist. LEXIS 59829, at *20 (D. Col. June 6, 2011) (“[T]he Supreme Court considered the fact that the *Concepcions* and other class plaintiffs would be denied any recovery by its ruling, and ruled against the class plaintiffs nonetheless. The Court is bound by this ruling and, therefore, cannot be persuaded in this case by the fact that ordering the parties to arbitration may impact Plaintiffs’ ability to recover.”) (unpublished opinion).

c. Limited recovery

Third, again relying on *Zuver*, 153 Wn. 2d at 318, Plaintiffs argue that the arbitration provision is substantively unconscionable under Washington state law because it severely limits any recovery employees may obtain, which “blatantly and excessively favors the employers.” (Pls.’ Br. 25.) Again, to the extent *Zuver* holds that an arbitration provision that severely limits a party’s recovery is substantively unconscionable, it is overruled by *Concepcion*. See *Arellano*, 2011 U.S. Dist. LEXIS 52142, at *5 (“[P]laintiff argues that preclusion of injunctive relief on behalf of the class equates to preclusion of the ability to obtain effective [relief]

As stated above, however, *Concepcion* held that ‘States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.’”).

d. Class action waiver

Fourth, relying on *Scott v. Cingular Wireless*, 160 Wn. 2d 843, 854, 161 P. 3d 1000 (2007), Plaintiffs argue that the arbitration provision is substantively unconscionable under Washington state law to the extent it prohibits class-wide arbitration. Of course, this is the precise argument presented to, and rejected by, the Supreme Court in *Concepcion*. See *Concepcion*, 131 S. Ct. at 1748 (“Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”); see also *Day v. Persels & Associates, LLC*, Case No. 8:10-CV-2463-T-33TGW, 2011 U.S. Dist. LEXIS 49231, at *16 (M.D. Fla. May 9, 2011) (“[T]he parties were afforded an opportunity to comment on [*Concepcion*], and the plaintiff with commendable candor acknowledges that the decision defeats her argument [that the class action waiver provision in the agreement is unconscionable].”) (unpublished opinion).

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e. **Adhesion contract**

Fifth, Plaintiffs contend the arbitration provision is procedurally unconscionable because it is “one-sided” and “thrust” upon employees through an employee association that “lacks by design the resources or authority to enforce it.” (Pls.’ Br. 27-28.) Consequently, Plaintiffs contend, employees are deterred from enforcing their legal rights.

Essentially, Plaintiffs are arguing they were members of a “sham” union and parties to an adhesion contract drafted by the Company without a meaningful opportunity for them to negotiate. As discussed below, *see infra* pp. 46-47, this is not true. Nevertheless, *Concepcion* precludes Plaintiffs’ argument because *Concepcion* itself involved an adhesion contract. *See Concepcion*, 131 S. Ct. at 1750 (recognizing that the California law at issue “is limited to adhesion contracts”). *See also Bernal*, 2011 U.S. Dist. LEXIS 59829, at *18-19 (“[T]he fact that the contract at issue in *Concepcion* was an adhesion contract did not affect the Supreme Court’s analysis and, indeed, the majority in *Concepcion* appeared to be little troubled by that fact.”); *Day*, 2011 U.S. Dist. LEXIS 49231, at *21 (rejecting, in light of *Concepcion*, plaintiffs’ argument that contract was procedurally unconscionable because it was adhesive).

Clearly then, Plaintiffs' argument that the arbitration provision is substantively and/or procedurally unconscionable under Washington state law is foreclosed by *Concepcion* and should be rejected.

2. The arbitration clause is not unconscionable under Washington state law.

Regardless of whether *Concepcion* applies, the arbitration provision is neither substantively nor procedurally unconscionable under Washington state law.⁹

First, a shortened statute of limitations is not necessarily substantively unconscionable. *See Yakima Asphalt Paving Co. v. Dept. of Transp.*, 45 Wn. App. 663, 665, 726 P.2d 1021 (1986) ("Parties to a contract can agree to a shorter limitations period than that called for in a

⁹At the outset, the Court should note that none of the cases Plaintiffs cite to support their position of unconscionability involve a negotiated collective bargaining agreement, which distinguishes them from this case where both parties undisputedly negotiated the terms of the CBA's. *See Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 464, 45 P.3d 594 (2002) (involved mobile home sales contract); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 356-57, 103 P.3d 773 (2004) (individual employment dispute); *Zuver v. Airtouch Comm's, Inc.*, 153 Wn.2d 293, 309, 103 P.3d 753 (2004) (individual employment context); *Scott v. Cingular Wireless*, 160 Wn.2d 843, 854, 161 P.3d 1000 (2007) (consumer transaction case); *McKee v. AT&T Corp.*, 164 Wn.2d 372, 403, 191 P.3d 845 (2008) (consumer transaction case); *Alexander v. Anthony Int'l*, 341 F.3d 256, 271 (3rd Cir. 2003) (no collective bargaining agreement involved and court noting that "Plaintiffs had no opportunity to negotiate or otherwise reject its specific terms"); *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 788 (9th Cir. 2002) (no collective bargaining agreement and court noting that plaintiffs had no opportunity to negotiate); *Graham Oil Co.*, 43 F.3d 1244, 1247 (9th Cir. 1994) (involving distributorship agreements); *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1174 (N.D. Cal. 2002) (involving consumer lending).

general statute.”). Moreover, the latter part of the clause at issue here allows an aggrieved party to act based on their *knowledge* of an offending act, not the act itself, thus extending the time to bring a grievance in many cases. CP 142-143, 206-207, 229-230.

Second, the alleged value of Plaintiffs’ claims (\$15,000) relative to the average cost of arbitration (\$5,000), *see* CP 28 (Pls.’ Resp. to Def.’s Mot. to Comp. and/or for S.J. p. 12), is not commensurate to the value-to-ratio cost addressed in *Mendez*. *See Mendez*, 111 Wn. App. at 459 (arbitration fees of \$2,000 to resolve \$1,500 claim). Moreover, as the Washington Court of Appeals point out in *Walters v. AAA Waterproofing*, 120 Wn. App. 354, 361, 85 P.3d 389 (2004), *Mendez* did not arise under the FAA: “The *Mendez* court considered arbitration in the context of Chapter 7.04 RCW, not under the FAA. It is not clear that a similar analysis would apply to arbitration agreements governed under the FAA, but in any event, Walters has not shown that the costs of arbitrating his claim are prohibitive.”

Third, Plaintiffs are not, as they suggest, limited to “two to four months of back pay relief” from an arbitrator because the remedy clause is qualified with the following language: “unless specifically mandated by federal or state statute or law.” CP 142-143, 206-207, 229-230.

Finally, the CBA's are not adhesion contracts. The undisputed evidence establishes that each Employee Association negotiated the CBA with Garda, and employees participated in the negotiation process and reviewed the agreement before ratifying them. CP 65-66, 82. The following colloquy from Plaintiff Robert Miller's deposition confirms as much:

Q. [Y]ou would have reviewed the terms of this agreement as part of the process of negotiating with management?

A. The only parts we reviewed were the parts that we were interested in changing at that point in time.

Q. But you had access to the whole agreement?

A. One or two of the senior individuals at the branch had a copy of it that we would look at.

Q. All right. So you went and you looked at the agreement, correct?

A. Correct.

Q. You discussed the portions that you wanted to change, correct?

A. Right.

CP 66.

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Thus, the Employee Associations had sufficient negotiating power when they entered into the contracts, which precludes them from being considered adhesion contracts. Indeed, the very proposition that a collective bargaining agreement may be deemed a contract of adhesion is without merit. See *Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan*, 797 F.2d 521, 529 (7th Cir. 1986); *Waggoner v. Dallaire*, 649 F.2d 1362, 1367 (9th Cir. 1981); *Mic-Ron Gen. Contractors, Inc. v. Trs. of New York City Dist. Council of Carpenters Benefit Funds*, 908 F. Supp. 208, 213 n.3 (S.D.N.Y. 1995).

Regardless, Washington courts have recognized that adhesion contracts are not necessarily procedurally unconscionable. See *Mendez*, 111 Wn. App. 446, 459, 45 P.3d 594 (2002) (recognizing that the mere fact that an agreement constitutes a contract of adhesion is insufficient alone to support a finding that the agreement is procedurally unconscionable); *Kruger Clinic v. Regence Blueshield*, 123 Wn. App. 355, 98 P.3d 66 (2004) (contracts of adhesion are not per se unconscionable).

Further, Plaintiffs' suggestion of a "sham" union is misplaced and cannot support their procedural unconscionability argument. The validity of the Employee Associations is not properly before the Court. The Supreme Court has long recognized that the National Labor Relations Board exercises primary jurisdiction over such issues, and courts must

defer to the Board's exclusive competence. *See Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *see also Int'l Union v. J & R Flooring*, 616 F.3d 953 (9th Cir. 2010) (applying the doctrine of primary jurisdiction in declining to consider representational disputes that the NLRA commits to the Board's expertise).

Consequently, even if *Concepcion* does not foreclose Plaintiffs' unconscionability argument here, there is no evidence the arbitration provision is unconscionable under Washington state law.

IV. CONCLUSION

For these reasons, as well as those previously set forth in Garda's Opening Brief, the Court should remand the case to the Superior Court with instructions to order the parties to arbitrate the dispute without specifying that the arbitration proceed on a class-wide basis. In the

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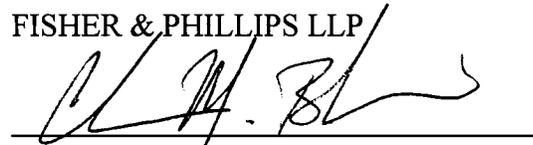
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alternative, the Court should direct the parties to submit to individual arbitration because the parties did not agree to submit to class arbitration.

DATED this 12 day of July 2011.

Respectfully Submitted,

FISHER & PHILLIPS LLP

A handwritten signature in black ink, appearing to read "C. M. Belnavis", is written over a horizontal line.

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Garda CL Northwest, Inc.

I hereby certify under penalty of perjury of the laws of the State of Washington that on this 12 day of July 2011, I caused a true and correct copy of the:

Reply Brief of Petitioner/Cross-Respondent

to be delivered by mail to the following:

Daniel F. Johnson
Breskin Johnson & Townsend
1111 – 3rd Avenue, Suite 2230
Seattle, Washington 98101-3292



Clarence M. Belnavis, WSB#36681

APPENDIX

No.		Page No.
1.	<i>Arellano v. T-Mobile USA, Inc.</i> , No. C 10-05663 WHA, 2011 U.S. Dist. LEXIS 52142, at *4-5 (N.D. Cal. May 16, 2011)	App. 1
2.	<i>Bernal v. Burnett</i> , Civil Action No. 10-cv-01917-WJM-KMT, 2011 U.S. Dist. LEXIS 59829, at *20 (D. Col. June 6, 2011)	App. 4
3.	<i>D'Antuono v. Service Road Corp.</i> , No. 3:11cv33(MRK), 2011 U.S. Dist. LEXIS 57367, at *55 (D. Conn. May 25, 2011)	App. 12
4.	<i>Day v. Persels & Associates, LLC</i> , Case No. 8:10-CV-2463-T-33TGW, 2011 U.S. Dist. LEXIS 49231, at *16 (M.D. Fla. May 9, 2011)	App. 34
5.	<i>Guida v. Home Savings of America, Inc.</i> , No. 11-cv-00009(JFB)(ARL), 2011 U.S. Dist. LEXIS 69159, at *13 (E.D.N.Y. June 28, 2011)	App. 40
6.	<i>Vilches v. The Travelers Companies, Inc.</i> , No. 10-2888, 2011 U.S. Ct. App. LEXIS 2551, at *11 (3rd Cir. Feb. 9, 2011)	App. 47



Analysis
As of: Jul 12, 2011

STACIE LEE ARELLANO, individually and on behalf of all those similarly situated, Plaintiff, v. T-MOBILE USA, INC. and HTC AMERICA, INC., Defendants.

No. C 10-05663 WHA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2011 U.S. Dist. LEXIS 52142

**May 16, 2011, Decided
May 16, 2011, Filed**

PRIOR HISTORY: *Arellano v. T-Mobile USA, Inc., 2011 U.S. Dist. LEXIS 41667 (N.D. Cal., Apr. 11, 2011)*

COUNSEL: [*1] For Dustin S. Peterson, Individually and on Behalf of all Those Similarly Situated, Plaintiff: George A. Otstott, Jr., LEAD ATTORNEY, Brydon Hugo & Parker, San Francisco, CA; Grant Bradley Stock, PRO HAC VICE, The Corea Firm, P.L.L.C., Dallas, TX; Thomas Mathew Corea, PRO HAC VICE, Corea Firm, Dallas, TX.

For Stacie Lee Arellano, Plaintiff: Thomas Mathew Corea, LEAD ATTORNEY, Corea Firm, Dallas, TX; Grant Bradley Stock, PRO HAC VICE, The Corea Firm, P.L.L.C., Dallas, TX; George A. Otstott, Jr., Brydon Hugo & Parker, San Francisco, CA.

For T-Mobile USA, Inc., Defendant: Candice M. Tewell, Charles Scott Wright, James Condon Grant, PRO HAC VICE, Joseph Edward Addiego, III, Davis Wright Tremaine LLP, San Francisco, CA.

For HTC America, Inc., Defendant: Rosemarie Theresa Ring, Esq., Sarala Vidya Nagala, Munger, Tolles & Olson LLP, San Francisco, CA.

JUDGES: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM ALSUP

OPINION

ORDER GRANTING MOTION TO COMPEL ARBITRATION AND STAY CLAIMS FOR INJUNCTIVE RELIEF

INTRODUCTION

In this proposed class action dispute, the parties submitted supplemental briefs on defendants' previous motion to compel arbitration.

STATEMENT

The facts are in the April 11 order. That order granted [*2] in part defendants' motion to compel arbitration and partially stayed the action. Specifically, plaintiff's seventh, eighth, and tenth claims, which did not seek injunctive relief, were ordered to proceed immediately to arbitration. Plaintiff's first, second, third, fourth, fifth, sixth, and ninth claims for injunctive relief were stayed pending the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 179 L. Ed. 2d 742 (2011), which concerned the issue of whether the Federal Arbitration Act preempts California's unconscionability law regarding arbitration of such claims. With the benefit now of that decision and further briefing, this order is compelled to do as follows.

ANALYSIS

Plaintiff seeks injunctive relief, among other remedies, for her claims brought under the California Unfair Competition Law, California Consumer Legal Remedies Act, California False Advertising Act, and Federal Communications Act. In her original brief opposing defendants' motion to compel arbitration, plaintiff argued that these claims for injunctive relief were not subject to arbitration. This proposition came from *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 1079-80, 90 Cal. Rptr. 2d 334, 988 P.2d 67 (1999) (holding [*3] that claims for public injunctive relief brought under the CLRA are not subject to arbitration), and *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 316, 133 Cal. Rptr. 2d 58, 66 P.3d 1157 (2003) (holding that claims for public injunctive relief brought under the UCL are not subject to arbitration).

The Act, however, preempts California's preclusion of public injunctive relief claims from arbitration, at least for actions in federal court. "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 16, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). The United States Supreme Court explained:

In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . . We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation [*4] of any contract." We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under State law.

Id. at 10-11 (quoting 9 U.S.C. 2). Unless one of these two limitations is present, arbitration agreements must be enforced "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).

The recent *Concepcion* decision compels preemption: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 179 L. Ed. 2d at 752. In sum, the Act preempts California's exemption of claims for public injunctive relief from arbitration, at least for actions in federal court.

Plaintiff's arguments to the contrary are unavailing. First, plaintiff argues that "the arbitration clause is void because it agrees to forego substantive rights afforded by statute. Such is accomplished . . . by the fact that the arbitration clause in question would preclude an individual from ever bringing these types of claims [*5] by foisting prohibitive costs on the individual plaintiff" (Dkt. No. 80 at 4). Perhaps regrettably, this argument was rejected by *Concepcion*: "The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 179 L. Ed. 2d at 758 (citation omitted).

Second, plaintiff argues that "preclusion of injunctive relief on behalf of the class equates to preclusion of the ability to obtain effective relief [relief] -- enjoining deceptive practices on behalf of the public in general" (Dkt. No. 80 at 7). As stated above, however, *Concepcion* held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 179 L. Ed. 2d at 758.

Third, plaintiff argues that "*Cruz* further stated that the United States Supreme Court had never directly decided whether a legislature could restrict a private arbitration agreement when it inherently conflicted with a public statutory purpose and transcended private interests. *Concepcion* never addressed that specific question but [*6] rather focused on the availability of a class action procedure" (Dkt. No. 80 at 7). *Concepcion*, on the contrary, decided that states cannot refuse to enforce arbitration agreements based on public policy. See 179 L. Ed. 2d at 752 (holding that the rule in *Discover Bank* is preempted by the FAA because it is inconsistent with the FAA's purposes, despite "its origins in California's unconscionability doctrine and California's policy against exculpation"). Accordingly, despite public policy arguments thought to be persuasive in California, *Concepcion* has trumped these considerations, at least for cases in federal court.

CONCLUSION

For the foregoing reasons, this order compels arbitration of plaintiff's remaining claims. Plaintiff's first, second, third, fourth, fifth, sixth, and ninth claims for

injunctive relief will proceed immediately to arbitration. The parties are **ORDERED** to proceed immediately to arbitration of these claims. The Court shall retain jurisdiction to enforce any award. Further litigation of these claims is **STAYED** pending arbitration. Defendants' motion to compel arbitration now has been fully resolved, and all claims have been sent to arbitration. As stated in the April 11 [*7] order, there will be a case management conference at 11:00 A.M. ON **DECEMBER 8, 2011**,

to assess whether the arbitration is proceeding apace. If not, the stay for arbitration may be lifted.

IT IS SO ORDERED.

Dated: May 16, 2011.

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE



1 of 1 DOCUMENT



Analysis

As of: Jul 12, 2011

KRYSTLE BERNAL, and AMANDA KROL, on behalf of themselves and all similarly situated individuals, Plaintiffs, v. GEORGE BURNETT, an individual, WILLIAM OJILE, an individual, ALTA COLLEGES, INC., a Delaware corporation, WESTWOOD COLLEGE, INC., a Colorado corporation, TRAV CORPORATION, a Colorado corporation d/b/a Westwood College and Westwood College Online, GRANT CORPORATION, a Colorado corporation d/b/a Westwood College, WESGRAY CORPORATION, a Colorado corporation d/b/a Westwood College, ELNELL, INC., a Colorado corporation d/b/a Westwood College, PARIS MANAGEMENT COMPANY, a Delaware corporation d/b/a Redstone College, ELBERT, INC., a Colorado corporation d/b/a Westwood College, and BOUNTY ISLAND CORPORATION, a Delaware corporation formerly d/b/a Redstone College, Defendants.

Civil Action No. 10-cv-01917-WJM-KMT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

2011 U.S. Dist. LEXIS 59829

June 6, 2011, Decided
June 6, 2011, Filed

PRIOR HISTORY: *Bernal v. Burnett*, 2010 U.S. Dist. LEXIS 123885 (D. Colo., Nov. 9, 2010)

LexisNexis(R) Headnotes

CASE SUMMARY:

OVERVIEW: Corporation that operated for-profit colleges and online educational programs was entitled to compel individual arbitration under 9 U.S.C.S. § 4 in an action by former students alleging violations of the Colorado Consumer Protection Act. The arbitration agreements, which were signed by the students as part of their enrollment process, were not unconscionable as a matter of law. In light of the U.S. Supreme Court's decision in *Concepcion*, the arbitration agreements were valid and enforceable under 9 U.S.C.S. § 2 notwithstanding the adhesive nature of the agreements.

OUTCOME: Motion to compel arbitration granted.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN1] In determining whether a state court judgment has preclusive effect, a federal court applies the issue preclusion principles of the state rendering the judgment. Under Colorado law, collateral estoppel bars relitigation of an issue if: (1) the issue is identical to that actually and necessarily adjudicated in a prior proceeding; (2) the party against whom estoppel is asserted was a party or in privity with a party in the proceeding; (3) there was final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Under *Restatement (Second) of Judgments § 28(2)(b)* (1982), there is

an exception to the doctrine of collateral estoppel when the issue is one of law and a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise avoid inequitable administration of the laws.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Contracts Law > Defenses > Unconscionability > General Overview

[HN2] Whether a contract is unconscionable is a question of law.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > Arbitration Agreements

[HN3] The Federal Arbitration Act (FAA) was enacted in response to judicial hostility to arbitration agreements. Section 2 of the FAA, 9 U.S.C.S. § 2 provides in part that a written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. The U.S. Supreme Court has described 9 U.S.C.S. § 2 as reflecting both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > Arbitration Agreements

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > Orders to Compel Arbitration

Contracts Law > Contract Interpretation > Severability
Contracts Law > Defenses > Unconscionability > Arbitration Agreements

Evidence > Procedural Considerations > Burdens of Proof > General Overview

[HN4] One of the legal grounds for revoking a contract is unconscionability. As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Therefore, to defeat a defendant's motion to compel arbitration, the plaintiff must show that the arbitration agreement itself--and not the contract in general--is unconscionable and, therefore, unenforceable.

Contracts Law > Defenses > Unconscionability > General Overview

[HN5] Colorado courts consider several factors in determining whether a contractual provision is unconscionable, including: (1) the use of a standardized agreement executed by parties of unequal bargaining power; (2) the lack of an opportunity for the customer to read or become familiar with the document before signing it; (3) the use of fine print in the portion of the contract containing the provision in question; (4) the absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated; (5) the terms of the contract, including substantive fairness; (6) the relationship of the parties, including factors of assent, unfair surprise, and notice; and (7) the circumstances surrounding the formation of the contract, including setting, purpose, and effect.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

Contracts Law > Defenses > Duress & Undue Influence > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

[HN6] In *AT&T Mobility v. Concepcion*, the U.S. Supreme Court held a state may not apply its own law on contract interpretation and formation--including unconscionability--in a manner that interferes with the Federal Arbitration Act's (FAA) presumption in favor of arbitration. The Supreme Court held that when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. The Supreme Court struck down California's so-called Discover Bank rule.

Civil Procedure > Class Actions > General Overview

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > Arbitration Agreements

Constitutional Law > Supremacy Clause > Federal Preemption

Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

[HN7] In *AT&T Mobility v. Concepcion*, the U.S. Supreme Court stated the principal purpose of the Federal Arbitration Act (FAA) is to ensure that private arbitration agreements are enforced according to their terms. The Supreme Court acknowledged that parties may agree

to limit the subject of their arbitration, may agree to arbitrate according to specific rules, and may limit with whom they arbitrate. The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. However, the Supreme Court emphasized that there is a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The Supreme Court concluded that class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA. Thus, because the Discover Bank rule disfavored arbitration, it was preempted by the FAA.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > Arbitration Agreements

Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Contracts Law > Defenses > Unconscionability > Adhesion Contracts

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

[HN8] In *Concepcion*, the U.S. Supreme Court rejected the idea that arbitration agreements are per se unconscionable when found in adhesion contracts. The Supreme Court recognized that California's rule applied only to adhesion contracts and observed that the times in which consumer contracts were anything other than adhesive are long past. The Supreme Court noted that states were free to take steps addressing the concerns that attend contracts of adhesion--for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted--but ruled that such steps cannot conflict with the Federal Arbitration Act or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms. Thus, the fact that the contract at issue in *Concepcion* was an adhesion contract did not affect the Supreme Court's analysis and, indeed, the majority in *Concepcion* appeared to be little troubled by that fact.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

[HN9] In *Concepcion*, the U.S. Supreme Court held that states cannot require a procedure that is inconsistent with the Federal Arbitration Act, even if it is desirable for unrelated reasons.

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

[HN10] Courts have repeatedly held that there is nothing inherently unfair about an agreement to arbitrate.

COUNSEL: [*1] For Krystle Bernal, Amanda Krol, on behalf of themselves and all similarly situated individuals, Plaintiffs: Alan Charles Friedberg, Pendleton, Friedberg, Wilson & Hennessey, P.C., Denver, CO; John Allen Yanchunis, Jonathan Betten Cohen, Sean Estes, James Hoyer Newcomer Smiljanich & Yanchunis, P.A., Tampa, FL; Timothy Michael Kratz, Pendleton, Friedberg, Wilson & Hennessey, P.C., Denver, CO.

For George Burnett, an individual, William Ojile, an individual, Alta Colleges, Inc., a Delaware corporation, Westwood College, Inc., a Colorado corporation, Trav Corporation, a Colorado corporation, doing business as, Westwood College, doing business as, Westwood College Online, Grant Corporation, a Colorado corporation, doing business as, Westwood College, Wesgray Corporation, a Colorado corporation, doing business as, Westwood College, El Nell, Inc., a Colorado corporation, doing business as, Westwood College, Paris Management Company, a Delaware corporation, doing business as, Redstone College, Elbert, Inc., a Colorado corporation, doing business as, Westwood College, Bounty Island Corporation, a Delaware corporation formerly d/b/a Redstone College, Defendants: Laurence Wheeler Demuth, III, [*2] William J. Leone, Faegre & Benson, LLP-Boulder, Boulder, CO; Peter W. Homer, Homer Booner P.A., Miami, FL.

JUDGES: William J. Martinez, United States District Judge.

OPINION BY: William J. Martinez

OPINION

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL INDIVIDUAL ARBITRATION

Plaintiffs Krystle Bernal and Amanda Krol filed this action on behalf of themselves and others similarly situated against George Burnett, William Ojile, Alta Colleges, Inc., Westwood College, Inc., Trav Corporation d/b/a Westwood College d/b/a Westwood College Online, Grant Corporation d/b/a Westwood College Online, Wesgray Corporation d/b/a Westwood College, El Nell, Inc. d/b/a Westwood College, Paris Management Company d/b/a Redstone College, Elbert Inc. d/b/a Westwood College, and Bounty Island Corporation d/b/a Redstone College. Plaintiffs--former students at Defendants' various entities--allege that Defendants violated the Color-

do Consumer Protection Act by, amongst other things, misrepresenting the type and quality of services supplied by Defendants' various for-profit colleges and online educational programs.

Before the Court is Defendants' Motion to Compel Individual Arbitration asking the Court to dismiss this action based on issue preclusion, [*3] or, in the alternative, to order that Plaintiff pursue their claims in individual arbitration. Plaintiffs oppose the motion and ask the Court to find the arbitration clause unconscionable as a matter of law.

For the reasons explained below, the Court GRANTS Defendants' Motion to Compel Arbitration.

I. BACKGROUND

A. Factual Background

Plaintiffs Krystle Bernal and Amanda Krol attended Westwood College and/or Westwood College Online between 2004 and 2009. (Compl. (ECF No. 1) p. 6.) Defendant Alta Colleges Inc. is the parent company of Westwood Colleges, Inc., which is the operating company for seventeen colleges and trade schools located in six states under the names Westwood College, Westwood College Online, and Redstone College. (*Id.* ¶ 6.) Defendant George Burnett has been acting CEO and Director of Alta Colleges since 2006. (*Id.* ¶ 14.) Defendant William Ojile is Chief Legal and Compliance Officer for Alta Colleges. (*Id.* ¶ 15.)

Plaintiffs' Complaint alleges that Defendants, by and through their employees, systemically engage in deceptive trade practices by misrepresenting key facts about their operations, including the total cost of education at the schools, the prospect of job placement [*4] and salary expectations after graduation, the schools' accreditation status, and the transferability of credits obtained at the schools. (Compl. ¶¶ 16-36.) Plaintiffs claim that Defendants' "admissions counselors" or "academic counselors" employ high-pressure sales tactics to deceptively entice students into enrolling. According to Plaintiffs, Defendants provide extensive training in these high-pressure sales tactics and require that their counselors meet "budgets" with respect to enrollment. (*Id.* ¶¶ 37-50.)

Plaintiffs allege that these systemic practices violate the Colorado Consumer Protection Act. (*Id.* ¶¶ 102-120.) Plaintiffs seek class certification, an injunction against continuing unlawful actions, and monetary relief as allowed by the Consumer Protection Act. (*Id.* pp. 43-44.)

B. Arbitration Agreements

Plaintiff Krystle Bernal enrolled in Defendants' fashion merchandising program in 2005. (Bernal Decl. (ECF No. 24) ¶ 3.) Plaintiff Amanda Krol enrolled in Defendants' criminal justice program in March 2004. (Krol Decl. (ECF No. 21-2) ¶ 3.) As part of the enrollment process, both Plaintiffs completed Defendants' standard enrollment documents. (ECF No. 15-2.) Included in the enrollment [*5] documents was a stand-alone document entitled: "Agreement to Binding Arbitration and Waiver of Jury Trial" which stated in part that the signer "agree[s] that any dispute arising from my enrollment at Westwood College, no matter how described, pleaded or styled, shall be resolved by binding arbitration under the Federal Arbitration Act conducted by the American Arbitration Association ("AAA") under its Commercial Rules." (*Id.*) It further provides: "Both the Student and College irrevocably agree that any dispute between them shall be submitted to arbitration." (*Id.*) Additionally, embedded in another document that each Plaintiff signed was a provision that stated:

I, the applicant . . . acknowledge that any disputes relative to this contract or the education and training received by me, no matter how described, pleaded or styled, shall be resolved through binding arbitration under the Federal Arbitration Act conducted by the American Arbitration Association ("AAA") at Denver, Colorado under its Commercial Rules. The award rendered by the arbitrator may be entered in any court having jurisdiction. Refer to "Agreement to Binding Arbitration and Waiver of Jury Trial" form in the application [*6] materials.

(ECF No. 15-3.) Together these forms will be referred to as the Arbitration Agreements.

Neither Plaintiff had any commercial or business experience before enrolling in Defendants' programs. (ECF No. 21-2 & 24.) Krol was seventeen and Bernal was nineteen when they initially enrolled. (*Id.*) Plaintiffs did not believe that they had the right or ability to negotiate any of the terms contained in the enrollment materials. (*Id.*) Plaintiffs do not remember signing the Arbitration Agreements. (*Id.*) Defendants' admissions representatives made no effort to highlight the Arbitration Agreements in the admissions materials or to explain what they meant and what rights Plaintiffs were giving up. (*Id.*) Neither Plaintiff understood that she was waiving her right to pursue litigation. (*Id.*)

C. AAA Proceeding

In May 2009, Michael Mensch, Tyrone Bailey, and Jessica Rosales (the "Mensch Plaintiffs"), represented by the same counsel as represents Plaintiffs in this action, filed a putative class arbitration before the American Arbitration Association arguing that Defendants' business practices violated the Colorado Consumer Protection Act. (ECF No. 15-5 at 2.) The putative class included "All persons [*7] . . . whose last date of enrollment was on or after three years from the date" of the demand. (Defs.' Mot. To Compel at 5.) Bernal and Krol were part of the putative class though they did not know any of the Mensch Plaintiffs and were not aware of or following the outcome of the putative class arbitration. (ECF Nos. 21-2 & 22-1.)

The Mensch Plaintiffs sought a "Clause Determination Award that the Arbitration may be maintained as a class arbitration." (*Id.*) The parties chose Arbitrator William Baker to preside over the clause determination award. On July 16, 2010, Arbitrator Baker issued a forty-six page Partial Final Clause Construction Award. (ECF No. 25-1.) He ruled: (1) there was no explicit agreement to class arbitration so as to allow him to compel class arbitration under *Stolt-Nielsen v. AnimalFeeds*, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010); and (2) under Colorado law, the arbitration agreement was not unconscionable. (ECF No. 25-1 at 46.) On March 8, 2011, the Denver County District Court confirmed Arbitrator Baker's decision. (ECF No. 63-1.)

D. Procedural History In This Case

Plaintiffs initiated this action on August 11, 2010. (ECF No. 1.) Defendants filed the instant Motion to Compel Arbitration [*8] on August 24, 2010. (ECF No. 15.) The Motion is fully briefed and ready for ruling. The Supreme Court issued *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) on April 27, 2011. The Court requested supplemental briefing from the parties addressing *Concepcion* and it was received on May 19, 2011. (ECF Nos. 63 & 64.)

The case is currently stayed pending resolution of the instant Motion. (ECF No. 48.) No discovery has been conducted and no scheduling order has been entered.

II. ANALYSIS

Defendants move to compel arbitration under the Arbitration Agreements signed by Plaintiffs as part of their enrollment process. (ECF No. 15.) The Motion and Plaintiffs' opposition raise two issues: (1) whether Arbitrator Baker's decision is binding on Plaintiffs; and (2) if collateral estoppel does not apply, whether the arbitration agreement is unconscionable.

A. Collateral Estoppel and Arbitrator Baker's Determinations

Defendants argue that Plaintiffs are precluded from raising unconscionability because Arbitrator Baker has already ruled that the Arbitration Agreements were not unconscionable and his decision was confirmed by the Colorado District Court. [HN1] In determining whether a state court judgment [*9] has preclusive effect, a federal court applies the issue preclusion principles of the state rendering the judgment. *Hawkins v. C.I.R.*, 86 F.3d 982, 986 (10th Cir. 1996). Under Colorado law, collateral estoppel bars relitigation of an issue if: (1) the issue is identical to that actually and necessarily adjudicated in a prior proceeding; (2) the party against whom estoppel is asserted was a party or in privity with a party in the proceeding; (3) there was final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 82 (Colo. 1996).

Even if Defendants could show that all four prongs for collateral estoppel were satisfied, "[u]nder *Restatement (Second) of Judgments* § 28(2)(b) (1982), there is an exception to the doctrine of collateral estoppel when 'the issue is one of law and a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise avoid inequitable administration of the laws.'" *Central Bank Denver v. Mehaffy et al.*, 940 P.2d 1097, 1103 (Colo. App. 1997).

1 The Court [*10] has reservations about whether Defendants could show Plaintiffs Krol and Bernal were in privity with the Mensch Plaintiffs. There were no formal Rule 23 protections afforded to Bernal or Krol; they were not notified of the arbitration proceeding or given the opportunity to opt out. Arbitrator Baker made no finding as to the capacity of the Mensch Plaintiffs to serve as adequate class representatives or with respect to whether counsel was fit to serve as class counsel. Given these facts, Plaintiffs certainly have a plausible argument that barring their claims under the doctrine of issue preclusion would violate their Due Process rights. However, because the Court finds that the *Concepcion* decision constitutes a change in the law that warrants revisiting the issues determined by Arbitrator Baker, it need not decide whether Plaintiffs Krol and Bernal were in privity with the Mensch Plaintiffs.

[HN2] Whether a contract is unconscionable is a question of law. See *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 850 (10th Cir. 1986). The United States Supreme Court issued *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) on April

27, 2011 -- over nine months after Arbitrator Baker issued his [*11] decision finding that the Arbitration Agreements were not unconscionable. *Concepcion* held that the Federal Arbitration Act preempted California's judicially-created rule regarding the unconscionability of arbitration clauses in adhesion contracts. Though unconscionability is generally governed by state law, and Colorado's unconscionability standard is different than California's, the *Concepcion* decision has broad enough implications that it constitutes an intervening change in the applicable legal context. As Defendants admitted in their response to the Court's request for supplemental briefing, "*Concepcion* has implications important to this case." (ECF No. 63 at 5.) Given this intervening change in the law, the Court finds that its consideration whether the Arbitration Agreements are unconscionable is not barred by collateral estoppel. Accordingly, the Court will examine the merits of Defendants' Motion to Compel Arbitration and Plaintiffs' opposing argument that the arbitration agreement is unenforceable.

B. Merits of Motion to Compel Arbitration

[HN3] The Federal Arbitration Act ("FAA") was enacted in response to judicial hostility to arbitration agreements. See *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). [*12] Section 2 of the FAA provides, in relevant part: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court has described Section 2 "as reflecting both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility, Inc. v. Concepcion*, 131 S. Ct. 1740, 1742, 179 L. Ed. 2d 742 (2011) (internal quotations and citations omitted).

In this case, Plaintiffs do not argue that they did not sign the Arbitration Agreements. They also do not dispute that the nature of their claims falls within the scope of the Arbitration Agreements. Thus, the only issue is whether the Arbitration Agreements are enforceable contracts. If they are, the Court must compel the parties to arbitration.²

2 At argument on the instant Motion, the parties agreed that whether such arbitration should be class or individual is a matter for the arbitrator to decide. Thus, the only issue [*13] for the Court is whether the parties should be compelled to arbitration in general.

1. Legal Standard for Unconscionability

[HN4] One of the legal grounds for revoking a contract is unconscionability. *Univ. Hills Beauty Acad. Inc. v. Mountain States Tel. & Tel. Co.*, 38 Colo. App. 194, 554 P.2d 723, 726 (Colo. 1976). "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 445, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006). Therefore, to defeat Defendants' Motion to Compel Arbitration, Plaintiffs must show that the Arbitration Agreement itself--and not the contract in general--is unconscionable and, therefore, unenforceable. See *Rent-A-Center*, 130 S. Ct. at 2778 ("If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4.").

[HN5] Colorado courts consider several factors in determining whether a contractual provision is unconscionable, including: (1) the use of a standardized agreement executed by parties of unequal bargaining power; (2) the lack of an opportunity for the customer to read or become familiar [*14] with the document before signing it; (3) the use of fine print in the portion of the contract containing the provision in question; (4) the absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated; (5) the terms of the contract, including substantive fairness; (6) the relationship of the parties, including factors of assent, unfair surprise, and notice; and (7) the circumstances surrounding the formation of the contract, including setting, purpose, and effect. *Davis v. M.L.G. Group*, 712 P.2d 985, 991 (Colo. 1986).

[HN6] In *At&T Mobility v. Concepcion*, the Supreme Court held a state may not apply its own law on contract interpretation and formation--including unconscionability--in a manner that interferes with the Federal Arbitration Act's presumption in favor of arbitration. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011). The Court held: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, [*15] is alleged to have been applied in a fashion that disfavors arbitration." *Id.* at 1747. The Court struck down California's so-called *Discover Bank* rule which provided:

When the waiver [of class proceedings] is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predicta-

bly involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for its own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Discover Bank v. Superior Court, 36 Cal.4th 148, 162, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (Cal. 2005) (quoting Cal. Civ. Code § 1668).

[HN7] The Court stated that "[t]he 'principal purpose' of the FAA is to 'ensure that private arbitration agreements are enforced according to their terms.'" *Id.* at 1748 (quoting *Volt Information Sciences v. Bd. of Trustees*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). The Court acknowledged that parties may [*16] agree to limit the subject of their arbitration, may agree to arbitrate according to specific rules, and may limit with whom they arbitrate. "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.* at 1749. However, the Court emphasized that there is "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* The Court concluded that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." *Id.* at 1751. Thus, because the *Discover Bank* rule disfavored arbitration, it was preempted by the FAA. *Id.*

Because Colorado's test for unconscionability of a contract provision does not explicitly disfavor arbitration (class or otherwise), the degree to which *Concepcion* changes the legal landscape in Colorado is unclear. There does not appear to be any reason why the *Davis* factors are not still good law. Thus, the Court will consider the facts of this case under that structure, keeping in mind the Supreme Court's statements and observations in *Concepcion*.

2. [*17] Application

The Arbitration Agreements were contained within standardized agreements prepared by Defendants and not available for Plaintiffs to review until they started the enrollment process. Plaintiffs have submitted affidavits stating that they did not know there was an arbitration

clause in their enrollment documents; that no one pointed out the arbitration provisions or explained what they meant during the enrollment process; that they do not remember seeing the arbitration provisions; and that they did not believe they had the ability to negotiate the terms of their contracts. Plaintiffs were required to complete the enrollment documents--including signing the Arbitration Agreements--before they were permitted to speak with financial aid advisors. Though Plaintiffs could have chosen to pursue their education elsewhere, Defendants held the majority of the power in this situation and utilized it to persuade Plaintiffs into enrolling with their schools. All of these factors weigh in favor of finding the contracts unconscionable.

Plaintiffs' argument has considerable validity and the Court would likely have found that the Arbitration Agreements at issue here unconscionable pursuant [*18] to the *Davis* analysis if it were issuing this decision pre-*Concepcion*. But the Court has to take the legal landscape as it lies and cannot ignore the Supreme Court's clear message. Plaintiffs are essentially arguing that the adhesive nature of the contracts at issue here (*i.e.*, standardized forms, lack of ability to negotiate, power disadvantage, etc.) makes the arbitration clause unconscionable. [HN8] In *Concepcion*, the Supreme Court rejected the idea that arbitration agreements are *per se* unconscionable when found in adhesion contracts. The Court recognized that California's rule applied only to adhesion contracts and observed that "the times in which consumer contracts were anything other than adhesive are long past." *Id.* at 1750. The Court noted that states were "free to take steps addressing the concerns that attend contracts of adhesion--for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted" but ruled that "[s]uch steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1750 n.6. Thus, the fact that the contract at issue in *Concepcion* [*19] was an adhesion contract did not affect the Supreme Court's analysis and, indeed, the majority in *Concepcion* appeared to be little troubled by that fact. As a result, this Court has no alternative but to discount the weight to be attributed to the adhesive nature of the Arbitration Agreements at issue here.

Plaintiffs also argue that if they are not allowed to proceed as a class--either in arbitration or through this lawsuit--they will not be able to pursue their claims. They assert that the nature of the claims, *i.e.* fraud, takes time and upfront work to develop, and that no attorney will be willing or able to do that on an individualized basis. They also contend that the confidential, non-precedential nature of arbitration will make it impossible to pursue these claims on an individualized ba-

sis as their strongest witnesses--former employees of Defendants--would be forced to testify over 800 times.

Again, the Court is sympathetic to this argument. There is no doubt that *Concepcion* was a serious blow to consumer class actions and likely foreclosed the possibility of any recovery for many wronged individuals. The dissent in *Concepcion* recognized the impact of the majority's decision and [*20] argued that it would effectively end the ability to prosecute small-dollar claims and that those claims would slip through the legal system. *Id. at 1761*. Countering this argument, the majority wrote: [HN9] "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id. at 1753*. Thus, the Supreme Court considered the fact that the *Concepciones* and other class plaintiffs would be denied any recovery by its ruling, and ruled against the class plaintiffs nonetheless. The Court is bound by this ruling and, therefore, cannot be persuaded in this case by the fact that ordering the parties to arbitration may impact Plaintiffs' ability to recover.³

3 The Court notes that this case seems more likely than many others to be able to proceed via individual arbitration. Each individual Plaintiffs' claims are significantly larger than in many consumer class actions and the arbitration clause states that the Defendants bear a majority of the costs for any such arbitration. Moreover, the Colorado Consumer Protection Act contains a fee-shifting provision which would allow Plaintiffs, if successful, to recover their attorneys' fees. *See Colo. Rev. Stat. § 6-1-113(2)(b)*. [*21] At argument, defense counsel stated that at least two of the *Mensch* Plaintiffs have pursued individual class arbitration since the Arbitrator ruled on the claim construction matter. He did not indicate the outcome of those proceedings but the mere fact that they took place confirms the idea that some individual Plaintiffs may be willing and able to pursue their claims through individual arbitration.

Ultimately, there is no dispute that the agreement to arbitrate was prominently written in the enrollment documents, including an entirely separate document entitled "Agreement to Binding Arbitration and Waiver of Jury Trial". (ECF No. 15-2.) There is also no evidence

that Plaintiffs were subject to significant external pressure driving them to sign the documents without taking time to review them and/or have someone else review them. The Arbitration Agreements here appear to contain relatively standard terms, which would suggest that they are substantively fair. Plaintiffs had the ability to cancel the contracts and receive a substantial refund. Finally, there is a competitive market for education programs such as those offered by Defendants and Plaintiffs could have chosen to pursue their [*22] education elsewhere. All of these factors weigh against a finding of unconscionability.

[HN10] Courts have repeatedly held that there is nothing inherently unfair about an agreement to arbitrate. *See, e.g., Adams v. Merrill Lynch, 888 F.2d 696, 700 (10th Cir. 1989)* ("There is certainly nothing inherently unfair about the arbitration clauses, and they are therefore valid and enforceable."). The Arbitration Agreements signed by Plaintiffs are not out of the mainstream. The circumstances in which the Enrollment Agreements were signed does not appear to have been any more coercive than is common in a typical adhesion contract. Thus, given the Supreme Court's ruling in *Concepcion*, the Court finds that the arbitration agreements signed by Plaintiffs in this case were not unconscionable. Accordingly, the Court must enforce the Arbitration Agreements according to their terms and order the Plaintiffs to submit their claims to arbitration.

III. CONCLUSION

For the reasons stated above, Defendant's Motion to Compel Arbitration (ECF No. 15) is GRANTED. The Clerk of the Court is directed to administratively close this case without prejudice to a party moving to have the case reopened for good cause shown [*23] upon completion of arbitration proceedings, or for another proper purpose.

Dated this 6th day of June, 2011.

BY THE COURT:

/s/ William J. Martinez

William J. Martinez

United States District Judge



Analysis
As of: Jul 12, 2011

**DINA NICOLE D'ANTUONO, RAMONA P. CRUZ, KAREN VILNIT, Plaintiffs, v.
SERVICE ROAD CORP.; COUSIN VINNIE'S BACK ROOM, INC., Defendants.**

No. 3:11cv33 (MRK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2011 U.S. Dist. LEXIS 57367; 17 Wage & Hour Cas. 2d (BNA) 1429

May 25, 2011, Decided
May 25, 2011, Filed

SUBSEQUENT HISTORY: Motion granted by *D'Antuono v. Serv. Rd. Corp.*, 2011 U.S. Dist. LEXIS 60721 (*D. Conn.*, June 7, 2011)

COUNSEL: [*1] For Dina Nicole D'Antuono, on behalf of herself and all others similarly situated, Ramona P. Cruz, on behalf of herself and all others similarly situated, Karen Vilnit, on behalf of herself and all others similarly situated, Plaintiffs: Richard Eugene Hayber, LEAD ATTORNEY, Hayber Law Firm LLC, Hartford, CT; Sara Smolik, PRO HAC VICE, Shannon Liss-Riordan, PRO HAC VICE, Stephen Churchill, PRO HAC VICE, LEAD ATTORNEYS, Lichten & Liss-Riordan, P.C., Boston, MA.

For Service Road Corp., Cousin Vinnie's Back Room, Inc., doing business as Gold Club Groton doing business as Gold Club Hartford, Defendants: Allan S. Rubin, PRO HAC VICE, Christina A. Daskas, PRO HAC VICE, LEAD ATTORNEYS, Jackson Lewis LLP - MI, Southfield, MI; David R. Golder, William Joseph Anthony, LEAD ATTORNEYS, Jackson Lewis - Htfd, CT, Hartford, CT; Paul DeCamp, LEAD ATTORNEY, PRO HAC VICE, Jackson Lewis LLP-VA, Reston, VA.

JUDGES: Mark R. Kravitz, United States District Judge.

OPINION BY: Mark R. Kravitz

OPINION

MEMORANDUM OF DECISION

Arbitration is currently one of the most important issues in the federal courts. During October Term 2009, the United States Supreme Court decided a total of ninety-two merits cases, see *Final Stats OT09*, SCOTUSblog.com, [*2] <http://www.scotusblog.com/wpcontent/uploads/2010/07/Final-Stats-OT09-0707101.pdf> (July 17, 2010), and four of the ninety-two merits cases presented arbitration-related questions. See *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S. Ct. 2847, 2853, 177 L. Ed. 2d 567 (2010); *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772, 2775, 177 L. Ed. 2d 403 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1764, 176 L. Ed. 2d 605 (2010); *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584, 591, 175 L. Ed. 2d 428 (2009). Three of those four cases presented issues specifically related to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. See *Granite Rock*, 130 S. Ct. at 2857; *Rent-A-Center*, 130 S. Ct. at 2775; *Stolt-Nielsen*, 130 S. Ct. at 1764. The United States Supreme Court decided yet another FAA case this past April, see *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744, 179 L. Ed. 2d 742 (2011), and it will hear at least two more FAA cases during its next Term. See *CompuCredit Corp. v. Greenwood*, S. Ct. , 2011 U.S. LEXIS 3404, 2011 WL

220683, at *1 (2011) (granting petition for certiorari); *Stok & Associates, PA v. Citibank, NA*, 131 S. Ct. 1556, 1556, 179 L. Ed. 2d 299 (2011) (granting petition for certiorari).

The case pending [*3] before this Court presents difficult questions regarding the formation and enforceability of an arbitration agreement in a unique factual context. According to Plaintiffs, Defendants Service Road Corp. ("Service Road") and Cousin Vinnie's Back Room, Inc. ("Cousin Vinnie's") own and operate the Gold Club and the Gold Club Connection -- together, "the Clubs" -- in Groton, Connecticut. ¹ The Gold Club is a bar that features topless female dancers as entertainment; the Gold Club Connection is a nightclub that features fully nude female dancers as entertainment. Plaintiffs Dina Nicole D'Antuono, Ramona P. Cruz, and Karen Vilnit are exotic dancers who have performed at the Clubs -- the Court uses the phrase exotic dancers throughout this Memorandum of Decision because that is the phrase that Plaintiffs use to describe their occupation in the Complaint. *See* Compl. [doc. # 1] ¶ 1. When they performed at the Clubs, Plaintiffs were classified as tenants who rented performance space from the Clubs. *See* Tab 1 to First Genna Decl. [doc. # 13-1] at 5. They allege that they were really the Clubs' employees, and they seek both unpaid wages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, [*4] and other damages under Connecticut employment laws.

1 In their memorandum in support of the pending motion, Defendants point out that Plaintiffs have sued the wrong defendants, in that Service Road and Cousin Vinnie's own and operate the Clubs' Hartford locations, not the Clubs' Groton locations. *See* Mem. in Supp. [doc. # 13] at 1 n.1. Two different companies controlled by the same individuals, C & G of Groton, Inc. and RCG of Groton, Inc., actually own the Clubs' Groton locations. *See id.* But Defendants do not argue that Plaintiffs' mistake requires dismissal of this case. Plaintiffs may amend their Complaint to name the correct Defendants. *See Fed. R. Civ. P. 15 (a)(2)* ("The court should freely give leave [to amend] when justice so requires.").

Service Road and Vinnie's have filed a Motion to Dismiss and/or Stay this Action; to Compel Arbitration; and to Strike Class and Collective Action Allegations [doc. # 12] from Plaintiffs' Complaint [doc. # 1]. For the reasons set forth below, Defendants' motion is GRANTED IN PART and DENIED IN PART. The Court DENIES Defendants' motion insofar as it seeks an order to compel Ms. Cruz to arbitrate her claims against Defendants, since there is nothing [*5] in the record before the Court to show that she even implicitly agreed

to arbitration. However, the Court GRANTS Defendants' motion insofar as it seeks an order to compel Ms. D'Antuono and Ms. Vilnit to arbitrate their claims against Defendants, and on an individual basis rather than on a collective or class basis. Ms. D'Antuono and Ms. Vilnit undisputedly agreed to arbitration. In light of Defendants' concession that they will not seek to enforce the two most objectionable provisions in the arbitration agreement, *see* Notice [doc. # 52], the Court concludes that there is no ground under either Connecticut law or under the federal common law of arbitrability that permits the Court to invalidate Ms. D'Antuono's or Ms. Vilnit's agreement, including the provision requiring them to arbitrate their claims on an individual basis. As a result of the Court's decision, Plaintiffs' Motion for Clarification [doc. # 53] is also DENIED as moot.

I.

The Court sets forth only those facts that are necessary for purposes of resolving the pending motion. According to Plaintiffs' Complaint as well as various declarations filed in opposition to the pending motion, Ms. D'Antuono performed at the Clubs from [*6] December 2007 until February 2010, *see* D'Antuono Decl. [doc. # 26-2] ¶ 1; Ms. Cruz performed at the Clubs from August 2008 until December 2008, *see* Cruz Decl. [doc. # 26-4] ¶ 1; and Ms. Vilnit performed at the Clubs from December 2007 until November 2009, *see* Vilnit Decl. [doc. # 26-3] ¶ 1. Defendants assert in support of the pending motion that it is their "normal business practice to have [every exotic dancer] execute a . . . Lease" setting forth the terms of the relationship between the exotic dancer and the Clubs. First Genna Decl. [doc. # 13-1] ¶ 6. Defendants further claim that it is their policy to always "explain to the [exotic dancer] that [the Lease] . . . governs the relationship between [the exotic dancer] and the [Clubs]." Bergeron Decl. [doc. # 38-1] ¶ 4.

Ms. D'Antuono, who began performing at the Clubs in December 2007, signed an "Entertainment Lease" ("Lease") on November 4, 2008. Tab 1 to First Genna Decl. [doc. # 13-1] at 5, 8. However, according to Ms. D'Antuono's declaration, November 4, 2008 was the first day that anyone at the Clubs ever asked her to sign a Lease. *See* D'Antuono Decl. [doc. # 26-2] ¶ 5. On that date, during the middle of Ms. D'Antuono's performance [*7] shift, manager Miranda Bergeron asked Ms. D'Antuono to accompany her to the Clubs' office to update her paperwork. *See id.* Ms. Bergeron told Ms. D'Antuono that the Lease stated that Ms. D'Antuono was a subcontractor of the Clubs and worked for herself. *See id.* ¶ 6. Ms. D'Antuono signed the Lease and left the office to continue performing within five minutes after she arrived. *See id.* ¶ 8.

Ms. Vilnit, who also began performing at the Clubs in December 2007, signed the same form Lease on September 17, 2008, about two months before Ms. D'Antuono. *See* Tab 1 to First Genna Decl. [doc. # 13-1] at 10, 13. According to Ms. Vilnit, September 17, 2008 was the first day that anyone at the Clubs ever asked her to sign a Lease. *See* Vilnit Decl. [doc. # 26-3] ¶¶ 4-7. On that date, during the middle of Ms. Vilnit's performance shift, Ms. Bergeron asked Ms. Vilnit to accompany her to the Clubs' office to complete tax-related paperwork. *See id.* ¶¶ 4-5. Ms. Bergeron presented Ms. Vilnit with the Lease, and Ms. Vilnit signed it quickly and left the office to continue performing within five minutes after she arrived. *See id.* ¶ 7.

Ms. Cruz, who began performing at the Clubs in August 2008, never signed a [*8] Lease. According to Ms. Cruz, she showed up at one of the Clubs and was allowed to start performing the very same day. *See* Cruz Decl. [doc. # 26-4] ¶ 3. All that she was required to do was to show her identification, and fill out a form asking for her legal name, her stage name, and her home address. No one -- not Ms. Bergeron or anyone else -- ever asked her to sign the Lease or any other contract. *See id.* ¶¶ 2-3.

Defendants contend that Ms. Cruz never actually performed at the Clubs, and point out that she is named as a plaintiff in several similar cases pending before other courts, some involving the same plaintiffs' lawyers. *See* Bergeron Decl. [doc. # 38-1] ¶ 10 (asserting that no one at the Clubs remembers Ms. Cruz). To the extent that there is a dispute about whether Ms. Cruz actually performed at the Clubs, that dispute is not related to the pending motion, but instead goes to the merits of this case. For the time being, the Court need not consider whether she actually performed at the Clubs for a brief period at the end of 2008, as she alleges.

Defendants have not provided the Court with any admissible materials that contradict Ms. D'Antuono's and Ms. Vilnit's accounts of the circumstances [*9] under which they signed the Lease. Ms. Bergeron recalls presenting copies of the Lease to Ms. D'Antuono and Ms. Vilnit, and while she insists that it was not her intention to present the Lease in a "rushed or coercive manner," she does not contest that both signed the Lease within five minutes after she first showed it to them. Bergeron Decl. [doc. # 38-1] ¶¶ 5-7. Paul Genna, an officer of Service Road and Cousin Vinnie's, recalls that he received a telephone call from one of his managers asking if Ms. Vilnit could have permission to take a copy of the Lease home before she signed it, so that she could have an attorney review it. *See* Second Genna Decl. [doc. # 38-2] ¶ 4. Mr. Genna recalls that he told the manager that Ms. Vilnit could indeed take the Lease home if she wished, but does not recall whether Ms. Vilnit actually took the

Lease home. *See id.* Mr. Genna's recollection is not inconsistent with Ms. Bergeron's or Ms. Vilnit's declaration. *See* Vilnit Decl. [doc. # 26-3] ¶ 7.

Neither Ms. Bergeron nor Mr. Genna contests that Ms. D'Antuono and Ms. Vilnit were first shown the Lease and were first asked to sign the Lease nearly after a year after they first began performing at the Clubs. [*10] Mr. Genna baldly asserts that the Clubs had a policy of not permitting any exotic dancer to perform unless she first agreed to the terms of the Lease. *See* First Genna Decl. [doc. # 13-1] ¶ 6. But Defendants have not introduced any materials to show how the Clubs went about obtaining exotic dancers' consent to the terms of the Lease. There is no evidence that, for example, a copy of the Lease was posted in the exotic dancers' dressing room, or that the text of the Lease was included in any handbook or other document that was provided to new exotic dancers when they first arrived at the Clubs. Thus, Defendants' assertion that their "normal business practice" was to have all exotic dancers sign copies of the Lease, First Genna Decl. [doc. # 13-1] ¶ 6, is not consistent with any of the specific factual assertions made by either Plaintiffs or Defendants. The only concrete factual allegations before the Court show that the Clubs allowed at least two exotic dancers to perform for a year before showing them a copy of the Lease or asking them to sign a copy of the Lease, and that one exotic dancer who performed at the Clubs for several months never signed the Lease.

The four-page form Lease -- [*11] which Ms. D'Antuono admittedly signed on November 4, 2008 and which Ms. Vilnit also admittedly signed on September 17, 2008 -- indicates that the agreement between the exotic dancer and the Clubs is to take effect on the date the Lease is signed. *See* Tab 1 to First Genna Decl. [doc. # 13-1] at 5. ² It indicates that the agreement is to end at the latest one year from the date when the Lease is signed. *See id.* The Lease specifies that it creates a landlord-tenant relationship, rather than an employment relationship: the exotic dancer will rent the stage and other performance spaces in the Clubs, and may collect tips and payments directly from the Clubs' customers. *See id.* The Lease specifies that the Clubs will not pay the exotic dancer any hourly wage, any overtime pay, or any benefits. *See id.* The Lease specifies that if the exotic dancer were an employee rather than a tenant, then the customer fees would be the Clubs' property rather than the exotic dancer's own property. *See id.* It further indicates that "if any court, tribunal, arbitrator, or governmental agency determines that the relationship between the parties is something other than that of landlord/tenant and that [the exotic [*12] dancer] is . . . entitled to the payment of wages from the Club[s]," the exotic dancer must pay back customer fees to the Clubs. *See id.* at 5-6.

2 As the Court pointed out at oral argument, Ms. D'Antuono and Ms. Vilnet could have argued that the Lease does not preclude them from suing Defendants in federal court for violations of federal or state labor laws that occurred *before* Ms. D'Antuono and Ms. Vilnet signed the Lease and after the Lease ended. But that argument was nowhere to be found in Ms. D'Antuono's and Ms. Vilnet's briefing. Furthermore, their counsel made no attempt whatsoever to press that argument even when the Court suggested it to her at oral argument.

The Lease also contains an arbitration clause on the last page. *See id.* at 8. Most of the arbitration clause is either in boldface type, in capital letters, or underlined -- sometimes all three. *See id.* The Court reproduces the arbitration clause in its entirety below:

21. Arbitration/Attorney Fees and Costs/Waiver of Class Action. ANY CONTROVERSY, DISPUTE, OR CLAIM ARISING OUT OF THIS LEASE OR OTHERWISE OUT OF ENTERTAINER PERFORMING AT THE PREMISES OF THE CLUB, SHALL BE EXCLUSIVELY DECIDED BY BINDING ARBITRATION UNDER THE [*13] FEDERAL ARBITRATION ACT, IN CONFORMITY WITH RULES AND PROCEDURES AS ESTABLISHED BY THE AMERICAN ARBITRATION ASSOCIATION AND AS MAY BE MODIFIED BY ANY STATE ARBITRATION ACT. Any judgment or award may be entered in any court having jurisdiction thereof.

Any judgment, order, or ruling arising out of a dispute between the parties shall award costs incurred for the proceedings and reasonable attorney fees to the prevailing party.

ENTERTAINER AGREES THAT ALL CLAIMS BETWEEN HER AND THE CLUB WILL BE LITIGATED INDIVIDUALLY AND THAT SHE WILL NOT CONSOLIDATE OR SEEK CLASS TREATMENT FOR A CLAIM. ENTERTAINER FURTHER AGREES NOT TO COMMENCE ANY ACTION, SUIT OR ARBITRATION PROCEEDING RELATING, IN ANY MANNER WHATSOEVER, TO THIS LEASE OR TO HER PERFORMING AT THE

PREMISES OF THE CLUB, MORE THAN SIX MONTHS AFTER SHE LAST PERFORMED AT THE PREMISES, AND FURTHER AGREES TO WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY.

This paragraph 21 survives termination of this Lease.

Id. The blank spaces provided for the exotic dancer's signature and for the signature of the Clubs' representative appear only a few lines below the arbitration clause. *See id.*

The Lease also contains a comprehensive severability clause on [*14] the final page. The Court the severability clause in its entirety below:

20. Severability. In the event that any term, paragraph, subparagraph, or portion of this Lease is declared to be illegal or unenforceable, this Lease shall, to the extent possible, be interpreted as if that provision was not a part of this Lease; it being the intent of the parties that any illegal or unenforceable portion of this Lease, to the extent possible, be severable from this Lease as a whole. However, in the circumstance of a judicial, arbitration, or administrative determination that the business relationship between Entertainer and the Club is something other than that of landlord and tenant, Entertainer and the Club shall be governed by the provisions of subparagraph 12C.

Id. As the severability clause is also on the last page of the Lease, the blank spaces provided for the exotic dancer's signature and for the signature of the Clubs' representative appear only a few lines below the severability clause. *See id.*

Plaintiffs filed their Complaint in this Court on January 6, 2011. Their primary allegation, as the Court has already mentioned, is that they were employees rather than tenants or independent contractors [*15] when they performed at the Clubs, and were therefore owed the minimum wage. *See* Compl. [doc. # 1] ¶ 14. They also appear to believe that the provision of the Lease that requires them to repay the fees they received from the Clubs customers if a court finds them to have been employees of the Clubs violates Connecticut law. *See* Mem. in Opp'n [doc. # 26] at 28. However, that particular issue is not specifically raised in the Complaint.³

3 The Complaint also repeatedly indicates that the Lease misclassified Plaintiffs as independent contractors. *See* Compl. [doc. # 1] ¶ 1. It says nothing about the fact that Plaintiffs were actually considered tenants according to the terms of the Lease, not independent contractors.

Defendants filed the pending Motion to Dismiss and/or Stay this Action; to Compel Arbitration; and to Strike Class and Collective Action Allegations on January 28, 2011. After the motion was filed, the Second Circuit issued its decision in *In re American Express Merchants' Litigation ("American Express II")*, 634 F.3d 187 (2d Cir. 2011). In light of that decision, the Court directed Defendants to specifically address that decision in their reply brief and permitted Plaintiffs to [*16] file a sur-reply. *See* Order [doc. # 29]. The week before oral argument, the United States Supreme Court issued its decision in *AT&T Mobility*, 131 S. Ct. at 1740. In advance of oral argument, the Court ordered both parties to be prepared to discuss the possible impact of that decision on this case. *See* Order [doc. # 47].

At oral argument, the Court attempted to clarify Defendants' position regarding whether they planned to enforce two of the three features of the arbitration clause Plaintiffs take issue with: the cost- and fee-shifting provision, and the provision requiring that all arbitration claims be brought no later than six months after a dancer's final performance at the Clubs. *See* Tab 1 to First Genna Decl. [doc. # 13-1] at 8. The Court did not get a clear answer from Defendants' counsel at oral argument. The Court therefore issued an Order [doc. # 50] directing Defendants to give the Court a yes or no answer regarding whether it intended to enforce those two provisions in an arbitration. On May 23, 2011, Defendants filed a Notice [doc. # 52] in which they unequivocally concede that they will not enforce those two provisions against Plaintiffs.

II.

At the outset, the Court must [*17] consider the issue of subject-matter jurisdiction. Defendants argued in passing in their memorandum in support of the pending motion that because Ms. D'Antuono, Ms. Cruz, and Ms. Vilnit have agreed to arbitrate any disputes with Defendants, this Court lacks subject-matter jurisdiction over the federal law and state law claims in Plaintiffs' Complaint. *See* Mem. in Supp. [doc. # 13] at 5-6. Defendants' argument regarding subject-matter jurisdiction is baseless.

As a general matter, the FAA does not grant subject-matter jurisdiction to federal district courts. It does, however, provide that "[a] party aggrieved by the alleged

failure . . . of another to arbitrate under a written agreement may petition any United States district court which, save for such agreement, would have [subject-matter] jurisdiction . . . in a civil action . . . arising out of the controversy between the parties," for an order compelling arbitration. 9 U.S.C. § 4. Under that provision, a party that wishes to have an arbitration agreement enforced may instate a federal court proceeding and ask the court to require the other party to comply with the agreement. *See, e.g., Carrington Capital Management, LLC v. Spring Investment Services, Inc.*, 347 F. App'x 628, 629 (2d Cir. 2009) [*18] (summary order).

This case does not implicate that particular provision. It was Plaintiffs -- who do not believe that the arbitration agreement at issue here is enforceable -- who initiated this case by filing their Complaint. This Court has subject-matter jurisdiction over the federal law claims in that Complaint pursuant to 18 U.S.C. § 1331, and subject-matter jurisdiction over the state law claims in that Complaint pursuant to 18 U.S.C. § 1367(a). While the FAA may require the Court to enforce the disputed arbitration agreement as a matter of contract, *see* 9 U.S.C. § 2, Defendants have provided no authority to support the proposition that a valid arbitration agreement divests a federal court of its subject-matter jurisdiction. It would be odd if a valid arbitration agreement could have that effect, as "arbitration is simply a [private] matter of contract between the parties." *Stolt-Nielsen*, 130 S. Ct. at 1772.

The Court notes that at oral argument, Plaintiffs' counsel suggested that this action could not have initially been brought in state court because it involves a federal law claim. That suggestion is also erroneous. As a general matter, state courts and federal courts have concurrent [*19] jurisdiction over all federal law claims, and FLSA claims are no different. *See* 29 U.S.C. § 216(b) (providing that an FLSA claim can be maintained "in any Federal or State court of competent jurisdiction). A plaintiff may sue on a federal law claim either in federal court or state court. That said, if Plaintiffs had filed this action in state court, Defendants may or may not have elected to exercise their right remove the case to federal court pursuant to 28 U.S.C. § 1441(a).

III.

The FAA "reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center*, 130 S. Ct. at 2776; *see Stolt-Nielsen*, 130 S. Ct. at 1773. The FAA "places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms." *Rent-A-Center*, 130 S. Ct. at 2776; *see also New River Electrical Corp. v. Blakeslee Arpaia Chapman, Inc.*, No. 3:09cv192 (MRK), 2009 U.S. Dist. LEXIS 117837, 2009 WL 5111566, at *2 (D.

Conn. Dec. 17, 2009); *Ferguson v. United Health Care*, No. 3:08cv1389 (MRK), 2008 U.S. Dist. LEXIS 101796, 2008 WL 5246145, at *2 (D. Conn. Dec. 17, 2008). "Like other contracts . . . [arbitration agreements] may be invalidated by 'generally applicable contract defenses, such as fraud, [*20] duress, or unconscionability.'" *Rent-A-Center*, 130 S. Ct. at 2776 (citation omitted); see 9 U.S.C. § 2 (providing that arbitration agreements may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract"); *AT&T Mobility*, 131 S. Ct. at 1746. Employment contracts that include arbitration clauses are not exempt from the FAA's provisions, see *Ferguson*, 2008 U.S. Dist. LEXIS 101796, 2008 WL 5246145, at *2 (citing *Circuit City Stores v. Adams*, 532 U.S. 105, 119, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)), and the parties appear to agree that both FLSA claims and state employment law claims may be arbitrated. See *Carter v. Countrywise Credit Industries, Inc.*, 362 F.3d 294, 297 (5th Cir. 2004); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir. 1996).

It is well settled that "whether parties have agreed to 'submit[] a particular dispute to arbitration is typically an issue for judicial determination.'" *Granite Rock*, 130 S. Ct. at 2855 (citation omitted). "To satisfy itself that [an] agreement [to arbitrate] exists, [a] court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Id.* at 2856. Whether a particular [*21] arbitration agreement is invalid, revocable, or unenforceable is also an issue for judicial determination. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006). That said, "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Id.* at 445. Thus, "unless the challenge is to the [enforceability of the] arbitration clause itself, the issue of the contract's validity is [usually] considered by the arbitrator . . ." *Id.* at 445-46; see *JLM Industries v. Stolt-Nielsen SA*, 387 F.3d 163, 170 & n.5 (2d Cir. 2004).⁴

4 Parties may contract to have the very issue of arbitrability decided by an arbitrator, rather than a court. See *Shaw Group, Inc. v. Triplefine International Corp.*, 322 F.3d 115, 121 (2d Cir. 2003) ("A referral of 'any and all' controversies reflects such a 'broad grant of power to the arbitrators' as to evidence the parties' clear 'inten[t] to arbitrate the issues of arbitrability.'" (citation omitted)). But Defendants do not argue in this case that the Lease evidences such a clear intent.

The standard this Court must apply when reviewing a motion to compel arbitration is essentially the [*22] same standard that the Court applies when it reviews a

motion for summary judgment. See *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003); see, e.g., *DuBois v. Macy's East, Inc.*, 338 F. App'x 32, 33 (2d Cir. 2009) (summary order). The party seeking an order compelling arbitration must "substantiate [its] entitlement [to arbitration] by a showing of evidentiary facts" that support its claim that the other party agreed to arbitration. *Oppenheimer & Co., Inc. v. Neidhardt*, 56 F.3d 352, 358 (2d Cir. 1995). If the party seeking to compel arbitration makes such an evidentiary showing, the party opposing arbitration "may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried" as to the making of the arbitration agreement. *Id.* "If there is an issue of fact as to the making of the agreement for arbitration, then a trial [on that issue] is necessary." *Bensadoun*, 316 F.3d at 175; see 9 U.S.C. § 4. "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." *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980); [*23] see *Bensadoun v. Jobe-Riat*, 316 F.3d at 175 (citing *Par-Knit Mills* as setting forth the standard of review applicable when reviewing a motion to compel arbitration); *Sutherland v. Ernst & Young, LLP*, F. Supp. 2d , 2011 U.S. Dist. LEXIS 26889, 2011 WL 838900, at *2 (S.D.N.Y. 2011).

This Court does not need to hold an evidentiary hearing to resolve purely legal issues that are raised in the context of a motion for summary judgment. See *DaimlerChrysler Insurance Co. v. Pambianchi*, F. Supp. 2d , 2011 U.S. Dist. LEXIS 2294, 2011 WL 66584, at *5 (D. Conn. 2011). Similarly, when a party opposes a motion to compel arbitration on the ground that the arbitration agreement at issue is revocable "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, the Court may make its own legal finding as to the enforceability of the agreement. *American Express II*, 634 F.3d at 198; see, e.g., *Sutherland*, 2011 U.S. Dist. LEXIS 26889c, 2011 WL 838900, at *2 (finding as a matter of law that an arbitration clause in an employment contract was unenforceable). The party opposing enforcement has the burden showing that the arbitration agreement is unenforceable. See *American Express II*, 634 F.3d at 191 (citing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)).

IV.

The [*24] issues in this case relate to both the formation of an agreement to arbitrate, see *Granite Rock*, 130 S. Ct. at 2855, and the enforceability of the agreement to arbitrate. See *Buckeye Check Cashing*, 546 U.S. at 445-46. The issues in the case relating to the formation

of the agreement are reasonably straightforward. The materials in the record permit no conclusion other than that Mr. D'Antuono and Ms. Vilnit agreed to arbitration -- they appear to concede as much in their briefs, though their counsel would not make that concession at the oral argument. Ms. Cruz did not. Thus, Ms. Cruz need not arbitrate her claims against Defendants and is not bound by any provision in the Lease.

The enforceability-related issues, on the other hand, were at the outset significantly more difficult. Plaintiffs object to three specific features of the Lease's arbitration clause. First, in light of the potential costs associated with arbitration before the American Arbitration Association ("AAA") and the allegedly low amount of damages they each seek individually, they object to the provision of the arbitration clause that purports to waive Plaintiffs' right to proceed against Defendants via collective actions [*25] and class actions. See Tab 1 to First Genna Decl. [doc. # 13-1] at 8. ("ENTERTAINER AGREES THAT ALL CLAIMS BETWEEN HER AND THE CLUB WILL BE LITIGATED INDIVIDUALLY AND THAT SHE WILL NOT CONSOLIDATE OR SEEK CLASS TREATMENT FOR A CLAIM."). Second, they object to the cost- and fee-shifting provision in the arbitration clause. See *id.* ("Any judgment, order, or ruling arising out of a dispute between the parties shall award costs incurred for the proceedings and reasonable attorney fees to the prevailing party."). Third, they object to a provision that requires that all claims against Defendants, either in a court or before an arbitrator, be filed with six months after a exotic dancer's final performance at the Clubs. See *id.* ("ENTERTAINER FURTHER AGREES NOT TO COMMENCE ANY ACTION, SUIT OR ARBITRATION PROCEEDING RELATING, IN ANY MANNER WHATSOEVER, TO THIS LEASE OR TO HER PERFORMING AT THE PREMISES OF THE CLUB, MORE THAN SIX MONTHS AFTER SHE LAST PERFORMED AT THE PREMISES, AND FURTHER AGREES TO WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY."). They appear to object to all three of those features on both state and federal law grounds.

Plaintiffs argue that those three features, taken together, [*26] require the Court to invalidate the arbitration agreement and instead allow them to proceed in a collective or class action in this Court. While an arbitration clause is generally severable from the contract in which it appears, see *Granite Rock*, 130 S. Ct. at 2857, it is true that a court's invalidation of specific provisions within an arbitration clause may in some cases require invalidation of the entire arbitration agreement. See *Fensterstock v. Education Finance Partners*, 611 F.3d 124, 134 (2d Cir. 2010), *overruled in part by AT&T Mobility*, 131 S. Ct. at 1753. This is because arbitration is a

matter of contract, and "parties are generally free to structure their arbitration agreements as they see fit." *Stolt-Nielsen*, 130 S. Ct. at 1774 (quotation marks and citation omitted). A court generally cannot require parties to submit to arbitration procedures with which they never agreed to comply. See *id.* at 1775 (holding that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so").

Of course, it may be permissible for a court to invalidate some non-essential provisions in an arbitration [*27] agreement, sever those provisions, and require arbitration under a modified agreement. The Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. at 1758, and the Second Circuit's decision in *Fensterstock v. Education Finance Partners*, 611 F.3d 124, both stand only for the limited proposition that parties may not be required to submit to class arbitration when they have not agreed to that type of arbitration procedure. See, e.g., *Stolt-Nielsen*, 130 S. Ct. at 1776 (explaining why a class action mechanism would bring "fundamental changes" to the arbitration project). Neither of those cases necessarily implies a rule that if any provision in an arbitration agreement cannot be enforced as a matter of law, the entire agreement must fall.

Plaintiffs rely on both state law and federal law to support their position. As the Court explains in further detail in the discussion below, there is virtually no Connecticut case law to support Plaintiffs' views. But there are many, many federal law precedents -- and in particular, Second Circuit precedents -- that support Plaintiffs' position in this case. In *American Express II*, the Second Circuit established a standard [*28] under which district courts may invalidate arbitration agreements containing collective and class action waiver provisions on a case-by-case basis. See 634 F.3d at 197 (citing *Green Tree Financial*, 531 US. at 92). In *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115 (2d Cir. 2010), the Second Circuit stated that an arbitration clause containing both a provision shortening the statute of limitations and a cost- and fee-shifting provision might "significantly diminish a litigant's [statutory] rights," and thus might be invalid. *Id.* at 125-26 ("Had the defendants attempted to enforce the arbitration agreement as originally written it is not clear that we would hold in their favor.").

The Court knows of no cases from inside the Second Circuit or elsewhere in which a class action waiver provision, a cost- and fee-shifting provision, and a provision altering the statute of limitations were combined in one arbitration agreement. The fact that the arbitration clause at issue here combined some of the features which led the Second Circuit to strike down the arbitration agree-

ment in *American Express II* with some of the different features which caused the Second Circuit considerable concern [*29] in *Ragone* make this a particularly difficult case.

Further complicating matters, just days before the oral argument in this case, the United States Supreme Court issued its decision in *AT&T Mobility*, 131 S. Ct. 1740, 179 L. Ed. 2d 742. Regardless of one's views about the wisdom of that decision, see Marcia Coyle, *A Business Win in "AT&T"*, National Law Journal, May 2, 2011, at 17 (presenting views on both sides), it would be hard to dispute that *AT&T Mobility* and other recent United States Supreme Court decisions represent a shift in the federal law regarding the enforceability of arbitration agreements. See *AT&T Mobility*, 131 S. Ct. at 1747 (discussing the "judicial hostility towards arbitration . . . [that] manifest[s] itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy"). While this case does not ultimately turn on *AT&T Mobility's* holding, see 131 S. Ct. at 1753, this Court cannot overlook that decision entirely because its reasoning may be at odds with reasoning in the Second Circuit's recent cases, including *American Express II* and *Ragone*.

A.

The Court begins with the parties' disputes over the formation of the arbitration agreement at issue in this case. [*30] See *Granite Rock*, 130 S. Ct. at 2855. The FAA requires this Court to hold a trial "[i]f the making of the arbitration agreement . . . [is] in issue." 9 U.S.C. § 4. But "the making of [an] arbitration agreement . . . [is] in issue" within the FAA's meaning only when there are material *factual* disputes regarding the elements of contract formation under the applicable state law. *Oppenheimer & Co.*, 56 F.3d at 358. Under Connecticut law -- which all parties agree is the applicable law -- the essential elements of contract formation are offer and acceptance. See *Auto Glass Express, Inc. v. Hanover Insurance Co.*, 293 Conn. 218, 227, 975 A.2d 1266 (2009).

1.

In their briefs, Ms. D'Antuono and Ms. Vilnit seemingly concede that they accepted the terms of the arbitration clause. After all, they both signed the Lease, and the arbitration clause was on the same page as each of their signatures. At oral argument, however, Plaintiffs' counsel suggested for the first time that some of her arguments regarding Ms. D'Antuono's and Ms. Vilnit's obligations actually pertain to the formation of the arbitration agreement, rather than the enforceability of the arbitration agreement. The Court largely disagrees with Plaintiffs' [*31] counsel's re-characterization of her arguments, but Plaintiffs' counsel is correct in one respect. To the extent that Ms. D'Antuono and Ms. Vilnit

argue that they were misled about the content of the documents they signed and rushed into signing the documents, their argument goes to the formation of an agreement, rather than to enforceability. See *DiUlio v. Goulet*, 2 Conn. App. 701, 703-04, 483 A.2d 1099 (1984).

In Connecticut, the fact that a party signed a written agreement is usually conclusive evidence of contract formation. "The general rule is that where a person of mature years, who can read and write, signs or accepts a formal written contract affecting his pecuniary interests, it is his duty to read it, and notice of its contents will be imputed to him if he negligently fails to do so." *Ursini v. Goldman*, 118 Conn. 554, 562, 173 A. 789 (1934). There is an exception to that general rule when something has "been said or done to mislead the person . . . or to put a [person] of reasonable business prudence off his [or her] guard in the matter." *Id.* Ms. D'Antuono and Ms. Vilnit relied on that exception in the portion of their sur-reply brief discussing procedural unconscionability. See Pls.' Sur-Reply [doc. [*32] # 44] at 15 n.8. But under Connecticut law, that exception goes to the factual issues of offer and acceptance, rather than to the legal issue of whether an agreement, once formed, may be enforced. See *DiUlio*, 2 Conn. App. at 703-04 (1984) ("[E]ven though the plaintiff signed a release, the plaintiff's deposition and counteraffidavit raise a genuine issue of material fact as to her assent to the terms of the release."); *Delk v. Go Vertical, Inc.*, 303 F. Supp. 2d 94, 100-01 (D. Conn. 2004) (finding no evidence that the plaintiff had been misled or had been put off his guard at the time when he signed the agreement at issue).

Because Ms. D'Antuono and Ms. Vilnit did not rely on the *Ursini v. Goldman* exception until they filed their sur-reply brief, and did not characterize their argument as a factual argument about the formation of an agreement until oral argument, it appears that Ms. D'Antuono and Ms. Vilnit may have waived that argument. Assuming, however, that Plaintiffs did not waive that argument, the Court still concludes that the declarations in the record from Ms. D'Antuono and Ms. Vilnit are not sufficient to raise genuine issues of material fact as to the essential elements of [*33] contract formation under Connecticut law, which again are a valid offer and a valid acceptance. See *Auto Glass Express*, 293 Conn. at 227.

The declarations from Ms. D'Antuono and Ms. Vilnit establish that Ms. Bergeron told Ms. D'Antuono that the agreement provided that Ms. D'Antuono worked for herself and that the Clubs needed a copy for their files, see D'Antuono Decl. [doc. # 26-2] ¶ 6; and that Ms. Bergeron told Ms. Vilnit that the agreement was tax-related. See Vilnit Decl. [doc. # 26-3] ¶ 5. Although those statements were incomplete, they were both true enough. No reasonable jury could conclude from the

declarations that Ms. Bergeron was sufficiently misleading as to the content of the Lease to negate Ms. D'Antuono's and Ms. Vilnit's acceptance of the terms of the Lease, particularly in light of the fact that both Ms. D'Antuono and Ms. Vilnit had the opportunity to read the Lease. Although both declarations indicate that Ms. Bergeron told Ms. D'Antuono and Ms. Vilnit that they needed to sign the Lease, *see* D'Antuono Decl. [doc. # 26-2] ¶ 7; Vilnit Decl. [doc. # 26-3] ¶ 5, neither declaration indicates that Ms. Bergeron required an immediate signature, and neither shows that she [*34] in any way attempted to dissuade either Ms. D'Antuono and Ms. Vilnit from reading the Lease. *See Delk*, 303 F. Supp. 2d at 100 ("There is simply no evidence before the court that raises a genuine question as to whether Go Vertical or its employees deprived Delk of the opportunity to review the waiver or coaxed her to avoid reading it before she signed.").

Plaintiffs' counsel's other arguments with regard to Ms. D'Antuono and Ms. Vilnit relate not to the factual issue of whether an agreement to arbitrate was formed, but to the legal issue of whether Ms. D'Antuono's and Ms. Vilnit's agreement with Defendants is enforceable. *See* 9 U.S.C. § 2; *American Express II*, 634 F.3d at 198; *Delk*, 303 F. Supp. 3d at 101 ("Delk further asserts that, even assuming she assented to its terms, the waiver is not valid . . ."). In arguing to the contrary, Plaintiffs' counsel appears to be relying on a somewhat confusing passage from a district court decision that Plaintiffs' counsel repeatedly cited at oral argument, *Campbell v. General Dynamics Government Systems Corp.*, 321 F. Supp. 2d 142 (D. Mass. 2004). Several years before *Campbell*, the First Circuit held in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999), [*35] that a pre-dispute agreement to arbitrate discrimination claims was not "appropriate and authorized by law" within the meaning of the 1991 Civil Rights Act amendments to Title VII -- and thus could not be enforced -- because it did not give specific notice to the plaintiff that it required arbitration of employment claims. *Id.* at 4, 17, 20. The Second Circuit has never adopted the *Rosenberg* rule, and in one case, the Second Circuit explicitly declined to follow the *Rosenberg* court's reasoning. *See Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 149 (2d Cir. 2004).

In any case, the First Circuit's rule by its terms applies only to discrimination claims implicating the 1991 Civil Rights Act, and not to FLSA claims. *See Rosenberg*, 170 F.3d at 19 ("[T]his case does not implicate any broader questions of the enforceability of the arbitration clause when the 1991 CRA or ADEA are not involved."). This Court is unwilling to import that particular rule into the FLSA context, particularly since the

Second Circuit has not even adopted it in the limited context of claims implicating the 1991 Civil Rights Act.

2.

The only remaining dispute relating to the formation of an agreement to arbitrate is [*36] about Ms. Cruz. With regard to Ms. D'Antuono and Ms. Vilnit, there has never been any dispute that Defendants carried their initial burden of "substantiat[ing their] entitlement [to arbitration] by a showing of evidentiary facts." *Oppenheimer & Co.*, 56 F.3d at 358. With regard to Ms. Cruz, Defendants have failed to carry that initial burden. For that reason, the Court has no choice but to deny Defendants' motion with regard to Ms. Cruz.

Under Connecticut law, even when parties have not entered into a written contract, a legally binding agreement may be inferred from the parties' conduct when that conduct shows a tacit understanding, in the light of all of the surrounding circumstances. *See, e.g., Sandella v. Dick Corp.*, 53 Conn. App. 213, 219, 729 A.2d 813 (1999) (citing *Collins v. Lewis*, 111 Conn. 299, 304, 149 A. 668 (1930)). The FAA generally requires federal courts to enforce even implied agreements to arbitrate, so long as they are set forth in some writing. *See* 9 U.S.C. § 2; *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir. 1987). For example, if an employer presents a written arbitration agreement to an employee, and the employee's consent to the agreement can be reasonably inferred [*37] from the employee's subsequent conduct, the fact that the employee never actually signed the agreement is irrelevant. *See Brown v. St. Paul Travelers Companies, Inc.*, 331 F. App'x 68, 69-70 (2d Cir. 2009) (applying New York contract law and finding no genuine dispute of material fact as to the formation of an arbitration agreement).

In this case, Defendants have not introduced any evidence that could permit a jury to reasonably infer that Ms. Cruz consented to the terms of the Lease, let alone the arbitration agreement. Defendants' counsel has asserted in a reply brief that the Lease "was written and disseminated throughout" the Clubs and that Ms. Cruz therefore must have implicitly assented to the arbitration provision. Defs.' Reply [doc. # 38] at 22. If there were evidence that the Lease was posted in the Clubs, or that copies of the Lease were given to all new exotic dancers upon arrival, then it might be possible to infer an agreement from such a circumstance. *See Brown*, 331 F. App'x at 69-70. But defense counsel's generalized assertion is not supported by any evidence at all. The declarations that Defendants have introduced into the record indicate nothing more than that the Gold [*38] Club had a policy of providing a copy of the Lease to every exotic dancer at some point, *see* Bergeron Decl. [doc. # 38-1] ¶ 4; Second Genma Decl. [doc. # 38-2] ¶ 4, and of obtain-

ing a signed Lease from every exotic dancer *at some later point*. See First Genna Decl. [doc. # 13-1] ¶ 6 ("It is [Defendants'] normal business practice to have Entertainers execute a . . . Lease, in the substantially identical form as those executed by Ms. D'Antuono and Ms. Vilnit Assuming Ms. Romona Cruz performed as an Entertainer at the Groton Gold Club . . . she would have necessarily executed . . . [a] Lease or she would not have been permitted to perform."). Defendants have not introduced any evidence at all about *when* copies of the Lease were ordinarily provided to new exotic dancers, let alone any specific evidence about when Ms. Cruz might have first been shown the Lease and arbitration agreement. Cf. *Fed. R. Civ. P. 56(c)(4)* (requiring that affidavits and declarations used to support or oppose a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated").

In [*39] fact, the only evidence before the Court indicates that Defendants often waited quite a long time before presenting new exotic dancers with copies of the Lease. According to both Ms. D'Antuono, see D'Antuono Decl. [doc. # 26-2] ¶ 5, and Ms. Vilnit, see Vilnit Decl. [doc. # 26-3] ¶¶ 4-7, Defendants waited until nearly a year after Ms. D'Antuono and Ms. Vilnit started performing at the Clubs to show them the Lease. Ms. Cruz only performed at the Clubs for a few months. Thus, the only reasonable inference the Court can draw based on the evidence is that Ms. Cruz never saw the Lease and had no opportunity to consent to it, or to the arbitration agreement. The Court cannot compel Ms. Cruz to arbitrate her claims against Defendants unless she in fact agreed to arbitration, see *Stolt-Nielsen*, 130 S. Ct. at 1773, and Defendants' motion is therefore DENIED IN PART.⁵

5 Plaintiffs' counsel suggested for the first time at oral argument that because Ms. Cruz did not agree to arbitration, she may be able to bring a collective action or class action on behalf of Ms. D'Antuono, Ms. Vilnit, and others even if they are bound by the arbitration clause. The Court does not reach that argument, which was [*40] never presented in any written brief, but notes that FLSA collective or class actions may only proceed on an opt-in basis. See 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any . . . action [to recover damages under the FLSA] unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

B.

Having determined that the facts before the Court permit no reasonable conclusions other than that Ms. D'Antuono and Ms. Vilnit agreed to arbitration, and that Ms. Cruz did not, the Court now turns to the issue of the enforceability of the arbitration clause in the Lease. See 9 U.S.C. § 2; *American Express II*, 634 F.3d at 198. Plaintiffs contend that the arbitration clause is unenforceable under the principles of Connecticut contract law as well as under the principles of federal common law as envisioned by the passage of the FAA. See *Green Tree Financial*, 531 U.S. at 92; *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).

With regard to both state law and federal law, Plaintiffs' central argument is that the arbitration clause cannot be enforced because it requires each Plaintiff to proceed in an individual arbitration, [*41] and forbids them from bringing collective actions or class actions. At oral argument, Plaintiffs' counsel backed away from the state law argument, in light of the United States Supreme Court's recent holding in *AT&T Mobility* that the FAA preempts state law rules conditioning the enforceability of arbitration agreements on the availability of class arbitration procedures. See 131 S. Ct. at 1744. However, Plaintiffs did not abandon their state law argument entirely. The Court thus considers both their state law argument and their federal law argument below. After setting forth the relevant Connecticut law -- or rather, the lack thereof -- the Court will examine the possible impact of *AT&T Mobility* on that state law. See *id.* at 1740.

1.

As the Court has already mentioned, the FAA permits federal courts to invalidate arbitration agreements based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Rent-A-Center*, 130 S. Ct. at 2776; see 9 U.S.C. § 2. *AT&T Mobility*, 131 S. Ct. at 1746. Typically, those defenses are state law defenses. See *Cap Gemini Ernst & Young, U.S., LLC v. Nackel*, 346 F.3d 360, 365 (2d Cir. 2003) ("[Q]uestions of contractual validity [*42] relating to the unconscionability of the underlying arbitration agreement must be resolved first, as a matter of state law, before compelling arbitration pursuant to the FAA."); see, e.g., *Fensterstock*, 611 F.3d at 134; *Skirchak*, 432 F. Supp. 2d at 179. In this case, Plaintiffs do not allege fraud or duress.⁶ Their only state law arguments are that the entire Lease is unenforceable as against public policy, see *Van Voorhies v. Land/home Financial Services, No. CV095031713S*, 2010 Conn. Super. LEXIS 2256, 2010 WL 3961297, at *7 (Conn. Super. Sept. 3, 2010), and that the arbitration clause is unconscionable. See, e.g., *Skirchak*, 432 F. Supp. 2d at 179 (considering a plaintiff's argument that an arbitration clause was unconscionable

as a matter of Massachusetts law). Neither argument has any merit.

6 They could not have prevailed even if they did. Duress consists in either physical or other improper threats which leave a person with no other choice but to manifest assent. *See Restatement (Second) of Contracts* § 174, 175 (1981). There is nothing at all in the record before the Court to suggest that Ms. D'Antuono or Ms. Vilnit signed the Lease under duress.

a.

Under Connecticut law, it is "well established 'that contracts [*43] that violate public policy are unenforceable.'" *Hanks v. Powder Ridge Restaurant Corp.*, 276 Conn. 314, 326, 885 A.2d 734 (2005); Connecticut courts may thus void contracts that contain "exculpatory provisions [that] undermine the policy considerations" underlying state laws. *Id.* at 327; *see also Parente v. Pirozzoli*, 87 Conn. App. 235, 246, 866 A.2d 629 (2005) ("[I]t is well recognized that no court will lend its assistance in any way toward carrying out the terms of a contract, the inherent purpose of which is to violate the law."). Relying on the Connecticut Superior Court's decision in *Van Voorhies v. Land/home Financial Services*, 2010 Conn. Super. LEXIS 2256, 2010 WL 3961297, at *7, Plaintiffs appear to argue that this Court should void the entire Lease at the outset because it is designed in its entirety as an exculpatory provision authorizing labor law violations. *See* Pls.' Mem. in Opp'n [doc. # 26] at 22-23 & n.9.

The Court need not decide at this time whether the entire Lease is void as against public policy under Connecticut law. "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing*, 546 U.S. at 445-46. Thus, this Court's inquiry must [*44] be limited for now to the question of whether the *arbitration clause* is unenforceable. To the extent that Plaintiffs' public policy arguments are targeted solely at the arbitration clause, the Court believes it is appropriate to consider those arguments in the context of its discussion of the unconscionability doctrine. *See Van Voorhies*, 2010 Conn. Super. LEXIS 2256, 2010 WL 3961297, at *7. To the extent that Plaintiffs' public policy arguments are focused on other aspects of the Lease -- beyond the arbitration agreement -- those questions will be left for the arbitrators to ultimately resolve, since the Court will require Ms. D'Antuono and Ms. Vilnit's to submit their individual claims for arbitration. *See Buckeye Check Cashing*, 546 U.S. at 445-46; *JLM Industries*, 387 F.3d at 170 & n.5.

b.

"The purpose of the doctrine of unconscionability is to prevent oppression and unfair surprise." *Cheshire Mortgage Services, Inc. v. Montes*, 223 Conn. 80, 88, 612 A.2d 1130 (1992); *see DaimlerChrysler Insurance, Inc. v. Pambianchi*, F. Supp. 2d , 2011 U.S. Dist. LEXIS 2294, 2011 WL 66584, at *8 (D. Conn. 2011). "The classic definition of an unconscionable contract is one which no man in his senses, not under delusion would make, on the one hand, and which no fair and [*45] honest man would accept, on the other." *Smith v. Mitsubishi Motors Credit of America, Inc.*, 247 Conn. 342, 349, 721 A.2d 1187 (1998). Under Connecticut law, the party that raises unconscionability as a defense to the enforcement of any contract typically has the burden of showing that the contract is both procedurally and substantively unconscionable. *See Bender*, 292 Conn. at 732. "Substantive unconscionability focuses on the 'content of the contract,' as distinguished from procedural unconscionability, which focuses on the 'process by which the allegedly offensive terms found their way into the agreement.'" *Cheshire Mortgage*, 223 Conn. at 80 n.14 (quoting J. Calamari & J. Perillo, *Contracts* § 9-37 (3d ed.)). In other words, the party usually must show both that there was an absence of meaningful choice on the part of that party, and that the terms of the agreement were unreasonably favorable toward the other party. *See id.* In some rare cases, a contractual provision may be so outrageous as to warrant a court's refusal to enforce it based on substantive unconscionability alone. *See Hottle v. BDO Seidman LLP*, 268 Conn. 694, 720-21, 846 A.2d 862 (2004). In the Court's view, Plaintiffs have not shown that the arbitration [*46] clause is either procedurally unconscionable or substantively unconscionable, let alone both.

First, Plaintiffs have not shown that the arbitration clause is procedurally unconscionable. ⁷ They suggest that the arbitration clause is procedurally unconscionable because it was "hidden in a maze of fine print, [because] no effort was made to alert [them] directly to the existence of the provision[], [and because] the parties had unequal bargaining power." *Edart Truck Rental Corp. v. B. Swirsky & Co., Inc.*, 23 Conn. App. 137, 143, 579 A.2d 133 (1990). It is true that the Appellate Court has indicated that a contractual provision *might* be procedurally unconscionable under all three of those circumstances. *See id.*

7 As the Court has already indicated, there is no merit to Ms. D'Antuono's and Ms. Vilnit's argument that the Court should overlook their negligence in failing to read the Lease and arbitration agreement. That argument relates to the formation of the agreement, not to the procedural unconscionability issue.

But Plaintiffs' assertion that the arbitration clause was hidden in a maze of fine print is simply not true. The arbitration clause was printed on the last page of a four-page Lease, the same [*47] page on which both Ms. D'Antuono and Ms. Vilnit signed their names. See Tab 1 to First Genna Decl. [doc. # 13-1] at 8. The arbitration clause was written in ordinary-size type, in bold, capital letters, and underlined. See *id.* It could hardly have been any less hidden. See, e.g., *Palacios v. Boehringer Ingelheim Pharmaceuticals, Inc.*, No. 10-22398-Civ-UU, Slip. Op. at 5 (S.D. Fla. Apr. 18, 2011) (applying Connecticut contract law and finding that an arbitration clause in a nine-page employment contract was not hidden); *Van Voorhies*, 2010 Conn. Super. LEXIS 2256, 2010 WL 3961297, at *5 (finding that an arbitration clause in a forty-five page employment contract were not hidden, and concluding that "any procedural unconscionability inherent in the arbitration agreement is minimal").

In the Court's view, Plaintiffs' procedural unconscionability argument comes down to nothing more than a claim that the parties had unequal bargaining power -- as reflected by the fact that the Lease was a take-it-or-leave-it form contract -- and that Defendants did not specifically direct Plaintiffs' attention to the arbitration clause in the Lease. As this Court has previously had occasion to recognize, see *DaimlerChrysler Insurance*, 2011 U.S. Dist. LEXIS 2294, 2011 WL 66584, at *10, [*48] the Connecticut Supreme Court has soundly rejected the notion that provisions in form contracts are procedurally unconscionable whenever the party with greater bargaining power fails to direct the other party's attention to important provisions. See *Smith*, 247 Conn. at 352 ("[W]e hold today that procedural unconscionability cannot be predicated solely on the failure by a commercial party proffering a form contract to an individual party to direct the individual's attention to specific terms of a contractual agreement."). Some federal courts applying other states' laws have suggested that "take it or leave it" employment contracts written by relatively sophisticated employers are *per se* procedurally unconscionable. See *Davis v. O'Melveny & Myers LLC*, 485 F.3d 1066, 1073 (9th Cir. 2007) (applying California law). Putting aside the question of whether those courts correctly applied the relevant state law, see *Roman v. Superior Court*, 172 Cal. App. 4th 1462, 1470 n.2, 92 Cal. Rptr. 3d 153 (2009) (holding that the adhesive nature of an employment contract does not necessary make it procedurally unconscionable), there is no such rule in Connecticut. See, e.g., *Van Voorhies*, 2010 Conn. Super. LEXIS 2256, 2010 WL 3961297, at *5. The arbitration clause at [*49] issue here is thus not procedurally unconscionable under Connecticut law.

Second, Plaintiffs have not shown that the arbitration clause is substantively unconscionable under Connecticut law. It is of course true that the arbitration clause contains a collective action and class action waiver, a cost- and fee-shifting provision, and a provision shortening the statute of limitations. Defendants have now conceded that they will not enforce the latter two provisions, see Notice [doc. # 52], but even if they had not made that concession, this Court could only say that the arbitration clause was substantively unconscionable if the clause was one that "no man in his senses, not under delusion would make, on the one hand, and which no fair and honest man would accept, on the other." *Smith*, 247 Conn. at 349; see *DaimlerChrysler Insurance*, 2011 U.S. Dist. LEXIS 2294, 2011 WL 66584, at *8. The Court is not persuaded that the three features Plaintiffs object to -- even taken together, and even assuming that Defendants had not agreed to waive enforcement of two of the three features -- render the arbitration clause so unfair that no sensible person would make it and that no fair and honest person would accept it.

Plaintiffs have [*50] not cited any cases in which the Connecticut Supreme Court, applying Connecticut law, has suggested that collective action or class action waivers, cost- or fee-shifting provisions, or provisions shortening the statute of limitations, whether or not they are part of an arbitration clause, might be substantively unconscionable. In addition, Plaintiffs have not cited any case in which the Connecticut Supreme Court or the Connecticut Appellate Court, applying Connecticut law, has struck down either some portion of any arbitration agreement or an entire arbitration agreement as substantively unconscionable. Indeed, in the only case the Court knows of in which the Connecticut Supreme Court considered whether an arbitration agreement was substantively unconscionable, the Connecticut Supreme Court applied New York contract law and concluded that the agreement at issue was not substantively unconscionable. See *Hottle v. BDO Seidman LLP*, 268 Conn. 694, 719-21, 846 A.2d 862 (2004). In the absence of any controlling ruling from the Connecticut Supreme Court, this Court must make an attempt to discern how the Connecticut Supreme Court would rule, "after giving proper regard to relevant rulings of other courts [*51] of the State." *Lander v. Hartford Life & Annuity Insurance Co.*, 251 F.3d 101, 119 (2d Cir. 2011).

The portions of Plaintiffs' briefs discussing substantive unconscionability are filled with references to cases involving other states' contract law, see, e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25, 60 (1st Cir. 2006) (discussing California contract law), but virtually devoid of any references to cases involving Connecticut law and cases decided by Connecticut courts. Plaintiffs have not cited any Connecticut Appellate Court cases at all in

support of their substantive unconscionability argument. The only Connecticut Superior Court decision Plaintiffs rely on is *Van Voorhies*, a case in which the parties chose California law as the governing substantive law. See 2010 Conn. Super. LEXIS 2256, 2010 WL 3961297 at *3. The *Van Voorhies* court explicitly applied the California Supreme Court's ruling that "a mandatory arbitration clause in an employment agreement could not require an employer and an employee to share costs," and that arbitration agreements containing such requirements are substantively unconscionable. *Id.* at *6 (citing *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 110-11, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000)).

While [*52] California courts have tended to look upon arbitration agreements with disfavor, see *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 153, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005); *Armendariz*, 24 Cal. 4th at 110-11, in Connecticut, "arbitration is a favored procedure" because it is "intended to avoid the formalities, the delay, the expense and the vexation" that are usually associated with ordinary litigation. *Waterbury Teachers Association v. City of Waterbury*, 164 Conn. 426, 434, 324 A.2d 267 (1973). Connecticut's preference for arbitration is even embodied in a statute that tracks the language of the FAA. See Conn. Gen. Stat. § 52-409. The three features of the arbitration agreement that Plaintiffs object to -- the collective action and class action waiver, the cost- and fee-shifting provision, and the provision shortening the statute of limitations -- all have a general tendency to reduce the formalities, the delays, the expenses, and the vexation associated with ordinary litigation. That is, they further the very goals that make arbitration a favored procedure in Connecticut. See *Waterbury Teachers Association*, 164 Conn. at 434; cf. *AT&T Mobility*, 131 S. Ct. at 1749 ("The point of affording parties discretion in designing arbitration [*53] processes is to allow for efficient, streamlined procedures tailored to the type of dispute."). It may be true that under the particular circumstances here, the features of the arbitration clause make it more difficult or less attractive for Plaintiffs to pursue their claims against Defendants. See *American Express II*, 634 F.3d at 188. But under different circumstances that are not before the Court -- after all, the arbitration clause applies to all disputes between exotic dancers and the Clubs, not just wage and hour disputes -- those features might well benefit the dancers, rather the Clubs. The arbitration clause at issue here is not substantively unconscionable.

If the Court were to accept Plaintiffs' argument that the arbitration clause is substantively and procedurally unconscionable as a matter of Connecticut law, the Court would have to confront a problem that the parties did not brief and did not address at oral argument. As the Court

has already discussed, the Connecticut Supreme Court has never indicated that collective action and class action waivers, cost- and fee-shifting provisions, or provision shortening the statute of limitations can render an arbitration agreement unenforceable. [*54] But the California Supreme Court held in *Discover Bank v. Superior Court* that class action waivers can render arbitration agreements invalid as a matter of state law under some circumstances. See 36 Cal. 4th at 153. However, in *AT&T Mobility*, the United States Supreme Court concluded that California's *Discover Bank* rule is not a "ground[.] . . . exist[ing] at law or in equity for the revocation of any contract." *AT&T Mobility*, 131 S. Ct. at 1745. The United States Supreme Court reasoned that the *Discover Bank* rule embodied "a doctrine normally thought to be generally applicable," but that had "been applied in a fashion that disfavors arbitration." *Id.* at 1747. Thus, the United States Supreme Court held that *Discover Bank* rule was preempted by the FAA. See *id.* at 1753.⁸

8 In *Fensterstock v. Education Finance Partners*, the Second Circuit held that the FAA did not preempt California's *Discover Bank* rule. See *Fensterstock*, 611 F.3d at 134. *AT&T Mobility* thus directly overruled the Second Circuit's holding in that case. See 131 S. Ct. at 1753.

If the Court were to conclude -- based on nothing more than a guess, as the Connecticut Supreme Court has never considered the issue -- that arbitration [*55] agreements that include collective action and class action waivers, cost- and fee-shifting provisions, provision shortening the statute of limitations, or some combination of the three, are unconscionable as a matter of Connecticut law, it would be incumbent upon this Court to consider the United States Supreme Court's preemption analysis in *AT&T Mobility*. See 131 S. Ct. at 1746-1753. Such a state law rule, if it existed, might well be preempted by the FAA. See *id.* at 1749 ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as embodying a national policy favoring arbitration, and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." (quotation marks, alterations, and citations omitted)); *Day v. Persels & Associates*, No. 8:10cv2463-T-33TGW, 2011 U.S. Dist. LEXIS 49231, 2011 WL 177300, at *5, *7 (M.D. Fla. May 9, 2011); *Zarandi v. Alliance Data Systems Corp.*, No. CV 10-8309 DSF (JCG), 2011 WL 1827228, at *2 (C.D. Cal. May 9, 2011). It is not necessary for the Court to consider whether the FAA would preempt Connecticut law to the extent that it required [*56] invalidation of an arbitration agreement like the one at issue in this case, since the Court has no reason whatsoever to believe that the

Connecticut Supreme Court would invalidate such an agreement.

The Court notes that at oral argument, Plaintiffs' counsel conceded the reasoning of *AT&T Mobility* indicates that federal law trumps state substantive unconscionability principles as applied to arbitration agreements, but suggested that the decision does not impact state procedural unconscionability principles. But the *AT&T Mobility* decision explicitly refuses to draw the distinction Plaintiffs' counsel suggests. See *131 S. Ct. at 1749* (reasoning that the federal policy favoring arbitration agreements cannot be displaced by either substantive or procedural unconscionability principles). To the contrary, this Court reads the *AT&T Mobility* decision as casting significant doubt on virtually any "device [or] formula" which might be a vehicle for "judicial hostility toward arbitration." *Id. at 1747*.

2.

While the "generally applicable contract defenses," *Rent-A-Center*, *130 S. Ct. at 2776*, that permit this Court to invalidate an arbitration agreement are usually state law defenses, federal courts [*57] have also developed a federal common law regarding the enforceability of arbitration agreements, purportedly under the auspices of the FAA. See, e.g., *American Express II*, *634 F.3d at 188* (evaluating "the enforceability of . . . class action waivers under the federal substantive law of arbitrability"). Relying on that body of federal common law, Plaintiffs argued that the arbitration agreement at issue here is unenforceable because it imposes prohibitively expensive costs on them, thus precluding them from vindicating their federal statutory rights under the FLSA. See *id. at 197*. Though they further argue that the agreement is unenforceable because of its cost- and fee-shifting provision and its statute of limitations provision, see *Ragone*, *595 F.3d at 125-26*, Defendants have now agreed not to enforce those two provisions. See Notice [doc. # 52].

There is considerable uncertainty surrounding the precise metes and bounds of the federal common law of arbitrability. As the Court explains below, the notion that there is such a thing as a federal common law of arbitrability emerged from language two United States Supreme Court cases. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, *473 U.S. 614*, *105 S. Ct. 3346*, *87 L. Ed. 2d 444* (1985); [*58] *Green Tree Financial*, *531 U.S. at 90*. The Second Circuit followed the latter case for the first time in *In re American Express Merchants' Litigation ("American Express I")*, *554 F.3d 300* (2d Cir. 2009), vacated and remanded, a decision that the United States Supreme Court subsequently vacated. See *American Express Co. v. Italian Colors Restaurant ("Italian Colors")*, *130 S. Ct. 2401*, *176 L. Ed. 2d 920* (2010). On remand, the Second Circuit reaffirmed its

earlier decision, despite an intervening United States Supreme Court case, see *Stolt-Nielsen*, *130 S. Ct. at 1764*, that arguably cast doubt on some elements of the federal common law theory as articulated in the Second Circuit's earlier decision. See *American Express II*, *634 F.3d at 191*. After *American Express II*, the United States Supreme Court decided yet another case that calls at least some aspects of the federal common law of arbitrability theory into further doubt. See *AT&T Mobility*, *131 S. Ct. at 1740*. Because of the uncertainty surrounding the precise boundaries of the theory, the Court will discuss the development of that theory in the United States Supreme Court and in the Second Circuit below, even though Defendants' recent concession, see Notice [*59] [doc. # 52], renders it unnecessary for the Court to reach some of the most difficult issues in this case.

a.

At one time, following the Second Circuit's decision in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, *391 F.2d 821* (2d Cir. 1968), "the Courts of Appeal . . . uniformly held that the rights conferred by the antitrust laws were of a character inappropriate for enforcement by arbitration." *Mitsubishi Motors*, *473 U.S. at 620-21* (quotation marks and citation omitted). But in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the United States Supreme Court disapproved the *American Safety* doctrine -- at least in the international arbitration context, as the case involved an international arbitration -- and established a new framework for determining whether "Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum." *Id. at 628*.

Under the *Mitsubishi Motors* framework, federal statutory claims are generally arbitrable unless Congress's intention to protect against waiver of the right to litigate in court is "deducible from [the statute's] text or legislative history." *Id.*; see also *Gilmer v. Interstate/Johnson Lane Corp.*, *500 U.S. 20*, *26*, *111 S. Ct. 1647*, *114 L. Ed. 2d 26* (1991) [*60] (providing that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of particular statutory claims). Applying its new framework in *Mitsubishi Motors*, the United States Supreme Court determined that Congress did not intend to preclude arbitration of antitrust claims. See *473 U.S. at 628*. The Second Circuit has applied the *Mitsubishi Motors* statutory interpretation framework in numerous cases. See, e.g., *JLM Industries*, *387 F.3d at 181* (holding that Congress did not intend to preclude arbitration of horizontal price-fixing antitrust claims).

While *Mitsubishi Motors* primarily provides a test for determining whether Congress intended to preclude

arbitration of specific statutory claims, a single footnote in *Mitsubishi Motors* suggests that federal courts might in some circumstances have power to strike down arbitration agreements even absent any evidence of congressional intent to preclude arbitration. See 473 U.S. at 637 n.19. That single footnote provides that "in the event [that] choice-of-forum and choice-of-law clauses [in an arbitration agreement] operated in tandem as a prospective waiver of a party's right to pursue [*61] statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." 473 U.S. at 637 n.19. The statement in that footnote was a dictum, in that it was in no way necessary to resolve the case. See *Piscotano v. Murphy*, No. 3:04cv682 (MRK), 2005 U.S. Dist. LEXIS 17140, 2005 WL 1424394, at *3; see also *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 64 n.19, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989) (noting that "however helpful it might be . . . to adjudge every pertinent statutory and constitutional issue" that could arise in the application of a decision, a court "cannot properly reach out and decide matters not before" it).

The United States Supreme Court's statement in the *Mitsubishi Motors* footnote does not specify whether the source of law that could permit a court to strike down such an agreement is state contract law -- in that case, the Puerto Rico's contract law -- or some federal law source. See 473 U.S. at 621. In addition, it does not specify whether it sets forth a generally-applicable rule, or one whose application is limited to the antitrust context. See *id.* at 637 n.19. As a result, in the years after *Mitsubishi Motors*, some federal courts read the statement in the footnote [*62] extremely narrowly, and in some cases even went so far as to disregard it altogether. See, e.g., *Richards v. Lloyd's of London*, 135 F.3d 1289, 1295 (9th Cir. 1998) (en banc) ("Without question this case would be easier to decide if this footnote in *Mitsubishi* had not been inserted. Nevertheless, we do not believe dictum in a footnote regarding federal antitrust law outweighs the extended discussion and holding in *Scherk* on the validity of clauses specifying the forum and applicable law."). Initially, the Second Circuit was one of the courts that seemed to disregard the *Mitsubishi Motors* footnote altogether. See *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 851 (2d Cir. 1987) ("[A]fter *Mitsubishi*, 'determining statutory claims to be nonarbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible.'" (citation omitted)).

However, six years after it first stated that *Mitsubishi Motors* absolutely forbids the use of broad public policy considerations to strike down arbitration agreements, see *id.*, the Second Circuit relied for the first time on the *Mitsubishi Motors* footnote. In *Roby v. Corpora-*

tion of Lloyd's, 996 F.2d 1353 (2d Cir. 1993), [*63] the Second Circuit cited the *Mitsubishi Motors* footnote as setting forth a generally-applicable federal law rule permitting federal courts to strike down an arbitration agreement that, in effect, served as a prospective waiver of federal statutory rights. See *id.* 1364. Although the Second Circuit did not ultimately invalidate the arbitration agreement at issue in that case, it did indicate "concern[] . . . that the clauses [in the agreement] may operate 'in tandem' as a prospective waiver of the statutory remedies for securities violations." *Id.*

The United States Supreme Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. at 79, appears to have vindicated the Second Circuit's latter view, at least in part. One of the two questions presented in *Green Tree Financial* was "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs." *Id.* at 82. The United States Supreme Court answered that question in the negative. See *id.* However, the United States Supreme Court also noted that "the existence of large arbitration costs could preclude [*64] a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90. Thus, the United States Supreme Court indicated at the end of its decision that a party could avoid arbitration by showing a "likelihood of incurring" prohibitive costs in arbitration. See *id.* at 92.

As a technical matter, the standard that the United States Supreme Court set forth in the closing paragraphs of its decision in *Green Tree Financial* was also dicta, as it contemplated alternative circumstances that were not presented in the case. See, e.g., *National Aeronautics and Space Administration v. Nelson*, 131 S. Ct. 746, 751, 178 L. Ed. 2d 667 (2011) (assuming, without deciding, that the Constitution protects a right to informational privacy). The plaintiff in *Green Tree Financial*, who alleged violations of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq. among other statutes, had not introduced any materials into the record to show that arbitration would be prohibitively expensive. See *Green Tree Financial*, 531 U.S. at 91. But "as the Second Circuit has recognized, there is dicta and then there is dicta." *Piscotano*, 2005 U.S. Dist. LEXIS 17140, 2005 WL 1424394, at *3 (citing *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975)). [*65] Unlike the single footnote in *Mitsubishi Motors*, the carefully constructed standard set forth in *Green Tree Financial* is obviously designed to guide lower courts' resolution of arbitrability questions, and thus constitutes a judicial dictum that lower courts have no choice but to follow. See *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975). All the Courts of Appeal have appropriately adopted that standard. See *Hill v. Ri-*

coh Americas Corp., 603 F.3d 766, 780 (10th Cir. 2010); *American Express I*, 554 F.3d at 315-16; *E.E.O.C. v. Woodmen of World Life Insurance Society*, 479 F.3d 561, 566 (8th Cir. 2007); *Kristian v. Comcast Corp.*, 446 F.3d 25, 51 (1st Cir. 2006); *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259 (11th Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 659-60 (6th Cir. 2003); *Investment Partners, LP v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 (5th Cir. 2002); *McCaskill v. SCI Management Corp.*, 285 F.3d 623, 626 (7th Cir. 2002), rehearing granted and vacated, 298 F.3d 677 (7th Cir. 2002); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 607 (3d Cir. 2002); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002); *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 708, 345 U.S. App. D.C. 358 (D.C. Cir. 2001); [*66] *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556-57 (4th Cir. 2001).

The Second Circuit was one of the last of the federal Courts of Appeal to follow the *Green Tree Financial* standard. See *American Express I*, 554 F.3d at 315-16. *American Express I* involved a contract between a major credit card company and the merchants whose businesses accepted the card. See *id.* at 301. The arbitration clause in the contract between the credit card company and its merchant contained a provision purporting to waive the merchants' rights to pursue class actions against the credit card company. See *id.* The merchants nonetheless attempted to sue the credit card company in federal court for antitrust violations, and the Second Circuit concluded that the class action waiver provision in the arbitration agreement was unenforceable as a matter of federal common law. See 554 U.S. at 320.

Much of the Second Circuit's reasoning in *American Express I* involved a straightforward application of the *Green Tree Financial* standard. The Second Circuit reasoned that the United States Supreme Court's decision in *Green Tree Financial* was controlling, to the extent that it stated "that when a party seeks [*67] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *American Express I*, 554 F.3d at 315 (quotation marks and citation omitted). The evidence in the record indicated that the costs of an individual arbitration, including the cost of retaining expert witnesses, could exceed \$1 million, and that no individual plaintiff's treble damages would exceed \$40,000. See *id.* at 317. Moreover, the Second Circuit reasoned, it did not appear that the arbitration procedures would permit any plaintiff to recover expert witness fees. See *id.* at 318. Although attorney fees were available to a prevailing plaintiff under the antitrust laws, a plaintiff could not be assured of victory and thus needed to "include the risk of losing . . .

in [its] evaluation of the[] suit's potential costs." *Id.* The Second Circuit concluded based on that evidence that the plaintiffs had satisfied their burden under *Green Tree Financial*. See *id.* at 316-17.

In some respects, however, the Second Circuit's reasoning in *American Express I* went farther than the United States Supreme Court's reasoning [*68] in *Green Tree Financial*. The final pages of the decision include a section entitled "Two Caveats." *Id.* at 320. In that section, the Second Circuit indicated that, in determining whether a class action waiver provision in an arbitration agreement is or is not enforceable, federal courts should look to a wide variety of circumstances "includ[ing], but . . . not limited to, the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect that waiver will have on a company's ability to engaged in unchecked market behavior, and related public policy concerns." *American Express I*, 554 F.3d at 320 (quoting *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007)). The Second Circuit indicated in its reasoning that the need to consider broad "public policy" issues was particularly pressing in the antitrust context, citing the United States Supreme Court's footnote in *Mitsubishi Motors*. See *American Express I*, 554 F.3d at 319. But while that portion of the decision [*69] contains repeated references to antitrust-related concerns, it is not entirely clear that the Second Circuit intended its reasoning to be limited to the antitrust context.

While the Second Circuit concluded in *American Express I* that the class action waiver provision in the contract was not enforceable, it declined to decide whether its invalidation of that specific provision required invalidation of the entire arbitration clause. The Second Circuit reasoned that it did not need to determine whether the class action waiver provision was severable from the arbitration agreement since the defendants had indicated before the district court judge that they might not seek to enforce the arbitration agreement in the event that a court were to strike down the class action waiver provision. See *id.* at 321. Thus, the Second Circuit resolved the appeal by remanding the case to the district court in order to permit the defendants to voluntarily withdraw their motion to compel arbitration. See *id.* at 321.

In *Ragone*, a decision that came only a few months after *American Express I*, the Second Circuit expanded even further on that earlier decision's reasoning. See *Ragone*, 595 F.3d at 125-26. *Ragone* [*70] was an employment discrimination case in which the plaintiff asserted both federal and state law claims against a televi-

sion studio. *See id.* at 117. The plaintiff's employment contract with the studio contained an arbitration clause that included a provision requiring the plaintiff to file a demand for arbitration within ninety days after any claim she might have against the studio accrued. *See id.* at 123. It also contained a provision requiring that attorney's fees be awarded to the prevailing party in any arbitration. *See id.* at 119. The plaintiff argued that those two provisions, among others, made the arbitration clause unconscionable and therefore unenforceable under New York law. *See id.* at 118.

The Second Circuit declined to decide whether the two offending provisions did or did not make the arbitration clause unconscionable because the employer had agreed not to enforce those two provisions in arbitration. *See id.* at 124 ("We believe that New York law would allow for the enforcement of the arbitration agreement as modified by the defendants' waivers."). Nevertheless, just as the final pages of the Second Circuit's decision in *American Express I* included a "Two Caveats" section, [*71] 554 F.3d at 320, the final pages of the Second Circuit's decision in *Ragone* included a similar section entitled "A Note of Caution." 595 F.3d at 125.

In that section in *Ragone*, the Second Circuit indicated that it agreed to require arbitration "with something less than robust enthusiasm." *Id.* The Second Circuit cited the United States Supreme Court's *Mitsubishi Motors* footnote, and reasoned that the federal common law of arbitrability empowered federal courts to strike down as contrary to federal policy any arbitration agreement that effectively served as a prospective waiver of any party's right to pursue statutory remedies. *See Ragone*, 595 F.3d at 125. Second Circuit explained that it had applied "these principles" in *American Express I*. *Ragone*, 595 F.3d at 125. While the portions of *American Express I* decision that had discussed the *Mitsubishi Motors* footnote contained some indications that the Second Circuit's decision was justified by specifically anti-trust-related concerns, *see American Express I*, 554 F.3d at 319, *Ragone* did not involve any antitrust claims. The Second Circuit explained that the concerns expressed in the *Mitsubishi Motors* footnote and in *American Express I* applied [*72] equally in the context of Title VII claims. *See Ragone*, 595 F.3d at 125-26.

The Second Circuit strongly indicated that if the television studio had not agreed to waive enforcement of the two offending provisions, it might well have invalidated the arbitration clause in the plaintiff's employment contract. *See id.* at 125 ("Had the defendants attempted to enforce the arbitration agreement as originally written it is not clear that we would hold in their favor."). The Second Circuit explained that "the arbitration agreement signed by *Ragone* includes both a ninety-day statute of limitations for filing an arbitration claim and a

fee-shifting provision that requires that fees be awarded to the prevailing party." *Id.* at 125-26. The Second Circuit expressed tentative agreement with the plaintiff that the two provisions, taken together, "would significantly diminish a litigant's rights under Title VII." *Id.* at 126. It indicated that "had defendants not waived enforcement, it is at least possible" that it would have voided the entire arbitration agreement as inconsistent with the FAA. *Id.*

In spite of the Second Circuit's hint to the defendants in *American Express I*, the defendants in *American Express I* [*73] decided not to voluntarily withdraw their motion to compel arbitration. Instead, they petitioned the United States Supreme Court for a writ of certiorari. *See* Petition for Writ of Certiorari, *Italian Colors*, 130 S. Ct. at 2401, 176 L. Ed. 2d 920, 2009 WL 1511739, at *1. In their petition, they argued that the Second Circuit's decision was contrary to *Green Tree Financial*, which permits nothing more than an inquiry into any costs that are unique to arbitration, "such as the need to pay an arbitrator's potentially significant fees." 130 S. Ct. 2401, 176 L. Ed. 2d 920, [WL] at *18. Instead, the Second Circuit's decision rested on the amount of attorney fees and expert fees that would be needed for a plaintiff to prevail, which a plaintiff would of course incur either in court or before an arbitrator. *See id.*

In the meantime, after the Second Circuit issued its decisions in *American Express I* and *Ragone*, but while the *American Express I* defendants' petition for a writ of certiorari was pending, the United States Supreme Court issued a decision in *Stolt-Nielsen*. *See* 130 S. Ct. at 1758. The issue in that case was whether a court could require parties to arbitrate claims on a class basis when they had not explicitly agreed [*74] to do so. *See id.* at 1764. The United States Supreme Court held that it is impermissible to impose class arbitration on parties when their arbitration agreements are silent as to that issue. *See* 130 S. Ct. at 1775. In other words, the *default position* when parties agree to arbitration is that they agree only to individual, rather than to class-wide, arbitration.

It is possible to read *Stolt-Nielsen* as rather strongly indicating that arbitration agreements that contain class action waiver provisions are fully enforceable under federal law. The plaintiffs in *Stolt-Nielsen* had argued before the arbitrators that an agreement to use class action procedures should be inferred from the parties' arbitration agreement, since an arbitration agreement that did not so provide would be either void against public policy or unconscionable. *See id.* at 1768. The arbitrators' decision to infer such a provision appeared to have rested on the plaintiffs' public policy argument -- although, as the United States Supreme Court later pointed out, the arbitrators did not specify the ground of their decision, nor whether it rested on federal law or state law. *See id.* at 1768. Contrary to that decision, the United [*75] States

Supreme Court reasoned that parties who agree to arbitration may freely elect to limit available arbitration procedures, and that courts and arbitrators alike must honor such agreements. *See id.* at 1774-75.

In light of the intervening decision in *Stolt-Nielsen*, the United States Supreme Court granted the *American Express I* defendant's petition for a writ of certiorari, and vacated and remanded the Second Circuit's *American Express I* decision for further consideration. *See Italian Colors*, 130 S. Ct. at 2401. However, before the Second Circuit had an opportunity to reconsider its *American Express I* decision, the Second Circuit decided another arbitration-related case in which it read *Stolt-Nielsen's* holding very narrowly. *See Fensterstock*, 611 F.3d at 124.

Fensterstock was the first case in which the Second Circuit had an opportunity to construe the meaning of the United States Supreme Court's decision in *Stolt-Nielsen*. *See* 611 F.3d at 140. *Fensterstock* was a diversity case, involving California law claims that a lender engaged in fraudulent and deceptive practices in connection with student loan servicing. *See id.* at 127. Applying the same California contract law that the United [*76] States Supreme Court found to be preempted by the FAA in *AT&T Mobility*, *see Discover Bank*, 36 Cal. 4th at 156, the Second Circuit found that a clause in the student loan contract's arbitration agreement waiving the right to proceed via class action was unconscionable. *See Fensterstock*, 611 F.3d at 138.⁹

9 As the Court previously noted, *AT&T Mobility* directly overruled the Second Circuit's holding in *Fensterstock* that the FAA did not preempt the *Discover Bank* rule. *See Fensterstock*, 611 F.3d at 134.

Having struck down the class action waiver provision at issue in the case as a matter of California contract law, the Second Circuit turned to the single issue that it had left unresolved in *American Express I*, 554 F.3d at 321: if a court invalidated a provision in an arbitration clause that forbade the use of a class action mechanism, could the arbitration clause itself survive? *See Fensterstock*, 611 F.3d at 140. Or, in other words, could the class action waiver provision be severed from the arbitration clause? *See id.* The Second Circuit concluded that *Stolt-Nielsen*, 130 S. Ct. at 1758, provided a clear answer. *See Fensterstock*, 611 F.3d at 140.

The Second Circuit reasoned that *Stolt-Nielsen* [*77] stood for the proposition that "the FAA embodies a preference not so much for arbitration as for the enforcement of arbitration agreements." *Fensterstock*, 611 F.3d at 141. If parties have agreed to individual arbitration only, but their agreement to forego class proceedings

is unenforceable as a matter of law, the parties cannot be forced to proceed to arbitration on a class basis. *See id.* at 140. Thus, the Second Circuit reasoned, *Stolt-Nielsen* required that the entire arbitration clause be invalidated because of that single offending provision. *See id.* at 141.

The Second Circuit's decision on remand in *American Express II* took its cue from *Fensterstock*. After reconsidering its decision in light of *Stolt-Nielsen*, the Second Circuit panel that decided *American Express I* reaffirmed its earlier decision. *See American Express II*, 634 F.3d at 194.¹⁰ Specifically, the Second Circuit reasoned:

Stolt-Nielsen states that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so. It does not follow, as Amex argues, that a contractual clause barring class arbitration is *per se* enforceable. Indeed, our prior holding focused not on whether the plaintiffs' [*78] contract provides for class arbitration, but on whether the class action waiver is enforceable when it would effectively strip plaintiffs of their ability to prosecute alleged antitrust violations.

634 F.3d at 193-94. According to the Second Circuit, then, the only effect *Stolt-Nielsen* had was to "alter what relief t[he court could] order." *Id.* at 199. The Second Circuit reaffirmed its conclusion that the merchant plaintiffs had carried their burden of showing that they were likely to incur prohibitive costs if they were required to pursue their extremely low-value antitrust claims against the credit card company defendant by way of individual arbitrations, again citing *Green Tree Financial*, 531 U.S. at 90, and *Mitsubishi Motors*, 473 U.S. at 637. *See American Express II*, 634 F.3d at 197.

10 To be precise, only two of the three Second Circuit judges who decided *American Express I* participated in the case on remand, as then-Judge Sonia Sotomayor was a member of the original panel before she became an Associate Justice. *See American Express II*, 634 F.3d at 188 n.1.

The reasoning of *American Express II* is just as expansive as the reasoning of *American Express I*. Like *American Express I*, *see* [*79] 554 F.3d at 319, *American Express II* favorably cites the *Mitsubishi Motors* footnote for the broad proposition that the procedures available under a particular arbitration agreement may implicate general federal "public policy" concerns and require invalidation of the arbitration agreement. *See American Express II*, 634 F.3d at 197. It specifically

repudiated the argument that "*Stolt-Nielsen* . . . rejects the use of public policy as a basis for finding contractual language void." *Id.* at 199. *American Express II* also expressly provides that "[t]he two caveats we articulated in our original opinion still apply." *Id.*

b.

The United States Supreme Court has not overruled *American Express II*, *Ragone*, or any of the other cases adopting as a federal common law rule that courts may refuse to enforce arbitration agreements when, under the circumstances, they prevent plaintiffs from effectively vindicating their federal statutory rights. *See Green Tree Financial*, 531 U.S. at 90. It has never expressly called into doubt either its *Mitsubishi Motors* footnote or its reasoning and statements in *Green Tree Financial*. Furthermore, the Second Circuit has never cast any doubt on the continuing validity of [*80] *American Express II* or *Ragone*. Nevertheless, it would not be appropriate to ignore the impact that the United States Supreme Court's recent decision in *AT&T Mobility*, 131 S. Ct. at 1740, may have on the validity of *American Express II* and other lower court cases that have relied on the federal common law of arbitrability to invalidate arbitration agreements.

AT&T Mobility contains the most thorough analysis the United States Supreme Court has yet provided regarding the meaning of 9 U.S.C. § 2, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* As set forth in *AT&T Mobility*, that provision was designed to overcome the "judicial hostility towards arbitration . . . [that] had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration *against public policy*." 131 S. Ct. at 1747 (emphasis added). As such, the United States Supreme Court construed the provision to "permit[] agreements to arbitrate to be invalidated by generally applicable contract defenses . . . but not by defenses that apply only to arbitration or that derive their [*81] meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746 (quotation marks and citation omitted).

As the Court has already discussed, the United States Supreme Court's holding in *AT&T Mobility* was quite limited. The precise question presented in the case was whether California's *Discover Bank* rule, which "classif[ie]d most collective-arbitration waivers in consumer contracts as unconscionable" was preempted by the FAA. *Id.* The United States Supreme Court ultimately held that that California's *Discover Bank* rule was preempted -- even though it appeared on its face to be a generally applicable contract law rule -- because it was

"applied in a fashion that disfavor[ed] arbitration." *Id.* at 1747. "

11 As commentators have already pointed out, the United States Supreme Court's interpretation of the FAA in *AT&T Mobility* is just that -- an interpretation of a statute. Editorial, *Carving Out Class-Action Exceptions*, L.A. Times, May 17, 2011, <http://www.latimes.com/news/opinion/opinionla/a-ed-classaction-20110517,0,7127456.story>. Congress is free to override the United States Supreme Court's interpretation of the FAA if it wishes to do so.

The Court recognizes that the United [*82] States Supreme Court's holding in *AT&T Mobility* only implicated federal preemption of a particular state law rule. But the Court knows of no principled reason why federal law rules that have essentially the same purpose and effect as the *Discover Bank* rule would continue to be permissible after *AT&T Mobility*. *See id.* at 1753 ("The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even it is desirable for unrelated reasons." (citation omitted)); *id.* at 1760 (Breyer, J., dissenting) (describing the *Discover Bank* rule as a means of ensuring that "small-dollar claimants [do not] abandon their claims rather than . . . litigate"). It is at least arguable that after *AT&T Mobility*, the federal common law of arbitrability standards set forth in *American Express II* and other cases may require some modification to ensure that they will not be "applied in a fashion that disfavors arbitration." *Id.* at 1747.

That said, there are some caveats in the United States Supreme Court's decision in *AT&T Mobility* that could conceivably be read as vindicating [*83] decisions like *American Express II*. To be clear, none of the three opinions in *AT&T Mobility* cites either *Green Tree Financial* or the *Mitsubishi Motors* footnote. That said, in response to the dissenters' argument that class proceedings were necessary under the circumstances presented in the case to allow the plaintiffs to prosecute their small-dollar claims, *see AT&T Mobility*, 131 F.3d at 1760-61 (Breyer, J., dissenting), the majority expressly pointed out that the claim at issue in the case was "unlikely to go unresolved" if the arbitration agreement was enforced. *Id.* at 1753.

c.

This Court has doubts about the continuing validity of *Ragone*. Because the Second Circuit decided that case before the Supreme Court's decisions in *Stolt-Nielsen* and *AT&T Mobility*, the panel that decided the appeal in that

case did not have the benefit of the Supreme Court's reasoning in those two cases. However, the Court remains obligated to follow *Ragone* here, and *Ragone* could hardly be any clearer. It strongly indicates that when a plaintiff seeks to vindicate federal statutory rights, an arbitration clause that both requires the plaintiff to pay the defendants' costs and fees if she does not prevail and [*84] contractually shortens the statute of limitations on the plaintiff's federal law claim cannot be enforced. See *Ragone*, 595 F.3d at 125. Unless and until either the Second Circuit or the United States Supreme Court disavows that strong indication, this Court will continue to follow it.

Furthermore, even if *Ragone* did not indicate that those two provisions, when combined, can have the effect of preventing a plaintiff from vindicating important federal statutory rights, this Court would likely hold that the FLSA's statute of limitations cannot be contractually shortened. As the Ninth Circuit has recognized in a line of cases that this Court finds persuasive, the FLSA's statute of limitations provision, see 29 U.S.C. § 255, is part and parcel of a federally-guaranteed substantive right. See *David v. O'Melveny & Myers*, 485 F.3d 1066, 1077 (9th Cir. 2007); *Graham Oil Co. v. Arco Products Co.*, 43 F.3d 1244 (9th Cir. 1994). No business may require a worker -- regardless of how that worker is classified -- to forfeit that federally-guaranteed right as a precondition of employment. Thus, even absent the Second Circuit's guidance in *Ragone*, this Court very likely would invalidate the statute of [*85] limitations provision in the arbitration agreement, at least insofar as that provision shortens the statute of limitations on federal statutory claims such as FLSA claims. In light of the broad severability clause in the Lease, see Tab 1 to First Genna Decl. [doc. # 13-1] at 8, however, the Court would likely sever that particular provision from the arbitration clause instead of striking down the entire arbitration clause as contrary to federal law.

In any event, however, Defendants have unconditionally conceded that they will not seek to enforce either the cost- and fee-shifting provision or the statute of limitations provision in the Lease. See Notice [doc. # 52]. *Ragone* holds that when a defendant agrees not to enforce such offending provisions, a district court may require arbitration in light of the defendant's concession. See 595 F.3d at 125 (finding that an arbitration agreement was enforceable "as modified by the defendants' waivers" as to the various objectionable features of the agreement); see also *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 300 (5th Cir. 2004) (finding that a plaintiff's objection to a fee-shifting provision in an arbitration clause was [*86] mooted by the defendant's agreement to pay the costs of arbitration). There is thus no risk whatsoever that either Ms. D'Antuono or Ms.

Vilnit will be required to bear Defendants' arbitration costs, see *Carter*, 362 F.3d at 300, and no risk that their claims will be dismissed due to the fact that it has been more than six months since either Ms. D'Antuono or Ms. Vilnit performed at the Clubs.

Plaintiffs' counsel believes that Defendants should be required to make their concession with regard to every exotic dancer who ever signed the Lease. See Mot. for Clarification [doc. # 53] at 1-2. Plaintiffs' counsel also suggests that this Court should issue a notice to other exotic dancers so that they may attempt to intervene in this case before the Court decides Defendants' pending motion. See *id.* at 2. The Court believes that Plaintiffs' counsel's position is inconsistent with *Ragone*, which also appears to have involved a form employment contract. See 595 F.3d at 118. Neither the *Ragone* district court, see *Ragone v. Atlantic Video at Manhattan Center*, No. 07cv6084 (JGK), 2008 U.S. Dist. LEXIS 66369, 2008 WL 4058480 (S.D.N.Y. Aug. 29, 2008), nor the Second Circuit indicated that before deciding whether particular provisions [*87] in a form contract are or are not enforceable, every other person with an interest in the enforceability of those provisions must be given an opportunity to intervene and receive the benefit of a binding concession from the defendant. Furthermore, there is no basis for Plaintiffs' suggestion that the Court should send a notice to "class members" to allow them to "opt into the case." Mot. for Clarification [doc. # 53] at 2. In the section below, the Court concludes that the collective and class action waiver provision of the Lease is valid and enforceable. Thus, there are no missing "class members," *id.*, and other exotic dancers who signed the Lease do not have any right to "opt into" this case. *Id.*

That said, the Court's decision here is in the public record, and the Court believes that it has strongly indicated that it is *only* enforcing the arbitration clause in the Lease because of Defendants' concession. Plaintiffs' counsel is free to share the Court's decision with other exotic dancers who may wish to bring claims against Defendants, and is free to cite this Court's decision in other cases before this Court or before other district court judges. Plaintiffs' counsel is free to cite [*88] the Second Circuit's strong language in *Ragone* in any other cases she files against Defendants, although she neglected to do so in her briefs in this case. The Court hopes that in light of this decision, Defendants will agree to the same concession they eventually made in this case, even though they may not be bound to do so. The Court hopes that Defendant will not put either cost- and fee-shifting provisions or statute of limitations shortening provisions into their contracts in the future.

d.

This Court has some doubt about *American Express II* in light of *AT&T Mobility*, but again, the Court remains obligated to apply *American Express II*. The rule set forth by the Second Circuit in *American Express II* is that "a party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs." *American Express II*, 634 F.3d at 197 (quoting *Green Tree Financial*, 531 U.S. at 92). "[E]ach case which presents a question of the enforceability of a class action waiver [or other provision] in an arbitration agreement must be considered on its own merits, governed with a healthy regard [*89] for the fact that the FAA 'is a congressional declaration of a liberal federal policy favoring arbitration agreements.'" *Id.* at 199 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)).

As this Court reads *American Express II*, the decision requires this Court to inquire into whether it is economically feasible for Plaintiffs to proceed in individual arbitrations, rather than a collective or class action in federal court, given all of the procedural features that are specified in the arbitration clause in the Lease. *See* 634 F.3d at 199. In *American Express II*, "the record demonstrate[d] that the size of any potential recovery by an individual plaintiff w[ould] be too small to justify the expense of bringing an individual action." *Id.* The plaintiffs in *American Express II* submitted a detailed affidavit from an economist about the potential cost of proving their case -- including expert fees -- and the amount of potential recoveries. *See id.* at 197-98. The plaintiffs' out-of-pocket costs including expert fees would have been at least several hundred thousand dollars, and possibility over \$1 million. *See id.* at 198. The fee-shifting provisions of [*90] the federal antitrust laws would permit the plaintiffs to recover no more than a \$40 a day for expert fees. *See id.* And even assuming that the plaintiffs prevailed and were ultimately awarded treble damages, the average plaintiff's damage award would be only \$5,252, and the largest individual plaintiff's damage award would be only \$38,549. *See id.* Under those circumstances, the Second Circuit reasoned that no rational plaintiff would have agreed to arbitrate an individual antitrust claim against the defendant. *See id.*

In addition to *American Express II*, Plaintiffs rely on a recent district court decision from within the Second Circuit invalidating an arbitration agreement under the *American Express II* rule. *See Sutherland v. Ernst & Young, LLP*, F. Supp. 2d , 2011 U.S. Dist. LEXIS 26889, 2011 WL 838900 (S.D.N.Y. 2011). In *Sutherland v. Ernst & Young, LLP*, the plaintiff's potential damages were approximately \$4,000. *See* 2011 U.S. Dist. LEXIS 26889, [WL] at *4. The defendant did not dispute that

the cost of arbitration would likely exceed \$6,000 and that the plaintiffs attorney's fees would likely exceed \$160,000. *See id.* The plaintiff planned to use an expert witness who charged a \$25,000 retainer and whose total fees would likely exceed [*91] \$33,500. *See id.* Under the arbitration agreement between the plaintiff and the defendant, the arbitrator had discretion to decide whether or not to award fees and costs, and discretion to determine a reasonable amount of fees and costs. *See* 2011 U.S. Dist. LEXIS 26889, [WL] at *5-*6.

By contrast to the plaintiffs in *American Express II* and *Sutherland*, Plaintiffs here have not shown any likelihood that they will incur prohibitively high costs if this Court enforces the arbitration clause, including the provision banning collective or class actions. *See, e.g., Pomposi v. Gamestop, Inc.*, No. 3:09cv340 (VLB), 2010 U.S. Dist. LEXIS 1819, 2010 WL 147196, at *8 (D. Conn. Jan. 11, 2010). As to the size of Plaintiffs' potential recovery, Plaintiffs' counsel pleaded ignorance both in the briefing and at oral argument about the precise amounts that Ms. D'Antuono and Ms. Vilnit seek to recover, but did concede at oral argument that Ms. D'Antuono and Ms. Vilnit each seek at least \$10,000 in unpaid wages under the FLSA. That number may be low; Defendants calculate that Ms. D'Antuono and Ms. Vilnit seek significantly more than \$10,000 each, perhaps as much as \$30,000 each. *See* Defs.' Reply [doc. # 38] at 18. Because the FLSA provides for the recovery of [*92] double damages, *see* 29 U.S.C. § 216(b), each Plaintiff therefore seeks to recover at least \$20,000 on her FLSA claim alone.

Plaintiffs argue that they may not recover the full amount they seek, particularly if Defendants are able to prevail on possible counterclaims against Plaintiffs to recover fees paid directly to Plaintiffs by the Clubs' clients. But the *American Express II* test requires this Court to look into Plaintiffs "potential recovery," 634 F.3d at 199, which the Court believes means their potential recovery *assuming that they win*, rather than assuming that they lose. Presumably, Plaintiffs and their counsel believe that Defendants' counterclaims are meritless -- otherwise, it would be irrational for them to bring an action either in court or before an arbitrator, as the amount of Defendants' potential counterclaims may be much greater than the amount of damages Plaintiffs seek to recover. In addition, unlike in *Sullivan*, *see* 2011 U.S. Dist. LEXIS 26889, 2011 WL 838900, at *5-*6, the arbitration clause in the Lease explicitly permits Plaintiffs to recover their costs and attorney fees if they prevail. Thus, the Lease provides Plaintiffs with the same rights to recover costs and fees that they would have [*93] in this Court. *See* 29 U.S.C. § 216(b) (providing that in an FLSA action, the court "shall" award reasonable attorney fees and costs to any prevailing plaintiff).

As to the expense of bringing individual arbitration actions, Plaintiffs initially submitted various declarations and materials regarding the cost arbitration before the AAA, suggesting that the cost of an individual arbitration could approach \$60,000. See Tab 2 to Churchill Decl. [doc. # 26-1] at 2; Tab 1 to Liss-Riordan Decl. [doc. # 26-6]. But in their briefs and at oral argument, Defendants conceded that because this case involves employment-related claims, the AAA Employment Rules will apply. See Defs.' Reply [doc. # 38] at 14. Under the AAA Employment Rules, Defendants must bear the costs of arbitration above an initial \$175 filing fee. See Tab 1 to Genna Decl. [doc. # 39-7]; see also *Cooper v. MRM Investment Co.*, 367 F.3d 493, 513 (6th Cir. 2004) ("The AAA has . . . amended its rules . . . to hold employers responsible in the first instance for all expenses except a small filing fee and costs for the employee's witnesses. This may make it more difficult for Cooper to show [that] her likely arbitration costs are prohibitively [*94] high . . ."). In addition, because Plaintiffs do not intend to retain any expert witnesses, see Report of 26(f) Planning Meeting [doc. # 24] at 5, one of the most significant concerns that motivated the Second Circuit's decision in *American Express II* is simply not present in this case. See 634 F.3d at 198.

Thus, it appears that each Plaintiff's potential recovery is at least \$20,000 -- including double damages under the FLSA -- plus costs and attorney fees, and that each Plaintiff's total out-of-pocket costs will be only a \$175 filing fee plus attorney fees. Defendants have also conceded that they will not seek to recover fees and costs from Mr. D'Antuono and Ms. Vilnit in the event that Defendants prevail before an arbitrator. See Notice [doc. # 52]. Those facts alone are sufficient to distinguish this case from *American Express II*, where the potential individual recovery was dwarfed by the astronomical cost of litigating a complicated antitrust action. See 634 F.3d at 198-99. Under the circumstances presented here, there is no reason why a rational attorney would be unwilling to represent either Plaintiff, even if Plaintiffs' current counsel is not willing to continue to represent [*95] them. See *AT&T Mobility*, 131 S. Ct. at 1753; *Sutherland*, 2011 U.S. Dist. LEXIS 26889, 2011 WL 838900, at *6. It is true that Plaintiffs may not prevail before the arbitrator, and that Plaintiffs must take that possibility into account in evaluating the potential cost of litigation. See *American Express*, 554 F.3d at 318. But no plaintiff can ever be certain of victory, either in court or in arbitration. In all litigation, plaintiffs and their attorneys always take on a risk of spending money on litigation that they may eventually be unable to recover from any defendants. Even plaintiffs who are successful and win judgments may never be able to enforce them if the defendants later

turn out to be insolvent. Individual plaintiffs do undertake individual actions in this Court, including FLSA actions, see, e.g., *Medina v. Unlimited Sytems, LLC*, F. Supp. 2d , 2010 U.S. Dist. LEXIS 132275, 2010 WL 5253530, at *1 (D. Conn. 2010), in spite of those many obstacles.

V.

In sum, the Court concludes that there is no genuine dispute that Ms. D'Antuono and Ms. Vilnit agreed to arbitration and that Ms. Cruz did not; that the arbitration agreement in the Lease is neither substantively nor procedurally unconscionable under Connecticut law; and that in light [*96] of Defendants' concessions regarding certain provisions in the arbitration agreement and the amount of damages that Ms. D'Antuono and Ms. Vilnit seek individually, Plaintiffs cannot carry their burden under *American Express II* of showing a likelihood that requiring arbitration will deprive them of any opportunity to vindicate their federal statutory rights. See 634 F.3d at 197. For those reasons, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion to Dismiss and/or Stay this Action; to Compel Arbitration; and to Strike Class and Collective Action Allegations [doc. # 12]. The Court DENIES that motion in full with regard to Ms. Cruz's claims. The Court GRANTS that motion in part with regard to Ms. D'Antuono's and Ms. Vilnit's claims. Specifically, the Court STRIKES Ms. D'Antuono's and Ms. Vilnit's class and collective action allegations, and STAYS consideration of Ms. D'Antuono's and Ms. Vilnit's claims. See *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002).

As a result of the Court's decision, Plaintiffs' Motion for Clarification [doc. # 53] is DENIED as moot. That said, the Court has not dismissed Ms. Cruz's claim and has stayed, rather than dismissed, [*97] Ms. D'Antuono's and Ms. Vilnit's claims. This case will thus remain pending on the Court's docket. If other plaintiffs file complaints against the same Defendants in the District of Connecticut, and those plaintiffs raise substantially the same issues that are raised in this case, those plaintiffs make seek to have their complaints considered by this Court, rather than by a different judge, in the interests of justice and convenience, and also to avoid conflicting results.

Dated at New Haven, Connecticut: May 25, 2011.

IT IS SO ORDERED.

/s/ Mark R. Kravitz

United States District Judge



Cited

As of: Jul 12, 2011

MIRANDA L. DAY, Plaintiff, v. PERSELS & ASSOCIATES, LLC, et al., Defendants.

Case No. 8:10-CV-2463-T-33TGW

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

2011 U.S. Dist. LEXIS 49231

May 9, 2011, Decided

May 9, 2011, Filed

COUNSEL: [*1] For Miranda L. Day, for herself and all persons similarly situated, Plaintiff: Charles Franklin Ketchey, Jr., LEAD ATTORNEY, Trenam Kemker, Tampa, FL; Herbert Roy Donica, LEAD ATTORNEY, Donica Law Firm, PA, Tampa, FL; Katherine Earle Yanes, LEAD ATTORNEY, Kynes, Markman & Felman, PA, Tampa, FL; Thomas A. Lash, LEAD ATTORNEY, Gus M. Centrone, Lash & Wilcox, PL, Tampa, FL.

For Persels & Associates, LLC, a Maryland limited liability company, Ruther & Associates, LLC, Jimmy B. Persels, Robyn R. Freedman, Defendants: Charles Franklin Ketchey, Jr., LEAD ATTORNEY, Trenam Kemker, Tampa, FL; David Thomas Knight, LEAD ATTORNEY, Hill Ward Henderson, PA, Tampa, FL; Lara J. Tibbals, LEAD ATTORNEY, Hill Ward Henderson, PA*, Tampa, FL; Matthew A. Leish, LEAD ATTORNEY, Carlton Fields, PA, Tampa, FL.

For 3C Incorporated, a Maryland corporation doing business as Careone Credit Counseling, Freedom Point, a Maryland corporation, Ascend One Corporation, a Maryland corporation, Defendants: Brian L. Moffet, Catherine A. Bledsoe, Lawrence S. Greenwald, LEAD ATTORNEYS, Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC, Baltimore, MD; David Matthew Allen, Matthew A. Leish, LEAD ATTORNEYS, Carlton Fields, [*2] PA, Tampa, FL.

For Bernaldo Dancel, Defendant: David Matthew Allen, Matthew A. Leish, LEAD ATTORNEYS, Carlton Fields, PA, Tampa, FL.

JUDGES: THOMAS G. WILSON, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: THOMAS G. WILSON

OPINION

ORDER

THIS CAUSE came on to be heard upon the Motion to Compel Arbitration and Stay Action by defendants Ascend One Corporation, 3C Incorporated, CareOne, and Bernaldo Dancel (Doc. 25), and the plaintiff's response thereto (Doc. 50). The parties have consented in this case to the exercise of jurisdiction by a United States Magistrate Judge for the purpose of ruling on the motion (Doc. 58).

The defendants' request to compel arbitration and stay the action was incorporated into their motion to dismiss (Doc. 25). A hearing was held, and the motion to dismiss was denied as moot after the plaintiff agreed to file an amended complaint within thirty days (Doc. 67). However, the parties acknowledged that the request to compel arbitration by defendants Ascend One Corpora-

tion, 3C Incorporated, CareOne, and Bernaldo Dancel is a distinct issue that is appropriate for disposition (id.). For the following reasons, the motion will be granted.

I.

The plaintiff alleges that she enrolled in a credit counseling [*3] service program offered by defendant 3C Incorporated, doing business as CareOne, in an effort to reduce her debt balances and improve her credit (Doc. 1, ¶¶34, 36).¹ However, although the plaintiff paid \$1,274.34, the defendants disbursed no payments to her creditors and made no attempt to negotiate with her creditors, contrary to the terms of the contracts (id., ¶¶51, 66, 67). Subsequently, the plaintiff filed a voluntary petition for bankruptcy under Chapter 13 of Title 11 of the United States Code (id., ¶69). The plaintiff claims that the defendants "operate sham organizations designed to lure vulnerable victims into handing over what little money they have while Defendants are not obligated to perform any services whatsoever for the funds" (id., ¶76).²

1 CareOne, formally known as Freedom Point, is a debt management business and the subsidiary of parent company, defendant Ascend One (Doc. 1, ¶13). Defendant Bernaldo J. Dancel is the founder and Chief Executive Officer of the related Ascend One entities (Doc. 1, ¶¶13-15).

2 For purposes of this Order, the reference to "defendants" refers only to defendants CareOne, its parent (Ascend One), its affiliate (3C Inc.), and its officer [*4] (Dancel).

Filed as a class action, the plaintiff alleges, in addition to state law claims, that the defendants committed violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), §501.201, et seq., Fla. Stat., and the Credit Repair Organization Act ("CROA"), 15 U.S.C. 1679b. The defendants move to compel the plaintiff to arbitrate her claims individually because the written contract contained a binding arbitration clause which included a restriction against class actions.

II.

The defendants move to stay the action and compel the plaintiff to arbitrate her individual claims against them pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. 1, et seq. (Doc. 25, pp. 18-22). On the basis of an arbitration provision contained in the Client Agreement, the defendants contend that the parties mutually agreed to arbitrate any dispute arising out of the contractual relationship. Such a showing is essential because "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776, 177 L. Ed. 2d 403 (2010)(citation and quotation omitted).

In relevant part, the FAA provides (9 U.S.C. 2):

"A written provision in ... [*5] a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The Supreme Court has recently reiterated that this provision displays a "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, ___ S. Ct. ___, 2011 U.S. LEXIS 3367, 2011 WL 1561956 at *5 (2011) (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). "The overarching purpose of the FAA, evident in the text of §§2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." 2011 U.S. LEXIS 3367, [WL] at *8.

However, under the saving clause of §2, an arbitration agreement may be invalidated by contract defenses such as fraud, duress, or unconscionability. *Rent-A-Center, West, Inc. v. Jackson*, supra, 130 S.Ct. at 2776. The saving clause, on the other hand, does not authorize the invalidation of agreements to arbitrate "by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate [*6] is at issue." *AT&T Mobility, LLC v. Concepcion*, supra, 2011 U.S. LEXIS 3367, [WL] at *5. Thus, "[a]lthough §2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 2011 U.S. LEXIS 3367, [WL] at *7.

III.

The plaintiff challenges the enforcement of the arbitration provision based on three contentions: (1) she never entered into an arbitration agreement; (2) the arbitration clause was rejected when she cancelled the entire contract within sixty days; and (3) the arbitration agreement was contrary to public policy, substantively unconscionable, and procedurally unconscionable (Doc. 50, pp. 19-27). None of these contentions supports nonenforcement of the arbitration agreement.

A. Assent to the Agreement.

As her first argument, the plaintiff asserts that she never signed the Agreement (Doc. 50, p. 20). "[I]t is well established that parties cannot be forced to submit to

arbitration if they have not agreed to do so." *Magnolia Capital Advisors, Inc. v. Bear Stearns & Co.*, 272 Fed. Appx. 782, 785 (11th Cir. 2008)(unpub. dec.)(citation and quotations omitted). If there is a dispute whether there is an [*7] agreement to arbitrate, the court, rather than an arbitrator, must decide whether there is an agreement. Id.

The defendants have filed paper copies of exhibits showing the electronic communications that were exchanged between the plaintiff and CareOne in connection with her enrollment in CareOne's program (Doc. 25-1). The first page is a summary page listing three documents being transmitted to the plaintiff: (1) the Client Agreement, (2) the Repayment Schedule, and (3) the Easy Pay Authorization (id., p. 4). The next page is the Easy Pay Authorization, which contains checking account information and an instruction to sign it and fax it to CareOne (id., p. 5³). While there is a place for the plaintiff to sign, there is no signature on that document (id.). The next three pages constitute the Client Agreement, which includes the arbitration provision (id., pp. 6-8). Then, there is a document referred to as "E-Signature Disclosure and Consent" (id., p. 9). That describes what is involved in applying for the program online (id.). The document states that, by clicking "I consent" below, that is the plaintiff's electronic signature and that the plaintiff agrees, among other things, that [*8] the electronic signature has the same effect as the plaintiff's written signature (id.). The exhibits then contain a picture of the electronic screen which explains the steps for providing the plaintiff's electronic signature by clicking "I consent" (id., p. 11). The last page contains CareOne's contact notes showing that the plaintiff had agreed to the Client Agreement and the Digital Signature Agreement, among other things (id., p. 12).

3 The page number refers to the page number assigned by the CM/ECF system at the top of the document.

The defendants have shown, by affidavit and attached exhibits, that the plaintiff signed the Agreement electronically via CareOne's website (id.). The website gave the warning that clicking two boxes would affirm the Agreement and that CareOne "will immediately start the process of contacting your creditors" (id., p. 11). The record shows further that on November 12, 2007, the plaintiff followed the prompts and clicked the appropriate boxes to digitally sign the Repayment Schedule, Privacy Agreement, Client Agreement, and Digital Signature Agreement (id., p. 12).

In contending she did not agree to the arbitration provision, which was part of the Client [*9] Agreement, the plaintiff relies on the Enrollment Summary which stated that the agreement is given effect only after she

signs and faxes the form back to CareOne (Doc. 50, p. 20). Thus, the plaintiff asserts that she did not enter into the agreement containing the arbitration provision because "she did not sign and return the Enrollment Summary Page" (id.). However, the fact that the plaintiff did not physically sign the form and fax it to CareOne does not somehow cancel out her electronic signature.

Significantly, the form that the plaintiff did not sign required her to agree to both the Client Agreement and to automatic withdrawals from her bank account (Doc. 25-1, pp. 4-5). There is no indication in the record that the plaintiff ever authorized CareOne to make automatic withdrawals since such withdrawals were not included in the matters that the plaintiff agreed to electronically. Thus, it is understandable that the plaintiff did not sign the form agreeing to both the Client Agreement and the Easy Pay Authorization, but did sign electronically the Client Agreement without the Easy Pay Authorization.

In all events, it really does not matter why the plaintiff did not physically sign [*10] the Enrollment Summary and fax it back (maybe she did not have access to a fax machine). The plaintiff undoubtedly accepted the Client Agreement electronically. The plaintiff has made no attempt to show that such an acceptance is ineffective. See *U.S. Distributors, Inc. v. Block*, 2009 U.S. Dist. LEXIS 95391, 2009 WL 3295099 at *5 (S.D. Fla. 2009). Accordingly, the plaintiff's contention that she did not accept the Client Agreement with the arbitration provision is rejected. See *Brueggemann v. NCOA Select, Inc.*, 2009 U.S. Dist. LEXIS 55296, 2009 WL 1873651 (S.D. Fla. 2009).⁴

4 The plaintiff makes a conclusory argument that the Client Agreement fails to satisfy the Statute of Frauds because it was not signed and could not be completed within one year (Doc. 50, p. 21). The plaintiff has failed to develop this argument and has not cited any authority in support of it. For example, there is no discussion concerning whether the electronic signature satisfies the Statute of Frauds. See *U.S. Distributors, Inc. v. Block*, *supra*. Moreover, the contention was not mentioned at the hearing. Consequently, it is deemed abandoned.

B. Effect of Cancellation.

The plaintiff, in little over a month, cancelled the contract and received a refund of her single payment [*11] to CareOne (Doc. 25-1, p. 2). She argues that the cancellation revoked the entire contract and "nullified] the arbitration provision" (Doc. 50, pp. 21-22). However, the Agreement expressly stated that "[t]he Arbitration Agreement and the No Liability paragraphs of this

agreement continue to apply after this agreement ends" (Doc. 25-1, p. 8).

Moreover, the Supreme Court has said that an arbitration clause survives the termination of the contract unless the agreement to arbitrate is "negated expressly or by clear implication." *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionary Workers Union. AFL-CIO*, 430 U.S. 243, 255, 97 S. Ct. 1067, 51 L. Ed. 2d 300 (1977). Here, the agreement's arbitration provision set forth a procedure for the plaintiff to reject the provision. Thus, if the plaintiff wished to opt out of the arbitration requirement, the provision specifically instructed her to send a rejection notice, with her name, address, telephone number, and agreement number, to CareOne's address (and no other location) within 60 days after the date of the Client Agreement (Doc. 25-1, p. 8). The agreement stated that sending a rejection notice "is the only method [the plaintiff] can use to reject this arbitration [*12] agreement" (id.). The plaintiff has not presented any evidence that she complied with the provision's specific requirement that she send a rejection notice to CareOne. Therefore, as the defendants correctly asserted at the hearing, the arbitration provision survived the end of the Client Agreement.

C. Other defenses.

The plaintiff raises three other challenges to the arbitration provision. Thus, the plaintiff seeks to void the arbitration provision as contrary to public policy because the agreement's limitation on punitive damages defeats the remedial purpose of applicable statutes (Doc. 50, pp. 22-23). Second, the plaintiff asserts that the arbitration provision's restriction on a class action is substantively unconscionable (id., p. 24). Finally, the plaintiff contends that the Agreement is procedurally unconscionable as an adhesion contract that she could not understand (id., p. 25).

1. Void As Against Public Policy.

The plaintiff asserts that enforcement of the contract will violate public policy because the arbitration provision precludes the arbitrator from awarding punitive damages which are available to her under FDUPTA, the CROA, and common law fraud claims (id., p. 22). The two [*13] cases cited by the plaintiff do not directly support this proposition. One was based on unconscionability, which is distinct contention. *Hialeah Automotive, LLC v. Basulto*, 22 So.3d 586 (Fla. App. 2009). In the other, the court severed the damages limitation and enforced the remainder pursuant to a severability provision, which is also present in this case. *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So.2d 574 (Fla. App. 2007).

Regardless of what Florida law provides with respect to a damage limitation provision, the Supreme Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), establishes that the determination of that issue is for the arbitrator, and not the court. In *Buckeye Check Cashing*, the plaintiffs had entered into deferred-payment transactions that they subsequently challenged as charging usurious interest. The defendant sought to compel arbitration pursuant to arbitration provisions in the transaction agreements. The plaintiffs objected to arbitration, contending that the agreements violated public policy and were invalid. The Florida Supreme Court sustained that objection because the agreements violated state law. However, [*14] the United States Supreme Court reversed. The Supreme Court held that, as a matter of substantive federal arbitration law under the FAA, "an arbitration provision is severable from the remainder of the contract" and that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." 546 U.S. at 445-46.

In this case, the arbitration clause says nothing about damages. Rather, the provision limiting punitive damages is found not in the arbitration provision, but under the separate provision entitled "No liability" (Doc. 25-1, p. 7)(emphasis in original). Under these circumstances, the plaintiff is therefore requesting the court to rule on matters outside the arbitration clause. However, as indicated, the Supreme Court has held that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc. v. Cardegna, supra*, 546 U.S. at 449. Consequently, the issue of the damage limitation provision does not warrant the denial of the motion to compel arbitration.

2. Substantive Unconscionability.

The plaintiff's second [*15] challenge to the contract is based upon the arbitration provision's waiver of class arbitration, which she contends is substantively unconscionable (Doc. 50, pp. 24-25). In the arbitration provision, the class action prohibition states (Doc. 25-1, p. 7):

[T]he arbitrator may only resolve the claims, disputes, or controversies between [the plaintiff] and [CareOne]. The arbitration won't be conducted on a class-wide basis or be consolidated with claims or demands of other persons. [The plaintiff] agree[s] not to participate in a representative capacity or as a member of any class of claimants, pertaining to any Claim.

The plaintiff's contention that this limitation invalidates the arbitration provision is defeated by the Supreme Court's decision on April 27, 2011, in *AT&T Mobility, LLC v. Concepcion*, *supra*.

In *AT&T Mobility*, the Supreme Court reversed the Ninth Circuit's ruling under California law that an arbitration provision was unconscionable because it disallowed classwide proceedings. The Supreme Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 2011 U.S. LEXIS 3367, 2011 WL 1561956 at *8. [*16] Consequently, the state-law rule was pre-empted by the FAA.

The Supreme Court's decision was based essentially on the inconsistency of class-wide arbitration with bilateral arbitration as contemplated by the FAA. That consideration warrants the same result here. Significantly, the parties were afforded an opportunity to comment on *AT&T Mobility* (Doc. 75), and the plaintiff with commendable candor acknowledges that the decision defeats her argument on this point (Doc. 80, p. 5).⁵

5 Both parties in their memoranda have improperly made arguments beyond commenting on *AT&T Mobility*, which was all that was authorized. Those additional arguments will be deemed stricken.

It is recognized that, in *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1144 (11th Cir. 2010), the Eleventh Circuit certified to the Florida Supreme Court questions whether a class action waiver in an arbitration agreement was, under Florida law, procedurally unconscionable, substantively unconscionable, or void for any other reason. The Florida Supreme Court's answer will have no determinative effect here because, even if it says that the class action waivers are invalid, that answer would be pre-empted by the FAA under *AT&T* [*17] *Mobility*.

Therefore, the plaintiff's argument that the arbitration provision is substantively unconscionable due to the class action waiver is unavailing. This conclusion could potentially render immaterial the plaintiff's claim of procedural unconscionability since, as the Eleventh Circuit has pointed out, there is authority in Florida that, if either substantive or procedural unconscionability is not shown, no further analysis is required. *Pendergast v. Sprint Nextel Corp.*, *supra*, 592 F.3d at 1134. However, the Eleventh Circuit has also certified to the Florida Supreme Court the following question: "Must Florida courts evaluate both procedural and substantive uncon-

scionability simultaneously in a balancing or sliding scale approach, or may courts consider either procedural or substantive unconscionability independently and conclude their analysis if either one is lacking?" *Id.* at 1143. In view of the possibility that the Florida Supreme Court may say that a failure to show one of the factors is not dispositive, it is appropriate to evaluate the plaintiff's contention of procedural unconscionability.

3. Procedural Unconscionability.

The plaintiff asserts that the arbitration clause [*18] is procedurally unconscionable because (1) the arbitration provision "does not even explain what 'arbitration' is, what is involved in the process, or what it could mean for Plaintiff"; (2) the provision "uses legal jargon such as 'counterclaims,' 'intentional torts,' and 'common law and equity'" that "are not understandable to Plaintiff or the ordinary person who has not had legal training"; and (3) the document was an adhesion contract and she had no opportunity to negotiate its terms (Doc. 50, p. 26). These arguments are meritless.

Under Florida law, to determine whether a contract is procedurally unconscionable, courts must look to: "(1) the manner in which the contract was entered into; (2) the relative bargaining power of the parties and whether the complaining party had a meaningful choice at the time the contract was entered into; (3) whether the terms were merely presented on a "take-it-or-leave-it" basis; and (4) the complaining party's ability and opportunity to understand the disputed terms of the contract." *Pendergast v. Sprint Nextel Corp.*, *supra*, 592 F.3d at 1135.

The plaintiff contends that the arbitration agreement's legal jargon is not comprehensible to an ordinary [*19] person and therefore is procedurally unconscionable (Doc. 50, p. 26). She supports that claim with an affidavit stating, "[i]n reviewing the Client Agreement (Doc. 25, Ex. 1-A), I did not understand the language regarding arbitration. I have had no legal training and therefore am not familiar with legal jargon such as 'counterclaims,' 'intentional torts,' and 'common law and equity.' The arbitration language is not clear to me" (Doc. 50-2, p. 1). This contention is unpersuasive.

Wholly disregarding the fact that the plaintiff does not state that she carefully read the entire arbitration provision and did not provide her educational and her employment background, the assertion that she "did not understand the language regarding arbitration" and that "[t]he arbitration language is not clear to me" is simply too vague and conclusory. The arbitration provision consisted of six paragraphs that took up about one page of a two and one-half page agreement (Doc. 25-1, p. 7). The provision explains, among other things, that any claim or dispute must be resolved by binding arbitration; that the

arbitrator will only resolve claims or disputes between the plaintiff and the company and its representatives; [*20] and that "[t]he arbitrator's findings, reasoning, decision, and award must be in writing and must be based upon and consistent with the law of the jurisdiction that applies to the agreement," which is the jurisdiction where the plaintiff lives (*id.*). These details sufficiently inform the plaintiff of the nature of arbitration. Consequently, it is not good enough to simply say in general that the language was not clear and she did not understand it.

The only specific mention of language she was not familiar with were terms such as "counterclaims," "intentional torts," and "common law and equity." These terms, however, were contained in a parenthetical expression that simply gave examples of "all kinds of claims" that were subject to arbitration. Thus, the arbitration provision expressly told the plaintiff that "all kinds of claims" are subject to arbitration, even if it did not define each type of claim (which, if done, would have produced a bewildering explanation). That statement was clear enough.

Furthermore, the plaintiff had ample opportunity to read the document and get advice on its contents. Because the contract was delivered via email, the plaintiff could review the document [*21] at her leisure. Significantly, the arbitration provision contained contact information for the American Arbitration Association ("AAA"), including a website, if the plaintiff wished to obtain rules and forms. The plaintiff in her affidavit recounts at length the electronic research she conducted on the defendants and their activities (Doc. 50-2, pp. 2-4). In light of that capability, the plaintiff obviously could have obtained information about arbitration from the AAA if she had wanted to.

Moreover, the plaintiff's claim of procedural unconscionability is not meaningfully enhanced by characterizing the Client Agreement as an adhesion contract. In the first place, Justice Scalia, writing for the majority in *AT&T Mobility*, was unimpressed by the fact that the agreement in that case was an adhesion contract, stating that "the times in which consumer contracts were anything other than adhesive are long past." *2011 U.S. LEXIS 3367, 2011 WL 1561956 at *9*. More importantly, the arbitration provision was not a "take-it-or-leave-it" situation, since it provided that the plaintiff could reject the provision by sending a rejection notice to CareOne (Doc. 25-1, p. 8). And the Client Agreement itself was not par-

ticularly [*22] binding since the plaintiff was able to cancel it and get her money back.

Under these circumstances, the arbitration provision was not procedurally unconscionable. In light of this conclusion, and the determination that the provision is not substantively unconscionable, the resolution of the certified questions in *Pendergast v. Sprint Nextel Corp.* will make no difference in the decision here.

In sum, the various reasons asserted by the plaintiff do not support a conclusion that the arbitration provision in the Client Agreement is invalid or otherwise unenforceable. Therefore, the motion to compel arbitration will be granted.

IV.

The defendants have requested a stay under 9 *U.S.C.* 3, which provides for a stay "upon any issue referable to arbitration under an agreement" upon the court being satisfied that the issue is referable to arbitration. Accordingly, since I am satisfied that arbitration is warranted, the request will be granted as to defendants Ascend One Corporation, 3C Incorporated, and Bernaldo Dancel.

The issue is not entirely clear with respect to CareOne. That defendant is sued based under two agreements: the Client Agreement and the Retainer Agreement. The former had an arbitration [*23] provision and the latter did not. Therefore, absent some additional showing, the stay as to CareOne will only be with respect to discovery and proceedings involving the Client Agreement.

It is, therefore, upon consideration

ORDERED:

That the Motion to Compel Arbitration and Stay Action by defendants Ascend One Corporation, 3C Incorporated, CareOne, and Bernaldo Dancel (Doc. 25) be, and the same is hereby, **GRANTED**, and the plaintiff will be compelled to arbitration and the action stayed as to Ascend One Corporation, 3C Incorporated, CareOne, and Bernaldo Dancel with respect to the Client Agreement.

DONE and ORDERED at Tampa, Florida, this 9th day of May, 2011.

/s/ Thomas G. Wilson

THOMAS G. WILSON

UNITED STATES MAGISTRATE JUDGE



JOSEPH GUIDA, Plaintiff, versus HOME SAVINGS OF AMERICA, INC., DAVID CIROCCO, & GREGORY CAPUTO, Defendants.

No 11-CV-00009 (JFB) (ARL)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2011 U.S. Dist. LEXIS 69159

**June 28, 2011, Decided
June 28, 2011, Filed**

COUNSEL: [*1] Plaintiffs are represented by Erik Harald Langeland, Esq., Erik H. Langeland, P.C., New York, New York.

Defendant Home Savings is represented by Linda T. Prestegaard, Phillips Lytle LLP, Rochester New York.

JUDGES: JOSEPH F. BIANCO, United States District Judge.

OPINION BY: JOSEPH F. BIANCO

OPINION

MEMORANDUM AND ORDER

Joseph F. Bianco, District Judge:

Plaintiffs Joseph Guida ("Guida"), Michael Esposito ("Esposito"), Daniel McGorman ("McGorman"), and Jahn Ramirez ("Ramirez") (collectively "plaintiffs"), bring this putative class action on behalf of themselves, and on behalf of individuals similarly situated, against Home Savings of America, Inc. ("Home Savings" or "defendant"), David Cirocco, and Gregory Caputo (collectively "defendants"), asserting claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, and related New York state wage and labor laws.¹

¹ Plaintiff Guida, the named plaintiff, filed this lawsuit as a class action under the FLSA, 29 U.S.C. § 216(b), and Federal Rule of Civil Procedure 23(b)(3).

Home Savings now moves to dismiss plaintiffs' complaint, and compel arbitration on an individual basis pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* Plaintiffs agree [*2] to arbitrate the dispute, but argue that the arbitrator should decide whether the arbitration can proceed on a class basis. For the reasons set forth below, the Court grants in part and denies in part defendant's motion to compel arbitration. Specifically, the Court concludes that the parties must arbitrate this dispute, but that the determination of whether or not the arbitration should proceed on a class basis is for the arbitrator to make in the first instance. As a result, the Court stays this action pending the resolution of the arbitration proceeding.

I. BACKGROUND

A. The Underlying Facts

The following facts are taken from the Complaint ("Compl."), the Declaration of Greg Reniere ("Reniere Decl.") filed in support of defendant's motion, and the exhibits attached thereto.²

² The Court may properly consider documents outside of the pleadings for purposes of deciding a motion to compel arbitration. See *BS Sun Shipping Monrovia v. Citgo Petroleum Corp.*, No. 06 Civ. 839(HB), 2006 U.S. Dist. LEXIS 54588, 2006 WL 2265041, at *3 n. 6 (S.D.N.Y. Aug. 8, 2006) ("While it is generally improper to consider documents not appended to the initial pleading or incorporated in that pleading by reference in

the context of a Rule 12(b)(6) [*3] motion to dismiss, it is proper (and in fact necessary) to consider such extrinsic evidence when faced with a motion to compel arbitration." (citing *Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 32-33 (2d Cir. 2001)).

Plaintiffs are former employees of Home Savings, a provider of mortgage banking services. (Compl. ¶¶ 4-6; Reniere Decl. ¶¶ 2-9.) All of the plaintiffs signed an Alternative Dispute Resolution Agreement as well as a Compensation Agreement. (Reniere Decl. ¶¶ 2-9.) The terms of the Alternative Dispute Resolution Agreement are identical for all of the plaintiffs. The following are relevant portions from the Alternative Dispute Resolution Agreements:

I understand that Home Savings of America makes available arbitration for resolution of employment disputes that are not otherwise resolved by internal policies or procedures.

I agree that if I am unable to resolve any dispute through the internal policies and procedures of Home Savings . . . I will arbitrate . . . any legal claim that I might have against Home Savings . . . or its employees, in connection with my employment or termination of employment . . . whether arising out of issues or matters occurring [*4] before the date of this Agreement or after such date.

I agree to abide by and accept the final decisions of the arbitration panel as ultimate resolution of any disputes or issues for any and all events that arise out of employment or termination of employment.

I agree that the Employee Dispute Resolution Rules of the American Arbitration Association will apply to any resolution of any such matters. In exchange for the benefits of arbitration, I agree that the arbitrator will only have the power to grant those remedies available in court, under applicable law.

(Reniere Decl. Ex. A (signed by Guida), Ex. C (signed by Esposito), Ex. E. (signed by McGorman), Ex. G (signed by Ramirez).)

It is undisputed by the parties that the Alternative Dispute Resolution Agreements do not explicitly mention class arbitration. Defendant does not contest that the

Employee Dispute Resolution Rules of the American Arbitration Association include rules relating to class arbitration.

B. Procedural History

Plaintiffs filed the complaint on January 3, 2011. Defendant Home Savings filed a motion to compel arbitration and dismiss the complaint on March 15, 2011. On March 29, 2011, the Court set a pre-motion telephone [*5] conference to address defendant's filing of the motion. The conference was held on April 13, 2011. Plaintiffs filed their response to defendant's motion on May 17, 2011. Defendant filed its reply on May 27, 2011. Oral argument took place on June 16, 2011. Defendant submitted a letter to the Court dated June 22, 2011, to address issues raised at oral argument. On June 23, 2011, the Court received plaintiffs' letter in response. The Court has fully considered the submissions and arguments of the parties.

II. STANDARD OF REVIEW

The Court must evaluate a motion to compel arbitration, pursuant to the FAA, under a standard similar to the standard for a summary judgment motion. See *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (citing *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 n. 9 (3d Cir. 1980)); *Doctor's Assocs. v. Distajo*, 944 F. Supp. 1010, 1014 (D. Conn. 1996), *aff'd*, 107 F.3d 126 (2d Cir. 1997); see also *Mazza Consulting Grp., Inc. v. Canam Steel Corp., No. 08-CV-38 (NGG)*, 2008 U.S. Dist. LEXIS 32670, at *3 (E.D.N.Y. Apr. 21, 2008). "When such a motion is opposed on the ground that no agreement to arbitrate has been made between the parties, a district [*6] court should give the opposing party the benefit of all reasonable doubts and inferences that may arise." *Mazza Consulting Grp., Inc.*, 2008 U.S. Dist. LEXIS 32670, at *3. "If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary." *Bensadoun*, 316 F.3d at 175 (citing 9 U.S.C. § 4).

III. DISCUSSION

The plaintiffs and Home Savings agree that there is a valid agreement to arbitrate and that it applies to plaintiffs' FLSA and state law claims. Thus, the parties agree that this Court should compel arbitration in this case. The gravamen of the dispute is whether or not the arbitration can proceed on a class basis and whether it is for this Court or the arbitrator to decide the issue. As set forth below, the Court concludes that this dispute should be arbitrated, but that it is for the arbitrator to decide in the first instance whether or not the arbitration can proceed on a class basis. Furthermore, the Court stays this action pending the resolution of the arbitration.

A. Arbitration on Class Basis

For the reasons set forth below, the Court concludes that where, as here, there is disagreement over whether the agreement to arbitrate permits class [*7] arbitration and the agreement does not explicitly address this issue, the ability to proceed on a class basis is a procedural question involving contract interpretation and is therefore for the arbitrator to decide in the first instance.

1. Legal Standard

"The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the *question of arbitrability*, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (quotation marks omitted). What is deemed a question of arbitrability has been limited to

the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Id. at 83-84. Disputes about whether the parties are bound by the arbitration agreement, or if a particular controversy falls under the scope of an arbitration agreement, [*8] are both the type of gateway issues that go to arbitrability and which are for courts to decide. *Id.* at 84. On the other hand, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Id.* (emphasis in original) (quotation marks omitted). Issues of waiver, delay, "or a like defense" are the types of procedural questions that are left for the arbitrator. *Id.*

2. Analysis

Essentially, the parties dispute whether the ability to proceed on a class basis is more akin to a procedural question or, instead, to an issue of arbitrability. Plaintiffs assert that it is a procedural issue, relying on the Supreme Court's plurality opinion in *Green Tree Financial Corporation v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003). Home Savings, on the other hand, argues that *Bazzle* has been undermined by the

Supreme Court's more recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010), which allegedly suggests that whether or not an arbitration can proceed on a class basis is an arbitrability issue that should be decided by the courts. This Court agrees with plaintiffs. Although *Bazzle* [*9] is solely a plurality opinion, it is nevertheless instructive. Furthermore, many courts have continued to conclude subsequent to the Supreme Court's decision in *Stolt-Nielsen*, as does this Court, that the ability to proceed as a class in an arbitration proceeding is a procedural question for the arbitrator to decide.

As an initial matter, *Stolt-Nielsen* is consistent with *Bazzle*. In *Bazzle*, the parties "agreed to submit to the arbitrator *all* disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract[.]" but disputed whether class arbitration was permitted under the agreement, which did not explicitly address the issue. 539 U.S. at 447-48, 451-52 (emphasis in original) (quotation marks omitted). The Supreme Court concluded that "the dispute about what the arbitration contract in each case means (*i.e.*, whether it forbids the use of class arbitration procedures) is a dispute relating to this contract and the resulting relationships." *Id.* at 451 (citations and quotation marks omitted). The plurality opinion in *Bazzle* further elaborated that "whether the contracts forbid class arbitration . . . concerns neither the validity [*10] of the arbitration clause nor its applicability to the underlying dispute between the parties." *Id.* at 452. Thus, it was a procedural question concerning "contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question." *Id.* at 453. In *Stolt-Nielsen*, the Supreme Court did not reach the issue of who must decide whether a class can arbitrate a dispute. However, the Court addressed *Bazzle* in *dicta* as follows:

[T]he parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration. . . . In fact, however, only the plurality decided that question. But we need not revisit that question here

130 S. Ct. at 1772. Thus, while *Stolt-Nielsen* pointed out that *Bazzle* did not have the same precedential value as an opinion by a majority of the Court, it did not indicate that the plurality opinion in *Bazzle* was incorrect on the issue of who decides whether a class can arbitrate a dispute. Defendant argues, however, that *Stolt-Nielsen* implies that whether plaintiffs can proceed as a class in arbitration is such a fundamental issue that it is closer to one of arbitrability [*11] than procedure and must,

therefore, be decided by the courts. This Court does not read such an implication from *Stolt-Nielsen*.³ As noted above, the *Stolt-Nielsen* Court did not decide the threshold issue of whether the ability to proceed to arbitration on a class basis was for the arbitrators or the courts to decide. Instead, the opinion addressed that issue on the merits, holding that where there was no agreement on class arbitration, to which the parties specifically stipulated, the parties could not be compelled to arbitrate on a class basis. The Supreme Court left open the question of what factors can or should be considered in that analysis where there is no equivalent stipulation by the parties.

3 Although in *Stolt-Nielsen* the Supreme Court referred to the shift from bilateral to class arbitration as "fundamental," 130 S. Ct. at 1776, the Court was simply emphasizing the importance of not reading class arbitration into an agreement lightly.

This Court concludes, in light of *Stolt-Nielsen* and *Bazze*, that the ability of a class to arbitrate a dispute where the parties contest whether the agreement to arbitrate is silent or ambiguous on the issue is a procedural question that is for [*12] the arbitrator to decide.⁴ Even though *Bazze* does not have the full weight of Supreme Court precedent, it is nevertheless instructive. See, e.g., *Barbour v. Haley*, 471 F.3d 1222, 1229 (11th Cir. 2006) ("Plurality opinions are not binding on this court; however, they are persuasive authority."); *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 274 (3d Cir. 2007) (concluding that *dicta* in Supreme Court opinions has persuasive value). The Second Circuit found *Bazze* persuasive, as have other courts prior to *Stolt-Nielsen*. See *Vaughn v. Leeds, Morelli & Brown, P.C.*, 315 F. App'x 327, 329 (2d Cir. 2009) (concluding that the district court "properly compelled arbitration on the question of the arbitrability of class claims under the Settlement Agreement[.]" citing *Bazze* and *Howsam*);⁵ *JSC Surgutneftegaz v. President & Fellows of Harvard College*, 04 Civ. 6069 (RMB), 2007 U.S. Dist. LEXIS 79161, at *6 (S.D.N.Y. Oct. 11, 2007) (citing *Bazze* for the proposition that "arbitrators are well situated to answer the question whether contracts forbid[] class arbitration" (quotation marks omitted)); *Scout.com, LLC v. Bucknuts, LLC*, No. C07-1444 RSM, 2007 U.S. Dist. LEXIS 87491, 2007 WL 4143229, at *5 (W.D. Wa. Nov. 16, 2007) [*13] (concluding that, in light of *Bazze*, it was for the arbitrator to decide the procedural question of whether the plaintiffs can arbitrate as a class (collecting cases)). Furthermore, many courts since *Stolt-Nielsen* have continued to follow *Bazze's* conclusion that the ability to arbitrate on a class basis is a procedural question left for the arbitrator to decide. This Court finds the Third Circuit's opinion in *Vilches v. The Travelers Companies, Incorporated*, No. 10-2888, 2011 U.S. App. LEXIS 2551 (3d

Cir. Feb. 9, 2011), particularly instructive. In *Vilches*, the Third Circuit reconciled *Bazze* and *Stolt-Nielsen* as follows:

Although contractual silence [on the issue of arbitration on a class basis] has often been treated by arbitrators as authorizing class arbitration, *Stolt-Nielsen* suggests a return to the pre-*Bazze* line of reasoning on contractual silence, albeit decided by an arbitrator, because it focuses on what the parties agreed to— expressly or by implication.

Id. at *12-13 n.3. The Third Circuit concluded that the ability of the plaintiffs to proceed on a class basis in arbitration was essentially a question of "what kind of arbitration proceeding the parties agreed to[.]" [*14] *id.* at *10 (emphasis in original) (citing *Bazze*), and went on to conclude that "[w]here contractual silence is implicated, the arbitrator and not a court should decide whether a contract was indeed silent on the issue of class arbitration, and whether a contract with an arbitration clause forbids class arbitration." *Id.* at *11 (quotation marks omitted) (citing *Stolt-Nielsen*, 130 S. Ct. at 1771-72, describing the plurality opinion in *Bazze*). In *Vilches*, the agreement in question "did not expressly reference class or collective arbitration or any waiver of the same." *Id.* at *3. The parties debated whether a revised arbitration policy including a class arbitration waiver applied to plaintiffs but agreed that plaintiffs' causes of action alleged in the complaint otherwise fell under the purview of the arbitration agreement. *Id.* at *3-6, *9-10. The court in *Vilches* referred the "questions of whether class arbitration was agreed upon to the arbitrator." *Id.* This Court similarly concludes that *Stolt-Nielsen* and *Bazze* are reconcilable and that arbitrating on a class basis is a procedural question that is for the arbitrators to decide in accordance with the Supreme Court's analysis in *Stolt-Nielsen*, [*15] which provides a framework for the arbitrator's analysis of the issue.

4 The Second Circuit specifically distinguished ambiguous agreements on the issue of class arbitration, using the agreement in *Bazze* as an example of an ambiguous contract where it did not explicitly address class arbitration but the parties nevertheless contested the point based on other factors, from ones that are unambiguous. See *In re Am. Express Merchants' Litig.*, 554 F.3d 300, 311 n.10 (2d Cir. 2009) (distinguishing *Bazze*, where the agreement was "ambiguous as to whether it permitted" class arbitration, with the one at hand, which "is unambiguous in forbidding

arbitration to proceed on a class basis[.]" ultimately deciding whether class waiver was unconscionable under state law), *vacated by 130 S. Ct. 2401, 176 L. Ed. 2d 920 (2010), reaffirmed by 634 F.3d 187, 191 (2d Cir. 2011).*

5 Although *Vaughn* is an unpublished opinion, and is therefore not binding on this Court, it is nevertheless highly persuasive authority. *See, e.g., LaSala v. Bank of Cyprus Pub. Co., Ltd., 510 F. Supp. 2d 246, 274 n.10 (S.D.N.Y. 2007)* (finding an unpublished Second Circuit opinion "highly persuasive . . . and eminently predictive of how the Court would [*16] in fact decide a future case such as this one"); *Bernshsteyn v. Feldman, No. 04 Civ. 1774 (GEL), 2006 U.S. Dist. LEXIS 62689, 2006 WL 2516514, at *3 n. 3 (S.D.N.Y. Aug. 29, 2006)* (finding an unpublished opinion by the Second Circuit persuasive authority).

Nor is *Vilches* alone in its conclusion. There are a number of cases in addition to *Vilches* in which courts have concluded, subsequent to *Stolt-Nielsen*, that the ability of plaintiffs to arbitrate on a class basis is an issue to be determined by the arbitrator. *See, e.g., Aracri v. Dillard's Inc., No. 1:10cv253, 2011 U.S. Dist. LEXIS 41596, 2011 WL 1388613, at *4 (S.D. Ohio Mar. 29, 2011)* (concluding that "it is not for this Court, but for an arbitrator to decide whether class arbitration is forbidden under the Arbitration Agreement and Dillard's Rules of Arbitration" where the arbitration agreement did not explicitly mention class arbitration but the parties contested whether Dillard's Rules, to which all arbitration claims were subject, provided for class arbitration); *Smith v. The Cheesecake Factory Restaurants, Inc., No. 3:06-00829, 2010 U.S. Dist. LEXIS 121930, at *7 (M.D. Tenn. Nov. 16, 2010)* (concluding that "whether the [*17] parties agreed to class arbitration is to be resolved by the arbitrator[.]" citing *Stolt-Nielsen* and *Bazzle*); *Fisher v. General Steel Domestic Sales, LLC, No. 10-cv-1509-WYD-BNB, 2010 U.S. Dist. LEXIS 108223, at *6-7 (D. Col. Sept. 22, 2010)* (where parties agreed that plaintiffs' claims were subject to arbitration but were contesting whether the agreement in question permitted class arbitration, "based on the plain language of *Stolt-Nielsen*, it is clear that an arbitrator may, as a threshold matter, appropriately determine whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class" (quotation marks omitted)). *See also Clark v. Goldline Int'l, Inc., No. 6:10-cv-01884 (JMC), 2010 U.S. Dist. LEXIS 126192, at *21-22 (D. S.C. Nov. 30, 2010)* ("[T]he court notes that whether a class is appropriately certified in this case or otherwise is yet to be determined. Second, whether the Account Agreement precludes any putative class member from bringing a claim has no bearing on the validity

or enforceability of the arbitration provisions. Such issues raised by Plaintiffs must be determined by an arbitrator, not this court." (citing *Bazzle*). But [*18] *see Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950 (LBS) (JCF), 2011 U.S. Dist. LEXIS 46994, at *10 (S.D.N.Y. Apr. 28, 2011)* (concluding that the ability to arbitrate on a class basis requires a "determination of the scope and enforceability of the arbitration clause, and therefore the issue is appropriately characterized as a dispute over arbitrability[.]" further noting that this question "fits into the narrow circumstances where contracting parties would likely have expected a court to have decided the gateway matter[.]" relying on *Stolt-Nielsen*'s emphasis that *Bazzle* was solely a plurality opinion).⁶

6 Defendant relies on *Goodale v. George S. May International Company* to support its assertion that whether arbitration can proceed on a class basis is a question of arbitrability. *No. 10 C 5733, 2011 U.S. Dist. LEXIS 37111, 2011 WL 1337349 (N.D. Ill. Apr. 5, 2011)*. However, that case is distinguishable from the one at hand. In *Goodale*, the plaintiffs "insist[ed] that the agreement's silence mandates that the Court allow the arbitrator to determine the arbitrability of the class claims." *2011 U.S. Dist. LEXIS 37111, [WL] at *2*. In fact, as the court pointed out, plaintiffs "admit[ted]" in their brief that the agreement was silent on the [*19] issue of class arbitration. As a result, relying on *Stolt-Nielsen*, the court concluded that it was for the court to decide whether class claims fall "within the agreement's scope" where the agreement was silent on the issue because "Supreme Court precedent . . . squarely foreclose[d] the possibility that the class claims are arbitrable." *Id.* In this case, however, the parties contest whether the agreements are actually "silent" on class arbitration. Although it is apparent that the agreements at hand do not explicitly address class arbitration, plaintiffs assert that by referring to the rules of the American Arbitration Association, which permit class arbitration, the arbitration agreements allowed for class arbitration. Silence on the issue of class arbitration in an agreement does not "simply mean that the clause made no express reference to class arbitration. Instead, it meant that all the parties agree that when a contract is silent on the issue there's been no agreement that has been reached on that issue." *Aracri, 2011 U.S. Dist. LEXIS 41596, 2011 WL 1388613, at *4 n. 2* (quotation marks omitted) (citing *Stolt-Nielsen*).

At oral argument, in addition to *Stolt-Nielsen*, defendant relied on the Supreme Court's [*20] decision in

AT & T Mobility LLC v. Concepcion to argue that the ability to arbitrate on a class basis is not a procedural issue. 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011). However, defendant's reliance on *Concepcion* is misplaced. In *Concepcion*, the Supreme Court was not addressing the threshold issue of who should get to decide whether the arbitration could proceed on a class basis. Instead, the Supreme Court decided that a California rule allowing consumers to demand class arbitration despite any agreement stating otherwise was inconsistent with the FAA. 131 S. Ct. at 1750-51. In *Concepcion*, the Supreme Court essentially stated that class arbitration was disfavored even though the parties could agree to arbitrate on a class basis, explaining that

class arbitration requires procedural formality. The AAA's rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. And while the parties can alter those procedures by contract, an alternative is not obvious. If procedures are too informal, absent class members would not be bound by the arbitration. . . . We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements [*21] to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925 . . . And it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied.

131 S. Ct. at 1751-52 (emphasis in original) (citations omitted). It is apparent that the Supreme Court simply intended to say that arbitration on a class basis is not a preferred method to proceed and should not be inferred lightly from a contract. According to *Concepcion*, the procedural requirements necessary to safeguard the interests of an entire class are best carried out in a court rather than arbitration setting. However, nowhere did the Supreme Court suggest that it was for the courts to decide whether the parties agreed to arbitrate on a class basis. Furthermore, courts have relied on *Bazzle* even after *Concepcion* was issued. See, e.g., *Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino*, No. 10-1638, 640 F.3d 471, 2011 U.S. App. LEXIS 9107, at *6, *12, *14 (1st Cir. May 4, 2011) (referring to *Concepcion* and citing *Bazzle* in support of the court's conclusion that where "the party's claim turns on a construction of ambiguous [*22] terms of the agreement, the challenge does not present a question of arbitrability to be decided by a court, but rather an issue of contract in-

terpretation to be resolved in the first instance by an arbitrator" so that it was for the arbitrator to decide whether the scope of the remedies permitted under the agreement in question included all remedies available under federal law (quotation marks omitted)).⁷

7 At oral argument, defendant also referred to *Jock v. Sterling Jewelers, Incorporated*, and *Safra National Bank of New York v. Penfold Investment Trading, Limited*, in support of its argument. First, *Jock* does not address the threshold question of who should decide whether the parties agreed to class arbitration. In *Jock*, the arbitration panel permitted class arbitration and the court addressed the merits of that decision. In light of *Stolt-Nielsen*, the *Jock* court indicated that the agreement in question did not provide for class arbitration. 725 F. Supp. 2d 444, 450 (S.D.N.Y. 2010). The court explained that it would not remand this issue to the arbitration panel because that panel had already "adjudicated the issues submitted to them." *Id.* at 449 n. 5. Nowhere does *Jock* suggest that [*23] it was not for the arbitration panel to decide in the first instance whether class arbitration was permitted under the agreement. With respect to *Safra*, the court held that issues of joinder and consolidation are for the arbitrator to decide. No. 10 Civ. 8255 (RWS), 2011 U.S. Dist. LEXIS 51687, 2011 WL 1672467, at *5 (S.D.N.Y. Apr. 20, 2011). However, in *dicta*, *Safra* described *Stolt-Nielsen* as suggesting that "absent an agreement to arbitrate on a class basis, the availability of class arbitration is a gateway issue to be decided by the courts." 2011 U.S. Dist. LEXIS 51687, [WL] at *3. The decision does not elaborate on the court's reasoning and this Court finds it unpersuasive for the reasons stated *supra*.

In sum, the Court concludes that the arbitration panel will decide whether or not the plaintiffs in this case can proceed on a class basis. The Court, therefore, does not address the merits of the parties' arguments regarding whether class arbitration is appropriate.

B. Staying the Litigation

The remaining issue is whether the litigation should be stayed or dismissed pending arbitration. In its motion papers, defendant argues that the case should be dismissed because all issues in the dispute are subject to arbitration. At oral argument defendant [*24] indicated that, in the alternative, it requests a stay of the action. Plaintiffs also indicated at oral argument that they would like the action stayed. Pursuant to *Section 3 of the FAA*,

[t]he court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . .

9 U.S.C. § 3. The district court can exercise its discretion to stay the proceeding or can conclude that the litigation should be dismissed. See *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 92-93 (2d Cir. 2002). A decision to dismiss has implications for the speed with which the arbitration of the dispute may begin because a dismissal is reviewable by an appellate court under Section 16(a)(3) of the FAA, whereas a stay is an unappealable interlocutory order under Section 16(b). *Id.* at 93. Staying the action is, therefore, more likely to allow the matter to proceed to arbitration in an expeditious manner. *Id.* The Second Circuit urges courts deciding whether to dismiss or [*25] stay litigation when referring a matter to arbitration to "be mindful of this liberal federal policy favoring arbitration agreements" and consider that "[u]nnecessary delay of the arbitral process through appellate review is disfavored." *Id.* (citation and quotation marks omitted).

The Court concludes that a stay is appropriate in this case. As an initial matter, during oral argument defendant requested a stay in the alternative and plaintiffs also requested a stay, rather than dismissal. This Court recognizes that some courts have held that where "none of plaintiff's claims remain to be resolved by this court, . . . there is no reason to stay-rather than dismiss-this action." *Mahant v. Lehman Bros.*, No. 99 Civ. 4421(MBM), 2000 U.S. Dist. LEXIS 16966, 2000 WL 1738399, at *3

(S.D.N.Y. Nov. 22, 2000); see also *Mazza Consulting Grp., Inc. v. Canam Steel Corp.*, No. 08-CV-38 (NGG), 2008 U.S. Dist. LEXIS 32670, at *19-20 (E.D.N.Y. Apr. 21, 2008); *Perry v. N.Y. Law Sch.*, No. 03 Civ. 9221(GBH), 2004 U.S. Dist. LEXIS 14516, 2004 WL 1698622, at *4 (S.D.N.Y. July 28, 2004). However, in the case at hand, the Court believes that the more appropriate action is to stay the proceedings and compel arbitration, particularly to promote expeditious resolution [*26] of this dispute. See *Halim v. Great Gatsby's Auction Gallery*, 516 F.3d 557, 561 (7th Cir. 2008) ("[T]he proper course of action when a party seeks to invoke an arbitration clause is to stay the proceedings rather than to dismiss outright."); see also *Lloyd v. Hovenssa, LLC*, 369 F.3d 263, 269 (3d Cir. 2004) ("[T]he plain language of § 3 affords a district court no discretion to dismiss a case where one of the parties applies for a stay pending arbitration.").

IV. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part defendant's motion to compel arbitration. The parties shall arbitrate this dispute and the arbitrator will decide whether or not the arbitration can proceed on a class basis. For the reasons set forth above, this lawsuit is stayed pending completion of the arbitration. Counsel for plaintiffs is directed to file a status letter to the Court by September 30, 2011, advising the Court as to the status of the arbitration.

SO ORDERED.

Dated: June 28, 2011

Central Islip, NY

JOSEPH F. BIANCO

United States District Judge



1 of 1 DOCUMENT



Positive

As of: Jul 12, 2011

JOSE IVAN VILCHES; FRANCIS X SHEEHAN, JR.; JACK COSTEIRA, Individually, and on Behalf of All Others Similarly Situated, Appellants v. THE TRAVELERS COMPANIES, INC; TRAVELERS OF NEW JERSEY; TRAVELERS AUTO INS CO OF NEW JERSEY; FIRST TRENTON INDEMNITY CO.

No. 10-2888

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2011 U.S. App. LEXIS 2551

**January 11, 2011, Argued
February 9, 2011, Opinion Filed**

NOTICE: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the District of New Jersey. (D.C. Civil No. 2-09-cv-04630). District Judge: Honorable Katharine S. Hayden.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant former employees filed a class and collective action against appellee former employer, alleging violations of the Fair Labor Standards Act of 1938 (FLSA), *29 U.S.C.S. § 201 et seq.*, and the New Jersey Wage and Hour Law (NJWHL), *N.J. Stat. Ann. § 34:11-4.1 et seq.* The United States District Court for the District of New Jersey granted the employer summary judgment and ordered individual arbitration. The employees appealed.

OVERVIEW: The employment agreement between the parties contained an arbitration provision that did not expressly reference class or collective arbitration. The employer electronically published a revised arbitration policy that included a class arbitration waiver. The employees argued that the revised policy did not bind them and was unconscionable. The appellate court determined that it had to refer the question of whether class arbitration was agreed upon to the arbitrator because (1) the issue of whether an employee was bound by a disputed amendment to existing employment provisions fell within the scope of the expansive agreement to arbitrate, (2) the relevant question was what kind of arbitration proceeding the parties agreed to, and (3) the addition of the disputed class arbitration waiver did not disturb the parties' agreement to refer "all employment disputes" to arbitration. The class action waiver was not unconscionable, because, inter alia, the employees only demonstrated their position relative to the employer and their interest in maintaining employment, which was insufficient on its own to prove that the class arbitration waiver was unreasonably favorable to the employer.

OUTCOME: The appellate court vacated the district court order and referred the matter to arbitration to resolve whether the parties could proceed as a class in arbitration pursuant to the relevant arbitration provisions.

LexisNexis(R) Headnotes

*Civil Procedure > Summary Judgment > Standards > General Overview**Civil Procedure > Alternative Dispute Resolution > Judicial Review**Civil Procedure > Appeals > Standards of Review > De Novo Review*

[HN1] An appellate court exercises plenary review over questions regarding the validity and enforceability of an agreement to arbitrate. A court decides a motion to compel arbitration under the same standard it applies to a motion for summary judgment, because the order compelling arbitration is in effect a summary disposition of the issue of whether or not there had been a meeting of the minds on the agreement to arbitrate. Accordingly, the party opposing arbitration is given the benefit of all reasonable doubts and inferences that may arise. As with the standard for summary judgment, 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.

*Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview**Civil Procedure > Alternative Dispute Resolution > Judicial Review*

[HN2] Courts play a limited role when a litigant moves to compel arbitration. Specifically, whether the parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise. A question of arbitrability arises only in two circumstances—first, when there is a threshold dispute over whether the parties have a valid arbitration agreement at all, and, second, when the parties are in dispute as to whether a concededly binding arbitration clause applies to a certain type of controversy. In contrast, the Supreme Court has distinguished questions of arbitrability with disputes over arbitration procedure, which do not bear upon the validity of an agreement to arbitrate. "Procedural questions" - such as waiver or delay - which grow out of the dispute and bear on its final disposition are presumptively not for the judge.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Arbitrability

[HN3] The Supreme Court has made clear that questions of "contract interpretation" aimed at discerning whether a particular procedural mechanism is authorized by a given arbitration agreement are matters for the arbitrator to

decide. Where contractual silence is implicated, the arbitrator and not a court should decide whether a contract was indeed "silent" on the issue of class arbitration, and whether a contract with an arbitration clause forbids class arbitration.

*Civil Procedure > Alternative Dispute Resolution > Arbitrations > Arbitrability**Contracts Law > Defenses > Unconscionability > Arbitration Agreements*

[HN4] In stark contrast with the question of arbitration procedure, when a party challenges the validity of an arbitration agreement by contending that one or more of its terms is unconscionable under generally applicable state contract law, a question of arbitrability is presented. The Courts of Appeals are unanimous in recognizing that an unconscionability challenge to the provisions of an arbitration agreement is a question of arbitrability that is presumptively for the court, not the arbitrator, to decide.

Contracts Law > Defenses > Unconscionability > Adhesion Contracts

[HN5] The contractual doctrine of unconscionability involves both "procedural" and "substantive" elements, and requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions. In addressing a claim that an arbitration clause is unconscionable, the court applies the ordinary state law principles of the involved state or territory. New Jersey case law provides that adhesion contracts invariably evidence some characteristics of procedural unconscionability, and a careful fact-sensitive examination into substantive unconscionability is generally required.

*Civil Procedure > Class Actions > General Overview**Civil Procedure > Alternative Dispute Resolution > Arbitrations > Arbitrability**Contracts Law > Defenses > Unconscionability > Arbitration Agreements*

[HN6] The New Jersey Supreme Court has stated that the public interest at stake in consumers' ability to effectively pursue their statutory rights under consumer protection laws constituted the "most important" reason for holding a class-arbitration waiver unconscionable. Notably, however, class action waiver becomes problematic when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contract parties predictably involve small amounts of damages. Where a class action waiver is not part of a consumer contract of adhesion, New Jersey courts perceive nothing uncon-

cionable or unfairly burdensome about an arbitration agreement. Under New Jersey law, the class-arbitration waiver in an arbitration agreement is not unconscionable per se. Indeed, the affirmative policy of New Jersey, both legislative and judicial, favors arbitration as a mechanism of resolving disputes.

Contracts Law > Defenses > Unconscionability > Adhesion Contracts

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Arbitration Provisions > Enforcement

[HN7] Mere inequality in bargaining power is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. The Supreme Court obviously contemplated avoidance of the arbitration clause only upon circumstances more egregious than the ordinary economic pressure faced by every employee who needs the job. Echoing virtually every court to consider the adhesive effect of arbitration provisions in employment agreements, the court similarly has held that unequal bargaining power is not alone enough to make an agreement to arbitrate a contract of adhesion.

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

[HN8] There is no suggestion in the text, legislative history, or purpose of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C.S. § 201 et seq., that Congress intended to confer a nonwaivable right to a class action under that statute.

Contracts Law > Defenses > Unconscionability > General Overview

[HN9] Procedural unconscionability involves a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process.

COUNSEL: Jonathan I. Nirenberg, Esq., Resnick & Nirenberg, East Hanover, NJ; James B. Zouras, Esq., Chicago, IL, Counsel for Appellants.

Michael T. Grosso, Esq., William P. McLane, Esq., Andrew J. Voss, Esq., Littler Mendelson, Newark, NJ, Counsel for Appellees.

JUDGES: Before: RENDELL, AMBRO and FISHER, Circuit Judges.

OPINION BY: RENDELL

OPINION

OPINION OF THE COURT

RENDELL, Circuit Judge.

This appeal calls upon us to decide whether the District Court properly granted summary judgment to Appellee The Travelers Companies, Inc. ("Travelers"), in concluding that Appellants Vilches, Sheehan, and Costeira (collectively, "Vilches") assented to the insertion of a class arbitration waiver into an existing arbitration policy, and that the waiver was not unconscionable. The District Court ordered the parties into arbitration to individually resolve the claims brought by Vilches under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, et seq. ("FLSA"), and New Jersey Wage and Hour Law, N.J.S.A. § 34:11-4.1, et seq. ("NJWHL"). While we will find that the class arbitration waiver [*2] is not unconscionable, we will vacate the District Court's order and refer the matter to arbitration to determine whether Vilches can proceed as a class based upon the parties' agreements.

Factual & Procedural Background

We briefly summarize the allegations pertinent to our decision. Appellants Vilches filed a class and collective action in the Superior Court of New Jersey to recover unpaid wages and overtime allegedly withheld in violation of the FLSA and the NJWHL, contending that Travelers consistently required its insurance appraisers to work beyond 40 hours per week but failed to properly compensate the appraisers for the additional labor. Travelers removed the matter to the United States District Court for the District of New Jersey, and filed a Motion for Summary Judgment seeking the dismissal of the complaint and an order compelling Vilches to arbitrate their individual wage and hour claims.

Upon commencing employment with Travelers, Vilches agreed to an employment provision making arbitration "the required, and exclusive, forum for the resolution of all employment disputes that may arise" pursuant to an enumerated list of federal statutes, and under "any other federal, state [*3] or local statute, regulation or common law doctrine, regarding employment discrimination, conditions of employment or termination of employment." ¹ (App'x at 79.) The agreement did not expressly reference class or collective arbitration or any waiver of the same. The agreement reserved to Travelers

the right to alter or amend the arbitration policy at its discretion with appropriate notice to employees.

1 Vilches accepted employment on July 26, 2004, and was discharged in January 15, 2009. Costeira entered employment on January 23, 2003, and was terminated on February 26, 2009. Sheehan began working on October 13, 1994, and was terminated on December 9, 2008.

In April 2005, Travelers electronically published a revised Arbitration Policy. In addition to restating the expansive scope of the Policy, the update also included an express statement prohibiting arbitration through class or collective action:

The Policy makes arbitration the required and exclusive forum for the resolution of all employment-related and compensation-related disputes based on legally protected rights (i.e., statutory, contractual or common law rights) that may arise between an employee or former employee and the Company. [*4] . . . [T]here will be no right or authority for any dispute to be brought, heard or arbitrated under this Policy as a class or collective action, private attorney general, or in a representative capacity on behalf of any person.

(App'x at 88) (emphasis added). Travelers communicated the revised Policy to Vilches in several electronic communications.²

2 First, Travelers sent an e-mail to all employees on April 1, 2005, titled "Internal dispute resolution/arbitration program," which announced important changes to the existing dispute resolution procedures, and included a link to the revised arbitration policy. The email expressly stated that the arbitration policy was an essential element and condition of continued employment. Second, Travelers required Vilches to annually view and complete an online ethics quiz, which required employees to certify that they would abide by "key obligations" of employment, including the Arbitration Policy. Certification signified that the employee received, read, and understood both the content and the location of the policies, and agreed to abide by the terms therein. Finally, Travelers sent an e-mail to Vilches on December 31, 2007, asking them to review [*5] specified updated policies - including the updated Arbitration Policy - and to acknowledge receipt, review,

and agreement to the documents by clicking on a link embedded in the e-mail. Vilches do not contest that they opened, viewed, and clicked on the embedded links, nor do they dispute that Appellants annually certified their completion of an agreement to the online ethics quizzes.

Before the District Court, Vilches initially alleged that they never agreed to arbitrate any claims against Travelers; their position changed, however, during the course of proceedings and they ultimately conceded that all employment disputes with Travelers must be arbitrated pursuant to the arbitration agreement they signed at commencement of employment. They nevertheless insisted that the revised Arbitration Policy introduced by Travelers in April 2005 prohibiting class arbitration, which Travelers attempted to enforce, did not bind them because they never assented to its terms. Vilches further argued that, even assuming that the updated Policy did bind them, the revision was unconscionable and unenforceable.

Notwithstanding the fact that the parties agreed to arbitrate all employment disputes, as we discuss [*6] below, the District Court addressed the question of whether Vilches agreed to waive the right to proceed by way of class arbitration. In an oral decision, the District Court granted Travelers' motion for summary judgment, finding that the various forms of correspondence from Travelers provided sufficient notice to Vilches of the revised Policy, and that their electronic assent and continued employment constituted agreement to the update. As such, the Court held that Vilches waived the ability to proceed in a representative capacity through class arbitration. The Court's opinion only briefly touched upon the unconscionability claims, stating that "there was no adhesion that was part of that process." (App'x at 23.) The Court ordered the parties to individually arbitrate the employment disputes, and this appeal followed.

Jurisdiction and Standard of Review

The District Court exercised jurisdiction over Vilches's complaint pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291 from the District Court's grant of summary judgment to Travelers.

[HN1] "We exercise plenary review over questions regarding the validity and enforceability of an agreement to arbitrate." *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 177 (3d Cir. 2010). [*7] A court "decides a motion to compel arbitration under the same standard it applies to a motion for summary judgment," *Kaneff v. Del. Title Loans, Inc.*, 587 F.3d 616, 620 (3d Cir. 2009) (citation omitted), because the "order compelling arbitration is 'in effect a summary disposition of the issue of whether or not there had been a meeting of the minds on the agree-

ment to arbitrate," *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 528 (3d Cir. 2009) (citation omitted). Accordingly, "[t]he party opposing arbitration is given 'the benefit of all reasonable doubts and inferences that may arise.'" *Kaneff*, 587 F.3d at 620. As with the standard for summary judgment, "[o]nly 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." *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980).

Discussion

The parties agree that any and all disputes arising out of the employment relationship - including the claims asserted here - are to be resolved in binding arbitration. Accordingly, the role of the Court is limited [*8] to deciding whether the revised Arbitration Policy introduced in April 2005 - and the class arbitration waiver included within that revision - governed this dispute. We conclude that the District Court should not have decided the issue presented as to the class action waiver, and, as we explain below, we will refer the resolution of this question to arbitration in accordance with governing jurisprudence. The District Court should have, however, ruled on the issue of unconscionability and we will address it.

We have repeatedly stated that [HN2] courts play a limited role when a litigant moves to compel arbitration. Specifically, "whether the parties have submitted a particular dispute to arbitration, *i.e.*, the *question of arbitrability*, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *Puleo*, 605 F.3d at 178 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)). "[A] question of arbitrability arises only in two circumstances—first, when there is a threshold dispute over 'whether the parties have a valid arbitration agreement at all,' and, second, when the parties are in dispute as to 'whether a concededly binding arbitration [*9] clause applies to a certain type of controversy.'" *Id.* (quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003)). In contrast, the Supreme Court has distinguished "questions of arbitrability with disputes over arbitration procedure, which do not bear upon the validity of an agreement to arbitrate." *Id.* at 179. We noted in *Puleo* that "procedural questions" - such as waiver or delay - "which grow out of the dispute and bear on its final disposition are presumptively not for the judge." *Id.*

This matter satisfies neither of the *Puleo* arbitrability circumstances. As stated, neither party questions "whether the parties have a valid arbitration agreement at all." *Id.*; (see also Appellants' Br. at 15 ("Plaintiffs do

not challenge the validity of the arbitration agreements they entered into when they first began their employment"); Appellees' Br. at 6 ("At the outset of employment, Appellants agreed to the Travelers Employment Arbitration Policy".) The original arbitration provision to which Vilches admittedly agreed provided that "the required, and exclusive, forum for the resolution of *all employment disputes*" would be arbitration. (App'x at 79 (emphasis added).) Here, the issue [*10] of whether an employee is bound by a disputed amendment to existing employment provisions falls within the scope of this expansive agreement to arbitrate. Indeed, the language makes clear that the "concededly binding arbitration clause applies" to the particular employment claims at stake here, and the parties do not advance a cognizable argument to suggest otherwise. *Puleo*, 605 F.3d at 178. Accordingly, the second *Puleo* arbitrability element is also unfulfilled.

While the parties framed their arguments so as to invite the Court's attention to the class action waiver issue - namely, whether the revised Arbitration Policy expressly prohibiting class arbitration governs the relationship between Travelers and Vilches - we conclude that "the relevant question here is what *kind of arbitration proceeding* the parties agreed to." *Bazzle*, 539 U.S. at 452 (emphasis in original). As stated, the addition of the disputed class arbitration waiver did not disturb the parties' agreement to refer "all employment disputes" to arbitration, and, thus, "does not bear upon the validity of an agreement to arbitrate." *Puleo*, 605 F.3d at 179. Assuming binding arbitration of all employment disputes, the contested [*11] waiver provision solely affects the type of procedural arbitration mechanism applicable to this dispute. [HN3] "[T]he Supreme Court has made clear that questions of 'contract interpretation' aimed at discerning *whether* a particular procedural mechanism is authorized by a given arbitration agreement are matters for the arbitrator to decide." *Id.* (emphasis in original). Where contractual silence is implicated, "the arbitrator and not a court should decide whether a contract[was] indeed 'silent' on the issue of class arbitration," and "whether a contract with an arbitration clause forbids class arbitration." *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1771-72, 176 L. Ed. 2d 605 (2010).

The Policy originally in force made no mention of class action or class arbitration, and was entirely silent on whether the parties had a right to proceed through class or collective arbitration. ³ In contrast, the amended Policy explicitly precludes class arbitration. Accordingly, we must "give effect to the contractual rights and expectations of the parties," and refer the questions of whether class arbitration was agreed upon to the arbitrator. *Stolt-Nielsen*, 130 S. Ct. at 1774.

3 Despite the parties' apparent [*12] concurrence that the original Policy's silence afforded Vilches a "right" to proceed in class arbitration, the provision's language does not actually confirm the existence of such a right. *See, e.g., Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) ("We thus adopt the rationale of several other circuits and hold that section 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration is silent on the matter"); *Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001) ("[B]ecause the [] agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals."). Although contractual silence in the post-*Bazze* era has often been treated by arbitrators as authorizing class arbitration, *Stolt-Nielsen* suggests a return to the pre-*Bazze* line of reasoning on contractual silence, albeit decided by an arbitrator, because it focuses on what the parties agreed to - expressly or by implication. *See 130 S. Ct. at 1776* ("[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . [*13] that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."). Although the Policy's silence here suggests that the addition of the class waiver did not deprive Vilches of the asserted "right" to class arbitration, we will refer this question to the arbitrator.

Although we offer no forecast as to the arbitrator's potential resolution of these questions, assuming *arguendo* that the arbitrator finds the class action waiver binding, we will address Vilches' alternative argument that the addition of the class action waiver was unconscionable for the sake of judicial efficiency, and because it does concern "arbitrability." *See Puleo*, 605 F.3d at 179.

[HN4] "In stark contrast with the question of arbitration procedure" discussed above, "when a party challenges the validity of an arbitration agreement by contending that one or more of its terms is unconscionable under generally applicable state contract law, a question of arbitrability is presented." *Id.* "The Courts of Appeals are unanimous in recognizing that an unconscionability challenge to the provisions of an arbitration agreement is a question of arbitrability that [*14] is presumptively for the court, not the arbitrator, to decide." *Id.* at 180. Here, Vilches contend that the timing, language, and

format of the class action waiver renders it unconscionable, even if it is binding. We disagree.

[HNS] The contractual doctrine of unconscionability "involves both 'procedural' and 'substantive' elements," and "requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions." *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 277 (3d Cir. 2004). "In addressing a claim that an arbitration clause is unconscionable, we apply the 'ordinary state law principles . . . of the involved state or territory.'" *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 200 (3d Cir. 2010). New Jersey case law provides that "adhesion contracts invariably evidence some characteristics of procedural unconscionability," and "a careful fact-sensitive examination into substantive unconscionability is generally required." *Moore v. Woman to Woman Obstetrics & Gynecology, LLC*, 416 N.J. Super. 30, 3 A.3d 535, 540 (N.J. Sup. App. Div. 2010) (internal quotations and [*15] citation omitted).

As we recently observed, [HN6] the New Jersey Supreme Court has stated that "[t]he public interest at stake in . . . consumers['] [ability to effectively] pursue their statutory rights under consumer protection laws constituted the 'most important' reason for holding a [] class-arbitration waiver unconscionable." *Homa v. Amer. Ex. Co.*, 558 F.3d 225, 230 (3d Cir. 2009) (quoting *Muhammad v. County Bank of Rehoboth Beach, De.*, 189 N.J. 1, 912 A.2d 88, 99-101 (N.J. 2006)). Notably, however, "class action waiver becomes 'problematic when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contract parties predictably involve small amounts of damages.'" *Id.* (citing *Muhammad*, 912 A.2d at 99) (emphasis added). Where a class action waiver is not part of a consumer contract of adhesion, New Jersey courts perceive nothing unconscionable or unfairly burdensome about an arbitration agreement. *See Delta Fund. Corp. v. Harris*, 189 N.J. 28, 912 A.2d 104, 115 (N.J. 2006) ("[U]nder New Jersey law, the class-arbitration waiver in [an] arbitration agreement is not unconscionable per se."). Indeed, "the affirmative policy of [New Jersey], both legislative and judicial, [*16] favors arbitration as a mechanism of resolving disputes." *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 800 A.2d 872, 881 (N.J. 2002).

Here, the class arbitration waiver does not concern a consumer contract with predictably small damages, nor is the arbitration agreement in whole unconscionably adhesive, as [HN7] "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* at 880 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S. Ct.

1647, 114 L. Ed. 2d 26 (1991)). "[T]he Supreme Court [in *Gilmer*] obviously contemplated avoidance of the arbitration clause only upon circumstances more egregious than the ordinary economic pressure faced by every employee who needs the job." *Id.* (citation omitted) (alterations in original). Echoing virtually every court to consider "the adhesive effect of arbitration provisions in [] employment agreements," *id.*, we similarly held that "[u]nequal bargaining power is not alone enough to make an agreement to arbitrate a contract of adhesion," *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 184 (3d Cir. 1998), *overruled on other grounds by Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)). [*17] Vilches only demonstrated their position relative to Travelers and their interest in maintaining employment, which is insufficient on its own to prove that the class arbitration waiver is unreasonably favorable to Travelers. As such, we conclude that the waiver is not substantively oppressive and unconscionable.⁴

4 Vilches's policy arguments are premised on the amorphous contention that arbitration would undermine the deterrent function of the FLSA. This contention is unavailing, however, since Vilches failed to substantiate the view that arbitration will not adequately protect the financial interests of employees. Indeed, [HN8] there is no "suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (citing *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir. 2000)).

Moreover, [HN9] "procedural unconscionability involves a 'variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process.'" [*18] *Estate of Ruzala v. Brookdale Living Comms., Inc.*, 415 N.J. Super. 272, 1 A.3d 806, 819 (N.J. Sup. App. Div. 2010) (quoting *Muhammad*, 912 A.2d at 96). Vilches failed to establish these inadequacies in this instance. Vilches were always aware of the existence of an arbitration policy that could be amended, they were sophisticated employees with significant corporate experience, and they failed to demonstrate that Travelers utilized unduly complex contract terms or engaged in oppressive bargaining tactics when introducing the revised Policy. Furthermore, Travelers provided several notices of the class arbitration amendment and requested acknowledgment and agreement to the revision on an annual basis. Moreover, Vilches presented no evidence that they could not have negotiated the terms of the arbitration agreement or found another job, as is their burden.

Accordingly, assuming that the arbitrator finds the revised Policy binding, we do not find the timing and format of the class action waiver either procedurally or substantively unconscionable.

Conclusion

For the foregoing reasons, we will vacate the District Court order, and refer the matter to arbitration to resolve whether the parties can proceed as a class [*19] in arbitration pursuant to the relevant arbitration provisions.