UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 13-01927 JVS(RNBx)	Date	April 8, 2014
Title	**Michael Appelbaum v. AutoNation Inc., et al.**		

Present: The Honorable	James V. Selna	
Karla J. Tunis		Not Present
Deputy Clerk		Court Reporter
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
Not Present		Not Present

Proceedings: (IN CHAMBERS)
Order Granting Defendants' Motion Compel Arbitration (fld 1-29-14)

Defendant AutoNation, Inc. ("AutoNation") and Costa Mesa Cars, Inc. ("Costa Mesa" and together, "Defendants") move for an order compelling arbitration of Plaintiff Michael Applebaum's ("Applebaum") claims on an individual basis and staying all proceedings in the case pending arbitration. (Mot., Docket No. 23.) Defendants move in the alternative for an order dismissing certain of Applebaum's claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Id.) Applebaum opposes the motion. (Opp'n, Docket No. 24.) Defendants have replied. (Reply, Docket No. 27.) For the following reasons, the Court GRANTS the motion to compel arbitration and STAYS the action pending the completion of arbitration.

I. Background

This putative class action arises out of the employment relationship between Applebaum and Defendants. Applebaum was employed by Defendants as a service technician from 2004 until June 2013. (Index of Exs. to Not. of Removal, Ex. 1-40 (First Amended Complaint) ("FAC") ¶ 4, Docket No. 2.) Defendant AutoNation is a Delaware corporation with its principal place of business in Florida, that owns automotive dealerships, including Defendant Costa Mesa, throughout the United States, including California. (Id. ¶¶ 5, 7, 15.)

In 2006, Applebaum was made to sign a Confidentiality Agreement. (Applebaum Decl. ¶ 6, Docket No. 24-2.) The Confidentiality Agreement contains provisions

providing for the confidentiality of Defendants' information and documents and preventing former employees from soliciting Defendants' customers or hiring their employees under particular circumstances. (Applebaum Decl. Ex. 1 ("Confidentiality Agreement"), Docket No. 24-2.) Notably, the Confidentiality Agreement provides that "[t]he parties agree that any action, suit or proceeding arising out of or relative to this Agreement or the relationship of Employee and Company shall be instituted only in the state or federal courts located in Broward County, in the state of Florida . . . ."

In May 2013, Applebaum signed an Arbitration Agreement. Applebaum declares that signing the Arbitration Agreement was presented as a condition to remaining employed. (Applebaum Decl. ¶¶ 4–5.) In rebuttal, Defendants offer evidence that signing the Arbitration Agreement was voluntary for employees. (Reply Ex. 1, Duport Decl. ¶ 6.)[1]

The Arbitration Agreement's terms apply to Applebaum and "the Company," defined as "the entity Employee is employed by, together with its parents, subsidiaries, predecessors, successors and assigns, and each of their respective owners, directors, officers, managers, employees, vendors, and agents." (Mot. Ex. 1, Harrison Decl., Ex. A ("Arbitration Agreement"), Docket No. 23-2.) Subject to exceptions largely irrelevant to this case, the Arbitration Agreement covers "any claim, dispute, and/or controversy . . . arising from, related to, or having any relationship or connection whatsoever with [Applebaum's] seeking employment with, employment by, termination of employment from, or other association with [Costa Mesa]" as well as "all theories and disputes, whether styled as an individual claim, class action claim, private attorney general claim or otherwise, and includes, but is not limited to, any claims of . . . violations of statute, regulation, or ordinance, or any claims in equity." (Id. at 1.)

Other important clauses in the Arbitration Agreement include the waiver of class and representative claims:

> **Waiver of Right to Participate in Class Actions**. Employee understands and acknowledges that the terms of this Agreement include a waiver of any substantive

[1] As discussed below, the Court need not resolve the conflict here or Applebaum's objection to Defendants' rebuttal evidence because the Court's decision does not turn on the rebuttal evidence.

> or procedural rights that Employee may have to bring or participate in an action on a class, collective, private attorney general, representative or other similar basis. This class action waiver does not take away or restrict the right of Employee to pursue Employee's own claims, but only requires that any such claim be pursued in Employee's own individual capacity, rather than on a class, collective, private attorney general, representative or similar basis.

(Id. at 2 (emphasis in original).) The Arbitration Agreement also includes a severability clause, noting that if any provision other than the one prohibiting class arbitration is deemed invalid, the invalidation will not nullify the rest of the agreement. (Id.) Finally, the Arbitration Agreement states that it is governed by the Federal Arbitration Act. (Id. at 1.)

Applebaum filed this action in Orange County Superior Court in October 2013. (Index of Exs. to Not. of Removal, Ex. 1-6 ("Compl."), Docket No. 2.) He filed the FAC in November 2013, seeking to represent a putative class of service technicians and mechanics in a suit alleging failure to comply with California's wage and hour laws and meal and rest break laws . (FAC.) Applebaum also seeks declaratory and injunctive relief for violation of California's unfair competition law. (Id.) On December 11, 2013, Defendants removed the action to this Court. (Not. of Removal, Docket No. 1.) Defendants now seek to compel the arbitration of Applebaum's claims on an individual basis pursuant to the Agreement. (Mot.)

II. Legal Standard

The Federal Arbitration Act ("FAA") "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements," and is meant "to ensur[e] that private arbitration agreements are enforced according to their terms." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745, 1748 (2011) (internal quotation marks and citations omitted). The FAA reflects a federal policy favoring arbitration, "a fundamental principle that arbitration is a matter of contract," and requires courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." Id. at 1745 (citations omitted).

Section 2 of the FAA provides that written agreements to arbitrate disputes arising out of transactions involving interstate commerce "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; Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 936 (9th Cir. 2001). Under section 2, "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, or unenforceability of contracts generally." Ticknor, 265 F.3d at 937 (quoting Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)) (internal quotation marks omitted). "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." Ticknor, 265 F.3d at 937 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686 (2000)) (internal quotation marks omitted). "[W]here a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles." Jackson v. Rent-A-Center West, Inc., 581 F.3d 912, 918–19 (9th Cir. 2009), rev'd on other grounds, 561 U.S. 63 (2010).

Under the FAA, a party to an arbitration agreement may bring a motion in federal district court to compel arbitration. 9 U.S.C. § 4. A district court may not review the merits of the dispute when determining whether to compel arbitration. Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1119 (9th Cir. 2008). Instead, the FAA limits the district court's role "to determining (1) whether a valid agreement to arbitrate exists and, if it does (2) whether the agreement encompasses the dispute at issue." Id. (internal citation and quotation marks omitted); Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). If a valid arbitration agreement exists, the district court is required to enforce the arbitration agreement according to its terms. Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004). Ambiguities as to the scope of the arbitration provision must be interpreted in favor of arbitration. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995).

III. Discussion

On its face, the Arbitration Agreement applies to Applebaum's claims against Defendants. There is no serious argument that Costa Mesa and AutoNation are not both covered by the term "Company" in the Arbitration Agreement, and Applebaum's wage

and hour claims are clearly covered by the Arbitration Agreement's broad language. But Applebaum argues that: (1) the Confidentiality Agreement, providing for court resolution of disputes between the parties, controls; (2) that the FAA does not govern the Arbitration Agreement; (3) even if the FAA does control, the Arbitration Agreement is procedurally and substantively unconscionable; (4) the class waiver is unenforceable under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151–59, and the Norris–LaGuardia Act, 29 U.S.C. §§ 101–14; (5) the Court should deny or stay arbitration pending the outcome of related litigation; and (6) Applebaum's claims under the Private Attorney General Act ("PAGA"), Cal. Lab. Code § 2699, et seq., are not arbitrable.

A. Whether the Confidentiality Agreement Governs

Applebaum argues that because of the Confidentiality Agreement's language stating that any dispute relative to "the relationship of [Applebaum] and [Defendants] shall be instituted" in state or federal court in Broward County, Florida, the parties have agreed to adjudicate the present claims in court. But the argument is without merit. First, it is clear from the language of the Confidentiality Agreement itself that it is meant "to confirm certain understandings with respect to such confidential and proprietary information and the solicitation and/or hiring of employees and customers of the [Defendants.]" (Confidentiality Agreement at 1.) While it is true that the Confidentiality Agreement's language is susceptible to the broad meaning Applebaum presses, such a construction would render the Arbitration Agreement meaningless; both speak to all disputes relative to "the relationship" of the parties. "It is a well settled principle that the later contract supersedes the former contract as to inconsistent provisions." NLRB v. Int'l Union of Operating Eng'rs Local No. 12, 323 F.2d 545, 548 (9th Cir. 1963). Thus, even if the Court were not persuaded that interpreting the Confidentiality Agreement's provisions to govern only claims pertaining to confidentiality and solicitation issues is eminently more reasonable than Applebaum's view, the Arbitration Agreement itself, as the later contract, would supersede the Confidentiality Agreement.

B. Whether the FAA Governs the Interpretation of the Arbitration Agreement

Applebaum argues that Defendants have not shown that the FAA applies in this matter because they have not shown that Applebaum's employment with Defendants constituted a transaction involving interstate commerce. The argument, however, is wholly unpersuasive.

"The FAA covers arbitration agreements with employers who operate within the flow of interstate commerce." Steele v. Am. Mortg. Mgmt. Servs., No. 2;12-cv-00085 WBS JFM, 2012 WL 5349511, at *3 (E.D. Cal. Oct. 26, 2012) (internal quotations and citation omitted); see also Nelsen v. Legacy Partners Residential, Inc., 207 Cal. App. 4th 1115, 1123–24 (2012) (applying FAA to arbitration agreement between a California residential property manager and his nationwide property management employer). To the extent that Applebaum cites cases from outside the employment context holding that the diversity of citizenship alone does not support a finding of interstate commerce, the FAC itself makes clear that AutoNation owns dealerships throughout the nation. (FAC ¶ 15.) The Court thus need not consider Defendants' evidence, offered in rebuttal of Applebaum's arguments, that Applebaum's duties included servicing cars and parts from across the country and abroad. Clearly, the FAA applies to govern the Arbitration Agreement at issue here.

C. Unconscionability

Applebaum also argues that should the Court find that the FAA governs the Arbitration Agreement, the Agreement should be deemed unconscionable.

In California, unconscionability has both a procedural and a substantive element. See Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (2000). The former addresses the manner in which the contract or the disputed clause was presented and negotiated, and focuses on "oppression" or "surprise" due to unequal bargaining power. Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev., 55 Cal. 4th 223, 246 (2012); Armendariz, 24 Cal. 4th at 114; Dotson v. Amgen, Inc., 181 Cal. App. 4th 975, 980 (2010). Substantive unconscionability, on the other hand,"focuses on the terms of the agreement and whether those terms are so one-sided as to shock the conscience." See Soltani v. Western & Southern Life Ins. Co., 258 F.3d 1038, 1043 (9th Cir. 2001) (quoting Kinney v. United Healthcare Servs., 70 Cal. App. 4th 1322, 1330 (1999)) (emphasis in original); see also Armendariz, 24 Cal. 4th at 114 (noting that substantive

unsconscionability is present if the contract terms are "overly harsh" or "one-sided"). While both procedural and substantive unconscionability are required to render a contract unenforceable, they need not be present in the same degree. Armendariz, 24 Cal. 4th at 114. The more substantively oppressive the terms are, the less evidence of procedural unconscionability is required to find that the contract is unenforceable, and vice versa. Id. Whether a contract or provision is unconscionable is a question of law. Flores v. Transamerica HomeFirst, Inc., 93 Cal. App. 4th 846, 851 (2001). The party challenging the arbitration agreement bears the burden of establishing unconscionability. Pinnacle Museum Tower Ass'n, 55 Cal. 4th at 247.

1. Procedural Unconscionability

Applebaum asserts that the Arbitration Agreement is procedurally unconscionable because it is a contract of adhesion. As discussed above, Applebaum claims that his remaining employed at Costa Mesa was conditioned on his signing the Arbitration Agreement. While Defendants offer evidence disputing this claim, it is unnecessary to resolve the conflict here. Even assuming, as the Court does below, that the Arbitration Agreement is a contract of adhesion and is procedurally unconscionable, it is only minimally so, and Applebaum has not made the necessary showing of substantive unconscionability to invalidate the Agreement.

The context in which Applebaum claims he signed the Arbitration Agreement does entail procedural unconscionability. "An arbitration agreement that is an essential part of a 'take it or leave it' employment condition, without more, is procedurally unconscionable." Martinez v. Master Prot. Corp., 118 Cal. App. 4th 107, 114 (2004); see also Armendariz, 24 Cal. 4th at 115 ("In the case of preemployment arbitration contracts, . . . few employees are in a position to refuse a job because of an arbitration requirement."). Notably, many courts have found that the take-it or leave-it employment contract scenario only results in a minimal degree of procedural unconscionability. See, e.g., Collins v. Diamond Pet Food Processors of California, LLC, No. 2:13-cv-00113-MCE-KJN, 2013 WL 1791926, at *4 (E.D. Cal. Apr. 26, 2013); Miguel v. JPMorgan

Chase Bank, N.A., No. CV 12-3308 PSG (PLAx), 2013 WL 452418, at *4 (C.D. Cal. Feb. 5, 2013); Saincome v. Truly Nolen of Am., Inc., No. 11-CV-825-JM (BGS), 2011 WL 3420604, at *4–5, 10 (S.D. Cal. Aug. 3, 2011). Therefore, the fact that Applebaum signed the Arbitration Agreement as a condition of his continued employment does establish that the Agreement is to some degree procedurally unconscionable.

Applebaum has therefore made a showing of some procedural unconscionability based upon the adhesive nature of the contract. However, California law requires that Applebaum also make a showing of substantive unconscionability in order for the Agreement to be held unenforceable on unconscionability grounds. See Soltani, 258 F.3d at 1043; Armendariz, 24 Cal. 4th at 114. The Court now turns to the issue of substantive unconscionability.

2. Substantive Unconscionability

Applebaum argues that the Arbitration Agreement is substantively unconscionable on five grounds: (1) the Agreement lacks mutuality; (2) the Agreement does not provide for adequate discovery; (3) the Agreement provides no rules on conducting the arbitration; (4) the Agreement will impose exorbitant fees and costs on Applebaum; and (5) the Agreement forecloses judicial review.

a. Mutuality

As noted by the California Supreme Court in Armendariz, an arbitration agreement's lack of mutuality can render the agreement substantively unconscionable. 24 Cal. 4th at 117–21. Lack of mutuality involves a one-sided agreement in which a party with superior bargaining power imposes limitations on the other party without accepting those limitations itself. Id. Furthermore, the Ninth Circuit has held that, "under California law, a contract to arbitrate between an employer and an employee . . . raises a rebuttable presumption of substantive unconscionability." Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1174 (9th Cir. 2003). This presumption applies "[u]nless the employer can demonstrate that the effect of [the] contract to arbitrate is bilateral . . . ." Id. All that is

required under California law is a mere "modicum of bilaterality." Armendariz, 24 Cal.4th at 117; see also Ingle, 328 F.3d at 1173.

Applebaum contends that the Arbitration Agreement lacks mutuality because it requires him to arbitrate all claims against Defendants yet does not require Defendants to arbitrate claims against Applebaum.

First, Applebaum argues that the language in the Confidentiality Agreement entitling Defendants to certain remedies means that Defendants may press any claim in court, but Applebaum must arbitrate. (Opp'n at 10.) But the Court has already rejected the argument that the Confidentiality Agreement governs all disputes between the parties here. At most, it entitles Defendants to seek such remedies if Applebaum breaches his agreement regarding confidentiality and the hiring and solicitation of Defendants' employees and customers. Moreover, the Confidentiality Agreement itself notes that both parties have the right to turn to the courts to resolve such a dispute. At the hearing, Applebaum pressed the argument regarding explicit reference to Defendants' remedies in the ConfidentialityAgreement, suggesting that such a one-sided exception to the later Arbitration Agreement rendered that later Agreement unconscionable. Applebaum points to the principle that an ambiguity in a contract should be resolved against the drafting party who created that ambiguity, in this case, Defendants. See Cal. Civ. Code § 1654. But interpreting the Confidentiality Agreement to mean that only Defendants' claims can be heard in court would actually be to construe the contract against Applebaum, for the purpose of invalidating the Arbitration Agreement. Such a construction would itself conflict with the principle that a contract should be interpreted in such a way to render it lawful, operative, and enforceable. See id. § 1643. Thus the best reading of the two agreements together is that both parties may seek court remedies for issues relating to the Confidentiality Agreement's confidentiality, no-hire, and no-solicitation provisions, and must arbitrate all other claims.[2] This does not render the Arbitration Agreement unconscionable. Cf. Ruhe v. Masimo Corp., No. SACV 11-00734-CJC (JCGx), 2011 WL 4442790, at *4 (C.D. Cal. Sept. 16, 2011) ("While the [confidentiality agreement] does create an exception to the arbitration agreement, it appears as though either employee or

[2] As for Applebaum's potential remedies under the Confidentiality Agreement, if an appropriate dispute arose, Applebaum could conceivably seek declaratory relief to the effect that he did not breach any of the confidentiality, no-hire, and no solicitation provisions.

employer may turn to a court to enforce their intellectual property rights under the [confidentiality agreement]. Even assuming the [confidentiality agreement] creates a carve-out that favors the employer, [that] does not create sufficient inequity between employer and employee, considering the remainder of claims which employer must arbitrate so as to 'shock the conscience' . . . .") (citation omitted).

Next, Applebaum argues that the Arbitration Agreement lacks mutuality because it can be modified at will by Defendants. But the Arbitration Agreement says that "[a]ny agreement contrary to, or modifying, the foregoing arbitration provisions must be entered into, in writing, by the President of the Company." It is obvious that such a provision means only that any agreement subsequent to the Arbitration Agreement, and purporting to modify it, must be signed by the President, not that the President has the unilateral authority to make changes.

Applebaum argues that the Arbitration Agreement's use of the term "Company" and the broad definition associated with it makes it impossible to identify the Defendants. (Opp'n at 11.) But this argument also fails to persuade. Use of such language appears to be common in arbitration agreements, and courts frequently enforce such agreements. See, e.g., Kaselitz v. hiSoft Tech. Int'l, Ltd., No. C-12-5760 MMC, 2013 WL 622382, at *4, 6–7 (N.D. Cal. Feb. 15, 2013) (enforcing arbitration agreement requiring arbitration with the "Company, . . . including . . . any employee, officer, director, shareholder or benefit plan of the company" and applying it to "parent" entity not identified in the agreement); Ramirez v. AutoNation, Inc., No. 08-60645-CIV, 2008 WL 2916278, at *1 (S.D. Fla. July 25, 2008) (enforcing agreement that defined "Company" to include "parents, subsidiaries, affiliates, predecessors, successors and assigns, their . . . respective owners, directors, officers, managers . . . , employees, vendors, and agents") (ellipses in original) (internal quotation marks omitted). Applebaum does not dispute that AutoNation is a parent of Costa Mesa, and indeed the claims against AutoNation are premised on its relationship with Costa Mesa.

Finally, Applebaum argues that the Arbitration Agreement's severability clause, stating that only the class waiver provision is not severable, is unconscionable because a class action waiver only benefits employers. (Opp'n at 11.) Under California law, an arbitration agreement is rendered substantively unconscionable if it requires arbitration of claims likely to be brought by employees and excludes claims likely to be brought by an

employer. See, e.g., Fitz v. NCR Corp., 118 Cal. App. 4th 702, 724–25 (2004); Mercuro v. Superior Court, 96 Cal. App. 4th 167, 175–76 (2002) (same); see also Armendariz, 24 Cal. 4th at 119 ("One such form [of unconscionability] is an agreement requiring arbitration only for the claims of the weaker party but a choice of forum for the claims of the stronger party"). While severing all provisions from the Arbitration Agreement apart from the class action waiver would inure to Defendants' benefit, the Agreement is clear that it applies to all claims. The class waiver provision is merely Defendants' legitimate means of protecting themselves against the one-sided risk of a class action. The law is clear that Defendants are free to guard against the risk of class actions. See Concepcion, 131 S. Ct. at 1752 (citation omitted).

It is clear from the context of the Arbitration Agreement that its provisions are binding on both Applebaum and Defendants. The language expressly states that "[b]oth employee . . . and the Company . . . agree that any claim . . . shall be resolved through mandatory, neutral, binding arbitration on an individual basis only." (Arbitration Agreement at 1.) The Agreement further provides that "EMPLOYEE AND THE COMPANY UNDERSTAND THAT BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH GIVE UP THEIR RIGHT TO TRIAL BY JURY OF ANY CLAIM EITHER MAY HAVE AGAINST THE OTHER . . . ." (Id. at 2.) Cf. Little v. Auto Stiegler, Inc., 29 Cal. 4th 1064, 1069–70, 1075 (2003) (upholding all but one-sided appealability provision of arbitration agreement with similar language); see also Saincome, 2011 WL 3420604 at *6 ("[A]lthough the language [of the arbitration agreement], when read alone, appears to be binding only on Plaintiff, when examined in the context of the Agreement as a whole, it is evident that the Agreement binds both parties to arbitrate their claims against the other."). Based upon the similarity of the arbitration provisions in Little to those in this case, the Court concludes that the Arbitration Agreement imposes obligations on both Applebaum and Defendants to arbitrate any claims they have against one another, and that the Agreement is not substantively unconscionable for lack of mutuality.

b. Failure to Provide for Adequate Discovery

Applebaum argues that the Arbitration Agreement is unconscionable because it makes no express provision for discovery rights. (Opp'n at 12.) Armendariz is clear that adequate discovery must be permitted to avoid a finding of unconscionability. See 24

Cal. 4th at 104. However, as Defendants point out, the Arbitration Agreement expressly provides that "except as modified by this Agreement" the arbitration will be governed by "the Federal Rules of Evidence[] [and] the Federal Rules of Civil Procedure . . . ." (Arbitration Agreement at 1.) These rules clearly provide for discovery, indeed, the same mechanisms that are applicable in this Court.

To the extent that Applebaum argues that the failure to attach the Rules is problematic, that argument is similarly unconvincing. Under California law, parties to an agreement can incorporate the terms of another document into the agreement by reference. Troyk v. Farmers Group, Inc., 171 Cal. App. 4th 1305, 1331 (2009); Wolschlager v. Fid. Nat. Title Ins. Co., 111 Cal. App. 4th 784, 790 (2003). "For the terms of another document to be incorporated into the document executed by the parties, the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." Collins, 2013 WL 1791926, at *5 (quoting Shaw v. Regents of Univ. of Cal., 58 Cal. App. 4th 44, 54) (1997)) (internal quotation marks omitted). Here, the Agreement clearly states that any arbitration will be conducted in conformity with the Federal Rules of Evidence and the Federal Rules of Civil Procedure. This is sufficiently clear and unambiguous to incorporate the Federal Rules into the contract by reference. Furthermore, the applicable Rules are readily available on the internet for free. Therefore, the Court concludes that the Arbitration Agreement is not substantively unconscionable for failure to provide for adequate discovery.

c. Failure to Provide Rules for Conducting the Arbitration

Applebaum's next argument, that the Arbitration Agreement fails to specify rules for conducting the arbitration (Opp'n at 12–13), is likewise unconvincing. First, the Agreement clearly provides that "[a]ny arbitration hereunder shall be governed by the [FAA] and not by any state law concerning arbitration, and, except as modified by this Agreement, in conformity with the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and the substantive law governing the claims pled." In addition, the Agreement specifies the qualifications for the arbitrator, mandates a written decision within forty-five days of arbitration, and lays out an appellate process. To the extent that the rules specified do not cover every procedural issue, those incorporated by reference,

such as the FAA and the Federal Rules, fill the gaps. See, e.g. 9 U.S.C. § 4 (section of FAA specifying venue for arbitration); id. § 5 (specifying procedure for appointing arbitrator should a party not avail itself of procedure in arbitration agreement). Thus the Court concludes that the Arbitration Agreement is not substantively unconscionable for failure to provide rules for conducting the arbitration.

d. Allocation of Fees and Costs

Applebaum argues that the Arbitration Agreement is also unconscionable because it will impose exorbitant fees and costs that Applebaum cannot pay. (Opp'n at 13.) The Agreement does not impose such costs, and it is not unconscionable on that basis.

It is true that a "process that builds prohibitively expensive fees into the arbitration process" may be substantively unconscionable. Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109, 1144 (2013). But the Southern District of California concluded that, "[t]he absence of specific provisions on arbitration costs would . . . not be grounds for denying the enforcement of an arbitration agreement." Marshall v. Pontiac, 287 F. Supp. 2d 1229, 1234 (S.D. Cal. 2003) (quoting Armendariz, 24 Cal. 4th at 113) (emphasis in original) (internal quotation marks omitted). While it may be required that the Defendants bear certain costs associated with the arbitration to avoid an unfair process, that "is a decision for the arbitrator and not for this Court." Id. The Arbitration Agreement expressly provides that the arbitration will be governed by the applicable state substantive law. (Arbitration Agreement at 1.) As Defendants point out, if California law would require Defendants to assume the costs of the arbitration to avoid unconscionability, that law would apply. (See Reply at 18.) Concepcion's powerful language in favor of arbitration agreements' enforceability requires this Court not to read the Arbitration Agreement unreasonably so as to render it unenforceable.

Even the evidence that Applebaum provides concerning the likely costs of arbitration (see Barnes Decl., Docket No. 24-1) does not affect the Court's conclusion. In a case before the District of Arizona, the court held that silence as to costs and fees was not unconscionable and that the plaintiff's evidence of having contacted fourteen arbitrators in the area to inquire as to their hourly fees was too speculative to show that plaintiff would likely bear prohibitive arbitration costs. See Monsanto v. DWW Partners, LLLP, No. CV-09-01788-PHX-FJM, 2010 WL 234952, at *2 (D. Ariz. Jan. 15, 2010).

Though not applying California law on unconscionability, the reasoning as to the speculative nature of plaintiff's evidence is instructive to this Court's consideration of Applebaum's evidence, consisting of a declaration from his attorney that based on his experience litigating wage and hour claims, an arbitration would be too expensive for Applebaum to bear any significant portion of the costs.

The Arbitration Agreement here is silent as to costs rather than specifying costs that employees must pay or displacing any state law rules as to costs, unlike any case Applebaum cites. Given the strong presumption in favor of arbitrability embodied by the FAA and Concepcion, the Court must conclude that the Agreement is not unconscionable on this ground.

e. Foreclosure of Judicial Review

Finally, Applebaum argues that the Arbitration Agreement is substantively unconscionable because it entirely forecloses judicial review. (Opp'n at 13–14.) But this contention also lacks merit. Applebaum quotes the Arbitration Agreement's provision stating that upon completion of the arbitration and any appellate process, the decision "shall be final and binding on the parties," but declines to quote the parenthetical immediately following this language, stating: "(except as otherwise provided for under the FAA)." (Arbitration Agreement at 1–2.) The FAA permits district courts to vacate, modify, or correct arbitration awards under certain circumstances. See, e.g., 9 U.S.C. §§ 10, 11. But a general provision regarding finality is entirely unremarkable, and indeed one of the advantages of the arbitration process itself. Applebaum has cited no authority, and the Court can find none, suggesting that the Arbitration Agreement is unconscionable for foreclosing judicial review; given the Agreement's language, it does no such thing.

D. Whether the Class Waiver is Enforceable Under the NLRA

Applebaum argues that the class action waiver provision in the Arbitration Agreement is unenforceable under both the NLRA's provision protecting concerted employee activities, see 29 U.S.C. § 157, and the Norris–LaGuardia Act's provision protecting workers from interference in concerted activities, see 29 U.S.C. § 102. The argument is based on a decision of the National Labor Relations Board ("NLRB") concluding that an agreement precluding class claims regarding employees' wages,

hours, or working conditions violated the NLRA. See D.R. Horton, Inc. v. NLRB, 357 N.L.R.B. No. 184 (Jan. 3, 2012), rev'd in part, 737 F.3d 344 (5th Cir. 2013).

However, even the cases Applebaum cites foreclose this argument. For example, in Jasso v. Money Mart Exp., Inc., the Northern District of California ruled that to follow the NLRB's reasoning on this issue would conflict with the FAA and the Supreme Court's decision in Concepcion strongly favoring enforcement of arbitration agreements and strongly against striking class waiver provisions. See 879 F. Supp. 2d 1038, 1047–48 (N.D. Cal. 2012). The Jasso court concluded, and this Court agrees, that neither the NLRA nor the Norris–LaGuardia Act renders class waiver provisions unenforceable. See id. at 1047–49; see also Fimby-Christensen v. 24 Hour Fitness USA, Inc., No. 5:13-cv-01007-EJD, 2013 WL 6158040, at *4 (N.D. Cal. Nov. 22, 2013) ("[N]umerous federal courts . . . have explicitly rejected" the argument that the NLRA precludes enforcement of class waiver provisions.).

Applebaum has cited no contrary authority, and the Court thus concludes that neither the NLRA nor the Norris–LaGuardia Act renders the class waiver provision in the Agreement unenforceable.

E. Whether the Court Should Stay the Arbitration

Applebaum contends that should the Court find the Arbitration Agreement enforceable, it should stay arbitration pending the resolution of a similar case, Djukich v. AutoNation, Inc., No. 2:13-CV-04455 (C.D. Cal.), presently before the Central District, or alternatively stay arbitration pending resolution of Applebaum's PAGA claims in this Court. The Court discusses the PAGA claims issue in further detail below, but concludes here that there is no reason to stay arbitration pending resolution of Djukich. First, Applebaum's argument is premised on the Court's application of California law concerning arbitration, rather than the FAA. (See Opp'n at 15–16.) Second, staying arbitration pending resolution of another case would conflict with one of the central purposes of the Arbitration Agreement—adjudicating claims on an individual basis. The Court therefore declines to stay arbitration.

F. Waiver of PAGA Claims

Applebaum argues that his PAGA claims are not arbitrable, and that adjudication of such claims in this Court will render arbitration of the other claims unnecessary. The Court concludes, as above, that it will not stay arbitration. Moreover the Court rejects the argument that Applebaum's PAGA claims are not arbitrable and any suggestion that the waiver of PAGA claims renders the Arbitration Agreement unenforceable.

The Arbitration Agreement states that it "covers all theories and disputes, whether styled as an individual claim, class action claim, private attorney general claim or otherwise" and further states in the class waiver that the Agreement constitutes "a waiver of any substantive or procedural rights that Employee may have to bring or participate in an action on a class, collective, private attorney general, representative or other similar basis." (Arbitration Agreement at 1, 2.) PAGA permits plaintiffs to bring representative claims on behalf of other aggrieved employees for an employer's violation of the California Labor Code for the purpose of collecting civil penalties. Cal. Lab. Code § 2699, et seq.

At the outset, the Court agrees with Defendants and with the reasoning in Quevedo v. Macy's, Inc. that the PAGA claim "is plainly arbitrable to the extent that [Applebaum] asserts it only on his own behalf." 798 F. Supp. 2d 1122, 1141 (C.D. Cal. 2011). Indeed, the court in Quevedo concluded that Franco v. Athens Disposal Co., 171 Cal. App. 4th 1277, a case cited by Applebaum, is "no longer tenable" in light of Concepcion. Id. at 1142. Thus, Applebaum's PAGA claim is arbitrable to the extent he seeks civil penalties for violations of wage and hour laws as to him personally, but the Agreement forecloses the claim to the extent it is brought on behalf of other workers. See id. at 1140–42; Grabowski v. Robinson, 817 F. Supp. 2d 1159, 1181 (S.D .Cal. 2011) ("Plaintiff's California Private Attorney General Act claim is arbitrable, and . . . the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable.").

Applebaum does not explicitly argue that the PAGA waiver provision is unenforceable, but that argument would also be unavailing. Most California district courts addressing the issue have concluded that Concepcion preempts the California rule that PAGA waivers are unenforceable. See, e.g., Morvant v. P.F. Chang's China Bistro, Inc., 870 F. Supp. 2d 831, 845–46 (N.D. Cal. 2012) ("[T]he Court must enforce the parties' Arbitration Agreement even if this might prevent Plaintiffs from acting as private

attorneys general."); Quevedo, 798 F. Supp. 2d at 1140–42 (enforcing waiver of representative PAGA claims); Grabowski, 817 F. Supp. 2d at 1181.

In light of the Supreme Court's holding in Concepcion, this Court similarly concludes that the waiver of representative PAGA claims in an arbitration agreement does not render the agreement unenforceable because concluding otherwise would undermine the FAA's policy of favoring the arbitration of claims. See Concepcion, 131 S. Ct. at 1748 (noting that the FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives").

Thus, Applebaum's PAGA claim is arbitrable on an individual basis, and the Arbitration Agreement's provision barring a PAGA claim on behalf of others is enforceable.

IV. Conclusion

For the foregoing reasons, the Court GRANTS the motion to compel arbitration of Plaintiffs' claims on an individual basis and STAYS the action pending completion of the arbitration. Because all proceedings are stayed, it is unnecessary to resolve Defendants' alternative motions to dismiss certain claims under Rule 12(b). Those issues should be presented to the arbitrator.

IT IS SO ORDERED.

CIVIL MINUTES - GENERAL

Case No. SACV 13-01927 JVS(RNBx) Date April 8, 2014

Title **Michael Appelbaum v. AutoNation Inc., et al.**

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