UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NASHONNA COLEMAN, an individual, TERESA SAMANIEGO, an individual, and GAIL CHILLINSKY, an individual, on behalf of themselves and all persons similarly situated, Plaintiffs, vs. JENNY CRAIG, INC., Defendant.	CASE NO. 11cv1301-MMA (DHB) **ORDER GRANTING DEFENDANT JENNY CRAIG, INC.'S MOTION TO COMPEL ARBITRATION** [Doc. No. 11]

Plaintiffs Nashonna Coleman, Teresa Samaniego, and Gail Chillinsky bring this putative collective and class action against Defendant Jenny Craig, Inc. for alleged violations of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, and California state wage and hour laws. Defendant moves to compel arbitration of Plaintiffs Samaniego and Chillinsky's claims, pursuant to agreements requiring arbitration of all claims arising out of their employment. Plaintiffs filed an opposition to the motion, to which Defendant replied. *See* Doc. Nos. 12, 15. For the reasons set forth below, the Court **GRANTS** the motion.

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BACKGROUND

In May 2011, subsequent to the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) ("*Concepcion*" hereafter), Defendant Jenny Craig, Inc. requested all current employees sign arbitration agreements. *See Witsenburg Decl'n ISO Defendant's Motion* ¶ 2. Plaintiffs Teresa Samaniego and Gail Chillinsky (together "Plaintiffs") signed arbitration agreements with the company in June 2011.[1] *Id*., Exs. A, B. The agreements are identical, and provide, in part:

> Any and all claims or controversies arising out of or relating to Employee's employment, the termination thereof, or otherwise arising between Employee and Jenny Craig Operations, Inc. ("Company") shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration. This agreement to arbitrate includes all claims whether arising in tort or contract and whether arising under statute or common law including, but not limited to, any claim of breach of contract, discrimination or harassment of any kind. The parties also agree to submit claims to the Arbitrator regarding issues of arbitrability, the validity, scope, and enforceability of this Agreement, his or her jurisdiction, as well as any gateway, threshold, or any other challenges to this Agreement, including claims that this Agreement is unconscionable.

Id. The class action waiver contained in the agreements provides:

> **THE PARTIES AGREE THAT THEY WILL RESOLVE THEIR DISPUTES ON AN INDIVIDUAL BASIS. ANY CLAIMS BROUGHT UNDER THIS AGREEMENT MUST BE BROUGHT IN THE PARTIES' INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS, COLLECTIVE, OR REPRESENTATIVE PROCEEDING. THIS AGREEMENT ALSO PREVENTS ANY PARTY FROM PARTICIPATING IN A CLASS ACTION (EXISTING OR FUTURE) THAT WAS BROUGHT BY ANY OTHER PARTY. INSTEAD, THE PARTIES AGREE TO RESOLVE THEIR DISPUTES UNDER THIS AGREEMENT ON AN INDIVIDUAL BASIS.**

Id. (boldface and capitalization in original). Pursuant to the above stated terms, Defendant moves to compel arbitration of Plaintiffs' claims.

The parties do not dispute that Plaintiffs entered into the Arbitration Agreements, nor that the terms of those Agreements cover Plaintiffs' claims. The question before the Court is whether the terms of the arbitration agreements, particularly the class action waiver, render the agreements unenforceable as unconscionable.

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[1] According to Defendant, the company does not have an arbitration agreement signed by Plaintiff Nashonna Coleman. *Witsenburg Decl'n* ¶ 2. Defendant seeks to compel arbitration of Plaintiffs Samaniego and Chillinsky's claims only.

DISCUSSION

1. Legal Standard

The Federal Arbitration Act reflects "a liberal federal policy favoring arbitration" and requires federal courts to compel arbitration of any claim covered by a written and enforceable arbitration agreement. *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745–47 (2011). When a party moves to compel arbitration, the court must determine whether: (1) there is an agreement between the parties to arbitrate; (2) the claims at issue fall within the scope of the agreement; and (3) the agreement is valid and enforceable. *Lifescan, Inc. v. Pernaier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). If all three conditions obtain, the court is without discretion to deny the motion and must compel arbitration. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration").

Agreements to arbitrate are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2. Courts must apply ordinary state law principles in determining whether to invalidate an agreement to arbitrate. *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 782 (9th Cir. 2002). As such, arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. *Concepcion*, 131 S.Ct. at 1745–47.

To be unenforceable as unconscionable, a contract must be both procedurally and substantively unconscionable. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114 (Cal.2000). Procedural unconscionability concerns the manner in which the agreement was negotiated, while substantive unconscionability concerns the terms of the agreement itself. The "[p]rocedural unconscionability analysis focuses on 'oppression' or 'surprise.'" *Nagrampa v. MailCoups Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006), quoting *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.App.4th 846, 853 (2001). "'Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice.'" *Id*. Both elements of unconscionability must be present to render a contract unenforceable, but they need not be present in

the same degree. *Id* . "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id*.

2. Analysis

a) Procedural Unconscionability

Plaintiffs argue that the arbitration agreements are procedurally unconscionable because they had no effective choice as to whether to sign the agreements, i.e., the agreements were contracts of adhesion. A contract of adhesion is procedurally unconscionable when it is "presented on a take-it-or-leave-it basis and [is] oppressive due to 'an inequality of bargaining power that result[ed] in no real negotiation and an absence of meaningful choice.'" *Nagrampa*, *supra*, 469 F.3d at 1281, quoting *Flores*, 93 Cal.App.4th at 853.

Under California law, a court's finding that a contract was one of adhesion establishes at least a minimal degree of procedural unconscionability. *See Bridge Fund Capital Corp. v. Fastbucks Franchise Corp*., 622 F.3d 996, 1004 (9th Cir. 2010). However, the Court notes that in *Concepcion* the contract at issue was a contract of adhesion. The Supreme Court held that California's prohibition on class action waivers in arbitration agreements is preempted by the Federal Arbitration Act in part because "[t]he rule [against class action waivers] is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, 131 S.Ct. at 1750. In light of *Concepcion*, the Court does not find that the adhesive nature of the agreement weighs strongly in favor of procedural unconscionability.

b) Substantive Unconscionability

Plaintiffs argue that the arbitration agreements are substantively unconscionable because enforcing the included class action waiver forces Plaintiffs to forego their representative and collective action claims. Plaintiffs assert that the agreements are unenforceable because the class action waivers violate the National Labor Relations Act ("NLRA") and force them to give up their right to proceed with a collective action under the Fair Labor Standards Act ("FLSA").

The Supreme Court in *Concepcion* stated that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme

inconsistent with the FAA." *Concepcion*, 131 S.Ct. at 1748. The Supreme Court further emphasized that the FAA is meant to ensure enforcement of the terms of arbitration agreements, including terms that limit "with whom a party will arbitrate its disputes." *Id*. at 1749. *Concepcion* holds that collective arbitration is contrary to the purposes of the FAA and thus the FAA requires not just compelling arbitration, but compelling arbitration on an individual basis in the absence of a clear agreement to proceed on a class basis. Since the *Concepcion* decision, courts in California have uniformly concluded that "unless the agreement is otherwise unenforceable for unconscionability in its other terms, the inclusion of a class action waiver provides no basis for denying [a] . . . motion [to compel arbitration]." *Jasso v. Money Mart Exp., Inc.* 2012 WL 1309171, 10 (N.D.Cal. 2012), citing *Lewis v. UBS Financial*, 818 F.Supp.2d 1161 (N.D.Cal. 2011); *Quevedo v. Macy's Inc*., 798 F.Supp.2d 1122 (C.D.Cal.2011) (class action waiver in arbitration agreement enforceable per *Concepcion*, required to arbitrate PAGA and Labor Code claims); *Valle v. Lowe's HIW, Inc*., 2011 WL 3667441, *6 (N.D.Cal. 2011); *Murphy v. DIRECTV*, 2011 WL 3319574, at *4 (C.D.Cal. 2011); *Morse v. ServiceMaster Global Holdings, Inc*., 2011 WL 3203919, at *3 n. 1 (N.D.Cal. 2011). Based on the sound analysis provided in these cases, this Court agrees.

Plaintiffs next argue that the agreements are unenforceable because the class waiver provision prevents Plaintiffs from acting as private attorneys general, in violation of California's Private Attorney General Act ("PAGA"), Cal. Labor Code §§ 2698 *et seq*. This argument is based on the *Broughton–Cruz* rule that prohibits arbitration of claims for public injunctive relief. *See Broughton v. Cigna Healthplans of Calif*., 21 Cal.4th 1066 (Cal. 1999) and *Cruz v. PacifiCare Health Systems, Inc*., 30 Cal.4th 303 (Cal. 2003). However, the argument is now foreclosed. In *Kilgore v. KeyBank, Nat. Ass'n*, 673 F.3d 947, 951 (9th Cir. 2012), the Ninth Circuit recently addressed this precise issue: whether, in light of *Concepcion*, the FAA preempts California's state law rule prohibiting the arbitration of claims for broad, public injunctive relief. The Ninth Circuit held that "[t]he FAA preempts California's *Broughton–Cruz* rule that claims for public injunctive relief cannot be arbitrated." *Id*. at 965. Thus, the Court must enforce the parties' arbitration agreements even if this might prevent Plaintiffs from acting as private attorneys general.

In sum, the arbitration agreements are not unenforceable as unconscionable based on the

inclusion of the class action waiver. The waiver does not interfere with the vindication of substantive statutory rights, nor does it violate PAGA or the NLRA.

Finally, Plaintiffs suggest that the arbitration agreements are unconscionable because they force Plaintiffs to incur costs they would not otherwise bear in a civil lawsuit, such as sharing the arbitrator fees. The Ninth Circuit has held that under California law a cost provision requiring the complaining employee to split arbitration fees with the employer "would render an arbitration agreement unenforceable." *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002). However, the arbitration agreements at issue in this case provide that the "employee will pay the then current Superior Court filing fee towards the costs of arbitration (i.e., filing fees, administration fees, and arbitrator fees), and each party shall be responsible for paying its own other costs for the arbitration, including, but not limited to, attorneys' fees, witness fees, transcript fees, or other litigation expenses that Employee would otherwise be required to bear in a court action." As Defendant points out, "[t]he arbitration agreement . . . preserves the same allocation of costs that a litigant would face if he filed in court." *See Def. Reply*, Doc. No. 15. p.7. Thus, the cost provision does not render the arbitration agreements unconscionable.

CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendant Jenny Craig, Inc.'s motion to compel arbitration of Plaintiffs Teresa Samaniego and Gail Chillinsky's claims. The Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs Samaniego and Chillinsky's claims against Defendant Jenny Craig, Inc. and **ORDERS** the parties to proceed to arbitration in accordance with the terms of the arbitration agreements.

IT IS SO ORDERED.

DATED: May 15, 2012

Hon. Michael M. Anello
United States District Judge