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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

SALVADOR CANAVA, individually and on behalf of others similarly situated,

Plaintiff,

v.

RAIL DELIVERY SERVICES, INCORPORATED AND GREG P. STEFFLRE, JUDI GIRARD STEFFLRE,

Defendants.

Case No. 5:19-cv-00401-JGB (KKx)

PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTIONS TO STRIKE AND TO COMPEL ARBITRATION

Hearing Date: November 25, 2019
Time: 9:00 a.m.
Judge: Honorable Jesus G. Bernal

Location: U.S. Courthouse
3470 Twelfth Street
Riverside, CA 92501
Courtroom: 1

Complaint filed: March 4, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Pursuant to the Court's Order of September 9, 2019, Doc 70, Plaintiff files this sur-reply in opposition to Defendants' motions to strike and to compel arbitration. Plaintiff sought leave to file this sur-reply to address new arguments, new declarations and new exhibit material submitted with Defendants' reply brief in support of their motion to compel arbitration.

I. THE CLASS WAIVER PROVISION OF THE AGREEMENT IS UNCONSCIONABLE

Although Defendants' reply brief does not address Plaintiff's likely dispositive argument that the arbitration provision and class waiver are unenforceable because severance of the admittedly illegal portions of the arbitration provision is not possible,[1] Defendants attempt to divert attention from the inability to sever with new declarations from Greg Stefflre, an officer of RDS, and Antonio Saavedra, Manager of RDS' owner-operator relations, describing their alleged efforts to explain the provisions of the Independent Contractor Agreement (ICA) that Plaintiff and other drivers signed. Docs 64 & 65. Defendants argue that, because of these explanations, the ICA cannot be considered procedurally unconscionable. That argument is both legally and factually flawed.

As a legal matter, the ICA is a procedurally unconscionable contract of adhesion regardless of the explanations provided with it. The California Supreme Court has repeatedly recognized, "[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion, 'which, imposed and

[1] Plaintiff argued that the arbitration agreement is unlawful in so far as it contains a PAGA class waiver and requires that all claims be arbitrated including wage claims in violation of Cal. Labor Code §229, and that the inability to severe those unlawful provisions renders the entire agreement unenforceable. *Securitas Security Serv. USA Inc. v. Superior Court,* 234 Cal.App. 4th 1109, 1123-1127 (2015). In response Defendants merely state that "Defendants disagree on the issues of severance, however." Doc 62 at 11.

drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" *Discover Bank v. Superior Court,* 36 Cal.4th 148, 160 (2005). *See also Sanchez v. Valencia Holding Co.,* 61 Cal.4th 899, 915 (2015) ("Here the adhesive nature of the contract is sufficient to establish some degree of procedural unconscionability."); *Gentry v. Superior Court,* 42 Cal 4th 443, 469 (2007) ("Ordinary contracts of adhesion . . . contain a degree of procedural unconscionability even without any notable surprises, and "bear within them the clear danger of oppression and overreaching."); *Ting v. AT&T,* 319 F.3d 1126, 1148 (9th Cir. 2003) ("[a] contract is procedurally unconscionable if it is a contract of adhesion, *i.e.,* a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it.").

Even if more were needed, it is evident that the arbitration provision and class waiver contain elements of surprise and oppression beyond the fact that they appear in a contract of adhesion: They falsely indicate that all claims must be arbitrated, when Defendants concede that wage claims are exempt; they falsely indicate that no class actions can be filed when Defendants again concede that the right to pursue a class PAGA claim cannot be waived; and they say the arbitration provision is to "be governed by the Federal Arbitration Act" when Defendants now insist that events subsequent to signing – i.e. the *New Prime* decision – entitle them to unilaterally change the agreement to make it governed by the California Arbitration Act. Doc 62-1. Finally, while the ICA arbitration provision references the American Arbitration Association it does not attach the rules applicable to such arbitrations which further contributes to the surprise and procedural unconscionability of the agreement. *Carmona v. Lincoln Millennium Car Wash, Inc.,* 226 Cal.App.4th 74, 84 (2014) (employer failure to "provide [arbitration] rules to which employee would be bound, support[s] a finding of procedural unconscionability); *Samaniego v. Empire*

Today LLC, 205 Cal.App.4th 1138, 1146 (2012) (same); *Trividi v. Curexo Tech. Corp.,* 189 Cal.App.4th 387, 393 (2010) (same).

Factually, Defendants' reply brief declarations support a finding of procedural unconscionability. Assuming Defendants went through the ICA paragraph by paragraph, as their declarations claim, doing so only compounded the oppressive nature of the ICA by reinforcing the unlawful aspects of the Agreement and by suggesting that they were lawful. Defendants, if their declarations are to be believed, falsely told Drivers that they were waiving the right to bring any claim, including a PAGA claim, as a class action and that they had to bring wage claims in arbitration.[2] They also misled Drivers into thinking they were independent contractors with no rights under California Labor Laws, Doc 64 at 19, even though the parties to a contract cannot make that legal determination, the question of whether a worker is an employee or independent contractor being a legal issued controlled by substantive law. In most cases, that law gives little weight to the parties contractual recitations[3] and in some cases ignores those recitations altogether.[4] Thus, the "explanations" described in the Defendants' reply-declarations only prove the extent to which

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[2] Even though Defendants concede that the class waiver does not apply to PAGA claims and that the arbitration agreement does not apply to wage claims, Defendants may have hoped that, as a result of their "explanations" Drivers would take the words of the ICA as a truthful recitation of their rights and not file in court or pursue a class PAGA claim.

[3] *See S.G.Borello & Sons v. Dept. of Indus. Relations,* 48 Cal.3d 341, 358-359 (1989) (the label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced); *Ruiz v. Logistics,* 754 F.3d 1093, 1105 (9th Cir.2014) (fact that parties labeled drivers independent contractors "is not dispositive and will be ignored if their actual conduct establishes a different relationship.").

[4] *See Dynamex Operations W. v. Superior Court,* 4 Cal.5th 903, 955-963 (2018) (describing ABC test applicable to California wage order claims).

Defendants materially misled the Drivers as to their rights under the ICA, rendering the agreement even more procedurally unconscionable than an ordinary contract of adhesion.

Moreover, there are other reasons to doubt the veracity of the Defendants' reply declarations. First, they are directly contradicted by Plaintiff's affidavits which uniformly state that no explanations were given. *See* Doc 53 at ¶¶6, 10 (Canava Decl); Doc 54 at ¶7 (Dominguez Decl.); Doc 55 at ¶7 (Rivera Decl.). In addition, Defendant Steffre recites at great length how he remembers going over the "Representations & Agreement" document with Plaintiff Canava on August 30, 2017, and asking Canava to "read and sign the Agreement" at that time. Doc 64 at ¶4. However, the Agreement, which is attached to Steffre's declaration as Exhibit 1, clearly shows that it was signed on September 6, 2017, not August 30. And, the declaration of Saavedra recites that some of the "information regarding the prospective relationship between Plaintiff Canava and RDSI" was provided on September 15, 2017, more than a week after Canava had already bound himself to the ICA. *See* Doc 65 at ¶7 (stating Canava signed the ICA on Sept. 6), ¶10 (reciting that further "information regarding the prospective (sic) relationship between Canava and RDSI" was provided on the 15th). Providing explanations after the Plaintiff was bound hardly reduces the procedural unconscionability of the ICA. For all of these reasons, Defendants' arguments against procedural unconscionability fail.

As for substantive unconscionability, Defendants attempt to escape the obvious unconscionability of the agreements' one-way fee shifting provision in favor of Defendants by arguing that the provision is contrary to Cal.Civ.Code ¶1717. As the Court in *Samaniego* said in response to that same argument "according to [defendant, the provision] isn't unconscionable because it's illegal and hence unenforceable. To state the premise is to refute [defendant's] logic." 205 Cal.App.

4th at 1147; *Carmona,* 226 Cal.App.4th at 88 (concluding that one-sided "attorney fee provision is not conscionable merely because section 1717 might provide employees relief from the provisions one-sidedness."). With respect to the substantive unconscionability of the class waiver provision, Defendants focus on the fact that Plaintiff's damages are greater than the individual damages at issue in *Discover Bank v. Superior Court,* 36 Cal.4th 148 (2005). But the point of *Discover Bank* is that one-sided provisions in contracts of adhesion, such as the class action waiver in this case, "that operate to insulate a party from liability that would otherwise be imposed under California law are generally unconscionable." *Id.* at 161. The class waiver in Plaintiff's ICA is clearly designed for the sole purpose of limiting Defendants' liability.

II. THE CLASS ACTION WAIVER IS CONTRARY TO PUBLIC POLICY

Defendants also offer reply-brief evidence that they claim demonstrates that the class action waiver is not contrary to public policy pursuant to *Gentry v. Superior Court,* 42 Cal.4th 443 (2007). For example, they offer a news release from the Department of Industrial Relations as evidence that the Labor Commissioner is active in the area of driver misclassification and sometimes recovers significant awards in misclassification cases. Doc 66-1 at 23-24. In fact, the press release announces an award to five drivers. Regardless, *Gentry* does not require Plaintiff to establish that a private class action is the only form of redress available to Drivers. To the contrary, *Gentry* only requires a plaintiff to show that, "a class action is likely to be a significantly more effective, practical means of vindicating the rights of the affected employees than individual litigation or arbitration." *Gentry,* at 463-64. The Labor Commissioner's actions, while laudable, are not really relevant to that question.

Defendants' reply brief also attaches documents from the $100M settlement in *Van Dusen v. Swift Transportation,* CV 10-899-PHX-JWS, Doc 66-1 at 27-107

(settlement agreement and motion for preliminary approval), to support its argument that individual litigation would be more effective and practical than class litigation. That seems an odd choice. The *Swift* settlement will provide an average of $3600 per driver to 19,407 drivers after ten years of litigation and six trips to the Ninth Circuit.[5] Defendants refer to this as a "token" recovery and would have the Court believe that these 19,407 drivers would have gotten more had they each had filed individually, but they offer nothing to substantiate that bald assertion. In addition, Defendants' reference to the average recovery is highly misleading in numerous respects. The class in *Van Dusen* includes drivers who worked between February 2001 and January 2019, many of whom are likely outside of the statute of limitations. Recovery for drivers with barred claims is small, as is appropriate, and the small recovery for those drivers has the effect of lowering the *average* recovery for the entire class. Class members whose claims are not subject to limitations defenses receive considerably more; many will receive upwards of $20,000. [6] Defendants

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[5] The case was first filed in December 2009; the defendants' motion to compel arbitration was granted which led to a mandamus proceeding, reconsideration by the district court, a subsequent appeal to the Ninth Circuit, and a petition for certiorari. Doc 66-1 at 74-75. The *Swift* defendants then appealed and sought mandamus with respect to the district court's scheduling order for deciding whether the FAA applied to the named plaintiffs. *Id.* at 77. After the district court denied the motion to compel individual arbitration, the defendants appealed and filed mandamus again, *Id.,* at which point the case settled on behalf of the class alleged in the original complaint. *Id.* at 78.

[6] Defendants' math and description of the *Swift* settlement is also inaccurate. As Defendants disclosed in a footnote citing the motion for preliminary approval in *Swift*, (Doc.62 f.n.7 at 13 of 17), because Plaintiffs' counsel is seeking 29%, not the 33.33% calculated by Defendants, the average class member recovery is higher than stated by Defendants in the body of their brief. Defendants also neglected to explain that individual class member allocations in *Swift* will be adjusted upward if less than

also fail to mention that the district court, which was far more familiar with the litigation than Defendants, preliminarily approved the settlement as "fair, reasonable, and adequate" following consideration of the factors set forth in Rule 23(e)(2). Contrary to Defendants' assertions, the *Swift* case – and its $100M award to the entire class of drivers - is actually a prime example of why class treatment is "a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation." *Gentry,* 42 Cal.4th at 463-464. There is simply no way that 19,407 truck drivers would have found attorneys willing to invest the time and resources needed to pursue individual claims over ten years of litigation. And if only the *Swift* named plaintiffs, or a few drivers were to have filed their own separate cases against Swift instead of the class action, it is clear that the damages would have been measured in the thousands, not millions, and the public policies served by the wage statues involved would not have been vindicated.

Defendants also cite their Reply Declarations, Doc 64 & 65, to argue that class members could not be ill-informed about their rights (the third *Gentry* factor) because "drivers actually had extensive conversations with bilingual RDSA staff where the differences between contractors and employees were explained in detail." Doc 62 at 10. But as explained above, the fact that Defendants may have reviewed the many paragraphs in the ICA that recite that drivers are independent contractors and may have specifically told Drivers that "**YOU WILL NOT . . . BE ENTITLED TO CALIFORNIA LABOR LAW PROTECTIONS,"** Doc 64 at 19 (emphasis in original), proves, rather than disproves, that the Drivers in this case are highly likely to be confused about their rights, satisfying the third *Gentry* factor.

80% of overall claim value is claimed by class members. *Swift* Settlement Agreement, pp 4-7, Exhibit 6 to Doc. 66-1 at 30 of 111 (explanation of claim awards).

III. RDS'S MOTION FOR A STAY SHOULD BE DENIED.

Although Defendants made no effort to meet their burden of establishing the need for a stay in their opening motion, *see* Doc 51 at 23, in their reply brief they make the perfunctory argument that a stay will avoid the increased legal costs of litigating in two forums and the risk of inconsistent determinations with respect to the classification question. Doc 62 at 12. Neither of those arguments withstands scrutiny. The standard to be applied in determining whether Plaintiff and other drivers were employees for purposes of the Counts 6, 7, and 8, that Defendants argue should be arbitrated, is the *S.G. Borello & Sons Inc v. Dept. of Indus. Relations,* 48 Cal.3d 341 (1989), standard. *See Moreno v. JCT Logistics, Inc.,* EDCV 17-2489 JGB (KKx), 2019 WL 3858999 at *12 (C.D. Cal. May 29, 2019) (discussing applicable standard), while the standard to be applied to claims that Defendants concede must be heard by the Court are different: The FLSA economic reality test for the FLSA claim and the ABC test for Plaintiff's California minimum wage claim. *See Dynamex v. Superior Ct.,* 4 Cal. 5th 903, 956-57 (2018). Because different standards apply to the claims Defendants admit must be heard in court and the claims they seek to arbitrate, there is no likelihood of inconsistent judgments and no cost savings to be derived from a stay as Defendants will have to litigate the court claims in any event. Finally, the non-existent harms raised by Defendants are clearly outweighed by the harm that Plaintiff would suffer as a result of delay in litigating his primary claims – i.e. FLSA, CMWA, and PAGA. Stay of those claims will injure Plaintiff because it will delay resolution of the bulk of Plaintiff's potential damages and "increase the difficulty of reaching class members and increase the risk that evidence will dissipate." *Edwards v. Oportun, Inc.,* 193 F.Supp.3d 1096, 1101 (N.D. Cal. 2016); *Reed v. Autonation, Inc.,* No. CV 1608916 BROAGRX, 2017 WL 10592157 at *3 (C.D. Cal. Mar. 6, 2017) (same).

CONCLUSION

For all of the foregoing reasons, Defendants' motions to strike and to compel arbitration should be denied.

Respectfully submitted this 27th day of September 2019.

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