SAN BERNARDINO SUPERIOR COURT
SAN BERNARDINO JUSTICE CENTER
DEPARTMENT 29
247 W THIRD STREET
SAN BERNARDINO, CA 92415

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO, SAN BERNARDINO JUSTICE CENTER

VERONICA CISNEROS, et al

Plaintiffs,

v.

MTNA, INC., A California corporation, et al

Defendants.

CASE NO.: CIVDS 1601648

ORDER ON DEFENDANTS' MOTION TO COMPEL ARBITRATION

[SUBMITTED]

Defendant MTNA, INC.'s Motion to Compel Arbitration and Dismiss/Stay the Proceedings was heard by the Court on May 11, 2016. Plaintiff Veronica Cisneros appeared by T. JOSHUA RITZ & ASSOCIATES, by T. Joshua Ritz, Esq. Defendant MTNA, INC. appeared by FISHER & PHILLIPS, LLP by Lizbeth Ochoa, Attorney at Law. Defendant Richard Aguilar, who joined in the Motion, appeared by GORDON & REES LLP by Shaina Kinsberg, Attorney at Law.

After considering the papers filed in support of and in opposition to the motion and the oral argument of counsel, the matter was submitted for decision.

The Court now rules as follows:

Plaintiff's Evidentiary Objections:

Plaintiff objects to the Defendant's declarations accompanying the motion because the declarations were not sworn under penalty of perjury. However, Defendant cured this technical defect by submitting the same declarations, but sworn under penalty of perjury, with the Reply. Normally, the Court does not consider evidence submitted in a Reply, but in this case Plaintiff fully addressed the *contents* of the declarations in her Opposition, and the Court does not find any prejudice in considering the corrected Declarations. The objections are overruled.

Defendant's Evidentiary Objections:

1. Entire Declaration – overruled. California Rules of Court, Rule 3.1110(g) is for exhibits not declarations. Moreover, the declaration is not wholly in Spanish and then a courtesy copy in English, but is a single bilingual document with a translation after each paragraph.

2. 1-10 – overruled. The Court interprets Plaintiff Cisneros's declaration as stating her experience working for MTNA and being given the documents to sign. This testimony provides sufficient foundation for her statements, which are relevant to this motion.

Motion:

The motion to compel arbitration is denied.

California law favors the enforcement of valid arbitration agreements. *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 320; *In re Tobacco I* (2004) 124 Cal. App. 4th 1095, 1103.

> In light of California's strong public policy in favor of arbitration, 'broad contractual provisions for arbitration are to be liberally construed.' (*United Transportation Union v. Southern Cal. Rapid Transit Dist.* (1992) 7 Cal.App.4th 804, 809 [9 Cal. Rptr. 2d 702].) 'Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. The court should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute.' (*Id.* at p. 808; see *Weeks v. Crow* (1980) 113 Cal. App.3d 350, 352 [169 Cal. Rptr. 830].)"
> *Bigler v. Harker School* (2013) 213 Cal.App.4th 727, 738.

This Agreement does involve interstate commerce and therefore the Federal Arbitration Act (FAA) is operable.

Plaintiff contends that the Motion should not be granted because the Arbitration Agreement is unconscionable. Unconscionability is generally recognized as the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. *Allan v. Snow Summit* (1996) 51 Cal. App. 4th 1358, 1376. It requires a showing of both procedural and substantive unconscionability, with the former focusing on oppression or surprise due to unequal bargaining power, and the latter on overly harsh or one-sided results. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1214. Both elements must be present in order for a court to exercise its discretion to refuse to enforce the arbitration clause under the unconscionable doctrine. (*Armendariz, supra.*) Although both elements must be present, they do not need to be present in the same degree. (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1469; *Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159, 1165.)

A. Procedural Unconscionability:

Plaintiff Cisneros contends, *inter alia*, that the agreement is procedurally unconscionable because it was in English while she only understands the Spanish

language; there was no meaningful opportunity to negotiate or reject it; and both MTNA and the document concealed the importance of the material.

The evidence establishes that MTNA had prior knowledge that most of its workforce spoke only Spanish and that other employment documents were provided to Plaintiff Cisneros and the other employees in Spanish.[1]

The evidence is further uncontroverted that Cisneros requested that a Spanish translation be provided to her and that the forms were represented as being benign: only acknowledgements that they have been trained about safety and had received the company's policies and handbooks.[2]

Plaintiff Cisneros could not negotiate the agreement and had to accept it as a condition of employment. Such adhesive agreements are enforceable if they do not contain features contrary to public policy or otherwise unconscionable. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1130.) Instead, "the adhesive nature of a contract is one factor the courts may consider in determining the degree of procedural unconscionability. [Citation.]" (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 84, fn.4.)

The fact that Plaintiff cannot read English, and MTNA knew this when it presented the form to her, and the fact that other employment forms were presented in Spanish leads the Court to conclude that the failure to explain, in the employee's own language, that signing the document results in the waiver of the right to a jury, a fundamental right in our system of justice, was an intentional act on MTNA's part to conceal the importance of the document and take unfair advantage of Plaintiff. In essence, it deprived Plaintiff of any meaningful choice of whether to accept or reject its terms.

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[1] The Court accepts Defense counsel's representation at oral argument that most of the documents Plaintiff attached to her declaration were not MTNA's documents but that of a previous employer. However, there were documents attached solely in the Spanish language that *were* MTNA's documents and were provided to Plaintiff. Moreover, counsel also represented that many of the supervisors were bilingual so that they could converse with the employees who were not required, as part of their duties, to speak English.

[2] See Declaration of Veronica Cisneros, page 2, lines 14-19 and page 5, lines 17-27.

In California, a significant portion of our population is Spanish-speaking. There are laws enacted to protect consumers in California who speak other languages as their primary language.[3] While these laws do not apply in this context, there is a public policy recognition that some accommodation be made. It does not appear that it would have required a significant expenditure of resources to translate the agreement or at least allow time to have the employee get her/his own translation. Under the circumstances, Plaintiff Cisneros could not know the contents of what she was executing and was required to sign or face leaving the employment at that instant. In other words, there was no meeting of the minds so that Plaintiff can be said to have agreed to arbitration irrespective of what the terms actually were.

Accordingly, not only does the Court find procedural unconscionability by concluding that the agreement was adhesive in nature, was in English without a translation, where the employer knew its workforce (including Plaintiff) were non-English speaking, but the Court finds that no agreement was reached between the parties on the issue of arbitration.

B. Substantive Unconscionability:

Plaintiff Cisneros also contends that the agreement is substantively unconscionable because it does not contain a waiver of the same rights by MTNA; provides for cost splitting unless prohibited by law; gives SOI the unilateral right to appear by phone; does not provide for judicial review; only permits an award of the same remedies available in court instead of mandating the same remedies, and does not provide for adequate discovery.

MTNA has conceded that it will pay the associated costs of arbitration so the argument concerning the term on cost-sharing is moot.

While the remaining contentions, save one, can be addressed in a way that would not sustain a finding of substantive unconscionability, the fact that MTNA has not waived its rights in the employment dispute arena is determinative.

At the hearing, the Court inquired of Defendant as to whether or not the agreement would compel MTNA to arbitrate its claims against an employee since it was

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[3] See California Civil Code §1632.

not a signatory to the agreement but only a third party beneficiary of SOI. Defense counsel represented that it would be so bound but the Court is not convinced. There is nothing in the Agreement that binds MTNA to select binding arbitration in the event it brought an action against its employee.

The Court in *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 248, opined:

> Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.' ... If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage." (*Armendariz, supra,* 24 Cal.4th at pp. 117–118, 99 Cal.Rptr.2d 745, 6 P.3d 669; see *Carmona, supra,* 226 Cal.App.4th at p. 86, 171Cal.Rptr.3d 42.)
>
> Applying these standards, courts repeatedly have found an employer-imposed arbitration agreement to be substantively unconscionable when it requires the employee to arbitrate the claims he or she is mostly likely to bring, but allows the employer to go to court to pursue the claims it is most likely to bring. (*Carlson, supra,* 239 Cal.App.4th at p. 634, 191 Cal.Rptr.3d 29; *Serafin, supra,* 235 Cal.App.4th at p. 181, 185 Cal.Rptr.3d 151; *Carmona, supra,* 226 Cal.App.4th at p. 87, 171 Cal.Rptr.3d 42.) (*Id*)

Applying this principle to this case, MTNA is clearly the beneficiary of the agreement designated as the "Company" and as a beneficiary it is entitled to the benefit of the agreement, but since MTNA did not waive its rights, it cannot be *compelled* to arbitrate its claims, if any, in the employment context. While the Court is sensitive to the reasons and concern of SOI in extending coverage to its clients, it would have been easy to include MTNA as a signatory to the agreement. The agreement in question is therefore substantively unconscionable as well.

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Taking into consideration all of the factors and applying the law to this case, the Court exercises its discretion, in light of the procedural and substantive unconscionability established, to deny the Motion.

The judicial assistant is directed to give notice of the Court's Order to the parties.

DATED: MAY 17 2016

Janet M Frangie

HONORABLE JANET M. FRANGIE
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT IN THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

I, Theresa Handyside, the undersigned state:

I am employed in the County of San Bernardino, State of California; I am over the age of 18 years and not a party to this action; my business address is 247 W. Third St, San Bernardino, California 92415.

I am familiar with this court's practice for collection and processing of documents for mailing with the United States Postal Service. The documents below are enclosed in a sealed envelope, with postage fully paid, and mailed to the interested party/ies below and placed for collection and mailing this date, following standard court practices.

ORDER ON DEFENDANTS' MOTION TO COMPEL ARBITRATION
(Case No. CIVDS- 1601648)

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I declare under penalty of perjury under the law of the State of California, that the foregoing is true and correct.

Executed on MAY 17 2016, San Bernardino, California.

Theresa Handyside
Judicial Assistant
San Bernardino Superior Court