**SUPERIOR COURT OF CALIFORNIA,**
**COUNTY OF SACRAMENTO**
**GORDON D SCHABER COURTHOUSE**

**MINUTE ORDER** [X] Amended on 08/16/2011

DATE: 08/16/2011 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM: P. Clausen CSR# 3750
BAILIFF/COURT ATTENDANT: V. Carroll

CASE NO: **34-2010-00093705-CU-OE-GDS** CASE INIT.DATE: 12/09/2010
CASE TITLE: **Anderson vs. Apple American Group LLC**
CASE CATEGORY: Civil - Unlimited

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**EVENT TYPE**: Petition to Compel Arbitration - Civil Law and Motion

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**APPEARANCES**
Gene J. Stonebarger, counsel, present for Plaintiff(s).
Melissa L Griffin, counsel, present for Defendant(s).

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**Nature of Proceeding: Petition to Compel Arbitration**

**TENTATIVE RULING**

Defendant Apple American Group, LLC's petition to compel arbitration is ruled upon as follows.

This matter was continued to this date to allow the parties to submit additional briefing regarding *Brown v. Ralphs Grocery Co*, 197 Cal.App.4th 489. The Court's previous tentative ruling is reprinted below:

Plaintiff Caitlin Anderson filed this action December 9, 2010 on behalf of herself and others similarly situated against her employer, Defendant. Defendant maintains and operates a number of Applebee's restaurants in California. Plaintiff alleges that Defendant requires its "front of the house" employees, including hosts, servers and bartenders, to wear uniforms. Plaintiff alleges that employees are required to wear football jerseys during certain days from August to February of each year. Plaintiff alleges that Defendant required these employees to purchase the jerseys, but, pursuant to Defendants' "Jersey Policy," refused to reimburse the employees for the costs of the jerseys in violation of Labor Code § 2802(a).

Defendant subsequently filed the instant petition to compel arbitration, arguing that upon commencement of her employment, Plaintiff entered into an agreement that required her to arbitrate all of the claims alleged in this lawsuit. The arbitration agreement cited by Defendant contains a provision stating: "We also agree that any arbitration between the Company and me is of an individual claim and that any claim subject to arbitration will not be arbitrated on a collective or class wide basis..." (Griffin Decl. Exh. A.) This "class action waiver" is the primary topic at issue in the instant motion.

*Gentry* and *AT&T*

Plaintiff contends that the Court should apply the analysis set forth in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, which held that in determining the enforceability of an arbitration agreement class action waiver in an employment context, a trial court must consider the following factors: "the modest size of

the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of the class members' rights...through individual arbitration." (*Gentry*, 42 Cal.4th at 463.) "If [the trial court] concludes, based on these factors, that a class arbitration is likely to be a significantly more effective means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum." (*Id*., citations omitted.) The *Gentry* court also instructed that "[c]lass arbitration must still also meet the 'community of interest' requirement for all class actions, consisting of three factors: '(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Id* at 464, citations omitted.)

Defendant argues that *Gentry* was effectively overruled by the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740. In that case, the Court considered "whether §2 [of the Federal Arbitration Act] preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." (*AT&T*, 131 S.Ct. at 1746.) The Court concluded that the rule embodied by the decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, that adhesive arbitration agreements containing class action waivers in consumer contracts are presumptively unconscionable, was preempted by the Federal Arbitration Act. Defendant contends that the Supreme Court's determination in *AT&T* extends to arbitration agreement class action waivers in employment agreements as well as those in consumer contracts, and serves to mandate enforcement of the arbitration agreement at issue here. Defendant asserts that it is immaterial that the claims of Plaintiff and the putative class members here involve statutory rights, and that the language of *AT&T* is clear that the provisions of the FAA preempt any conflicting state law.

The continued viability of *Gentry* after *AT&T* appears questionable. (*See e.g. Zarandi v. Alliance Data Sys. Corp*. (9th Cir. 2011) 2011 U.S. Dist. LEXIS 54602 at *4.) However, at least one California Court of Appeal appears to continue to follow the *Gentry* analysis. (*Brown v. Ralphs Grocery Co*, 2011 Cal.App. LEXIS 902.) In *Brown*, the court considered the enforceability of a class action waiver similar to the one at issue here. The plaintiff in *Brown* sought to pursue a class action against her employer based on violations of the Labor Code and of Bus. & Prof. Code §17200, *et seq.* (*Id.* at *3.) The defendant employer filed a petition to compel arbitration, citing an arbitration agreement that contained a waiver of the plaintiff's right to pursue any claims on a class action basis. (*Id.* at *4.) The trial court had applied the factors set forth in *Gentry*, and determined that the class action waiver should not be enforced. (*Id.* at *10.) On appeal, the court held that the party seeking to oppose enforcement of an arbitration agreement under *Gentry* was required to make "a factual showing under the four-factor test established in that case." (*Id.* at *10.) However, the court determined that the plaintiff had failed to make such a showing in opposing the petition to compel arbitration, and thus, "there was no evidence, much less substantial evidence, supporting the trial court's finding that under *Gentry*, plaintiff had established a basis not to enforce the class action waiver." (*Id.* at 10.) The court reversed the trial court's ruling invalidating the class action waiver. (*Id*. at 10.) As a result, the court concluded that it did not have to determine "whether, under *AT&T*..., the rule in *Gentry*...concerning the invalidity of class action waivers in employee-employer contract arbitration clauses is preempted by the FAA." (*Id*. at *10-11.) However, the *Brown* court indicated that *Gentry* remains valid, even after *AT&T.* The *Brown* court cited *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 836, which distinguished *Gentry* from *Discover Bank*, noting, "while *Discover Bank* is a case about unconscionability, the rule set forth in *Gentry* is concerned with the effect of a class action waiver on unwaivable rights regardless of unconscionability." (*Id*. at 11.) The court also noted in a footnote that "we follow the dictates of *Gentry*..." (*Id*. at n.4.)

Based on the reasoning above, the Court is inclined to follow the instruction of *Brown* and apply the analysis in *Gentry* in this case. However, given that the decision in *Brown* was issued only six days before the scheduled hearing in this case, the Court notes that this case was not addressed by the parties in their papers. Accordingly, the Court continues the hearing on this petition to permit the parties to submit supplemental briefing regarding the *Brown* case, including in particular, the evidentiary standard enunciated for the four *Gentry* factors. The hearing is continued to August 8, 2011. Plaintiff may file a supplemental brief no later than July 25, 2011, and Defendant may submit a response no later than August 1, 2011.

However, the Court has sufficient information to rule on the remaining issues raised by the parties.

Unconscionability

Plaintiff argues that the arbitration agreement is also unenforceable because it is unconscionable. An arbitration agreement may be revoked on "such grounds as exist for the revocation of any contract." (CC § 1281.) Further, the Court may refuse to enforce any contract determined to be unconscionable. (CC § 1670.5.) "To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the elements need not be present in the same degree." (*Gatton v. T-Mobil USA, Inc.* (2007) 152 Cal.App.4th 571, 579.)

Plaintiff argues that the arbitration agreement is procedurally unconscionable because it is a contract of adhesion. Here, the agreement was presented to Plaintiff as a condition of her employment. Defendant does not dispute this fact. Procedural unconscionability occurs where oppression or unfair surprise is present at the time the agreement is made. (*Dotson, supra*, 181 Cal.App.4th at 980.) "Oppression results from unequal bargaining power, when contracting party has no meaningful choice but to accept contract terms. Unfair surprise results from misleading bargaining conduct or other circumstances indicating that a party's consent was not an informed choice." (*Id.*) Where an arbitration agreement is presented to a prospective employee as a condition of employment "the courts have found a minimum degree of procedural unconscionability." (*Id*. at 981.) Thus, the Court concludes that because this arbitration agreement was a contract of adhesion, procedural unconscionability is present.

However, this does not mean that the agreement is necessarily unenforceable based on unconscionability. Where there is a low degree of procedural enforceability, "to find the agreement unenforceable, the degree of substantive unconscionability must be high." (*Id*.)

Plaintiff argues that the agreement is substantively unconscionable for a number of reasons. First, Plaintiff contends that the arbitration agreement improperly interferes with her rights to obtain attorney's fees under Labor Code §2802, and exposes Plaintiff and the class to a risk of an award of attorney's fees in favor of Defendant. However, based on a review of the provisions of the arbitration agreement, the Court cannot agree. The agreement provides: "The arbitration shall apply the substantive law and the law of remedies, if applicable, of the state in which the claim arose, or federal law, or both, depending on the claim asserted." (Griffin Decl. Exh. B, Dispute Resolution Program, p. 6.) Further, the agreement provides for an award of reasonable fees to any party that prevails on a statutory claim which calls for an award of fees. (*Id*.) As for the potential for an award of fees against Plaintiff and/or the class, the agreement provides only: "The arbitrator may assess attorneys' fees against a party upon a showing by the other party that the first party's claim is frivolous or unreasonable, or factually groundless." (*Id*.) These provisions do not restrict Plaintiff's or the class's ability to recover all statutorily-authorized fees. Further, they only authorize an award of fees against Plaintiff or the class if their claims are shown to be "frivolous, or unreasonable or factually groundless." These, to the Court's mind, do not constitute substantively unconscionable provisions. (*See Armendariz v. Foundation Health Psychare Services* (2000) 24 Cal.4th 83, 102 (arbitration agreement must provide for same relief that would be available in a judicial forum).)

Next, Plaintiff contends that the provision of the arbitration agreement granting exclusive authority to the arbitrator to determine the arbitrability of issues pursuant the agreement is substantively unconscionable. Defendant does not dispute that this type of provision has been determined to be substantively unconscionable. (*See Murphy v. Check N'Go of California* (2007) 156 Cal.App.4th 138.) However, Defendant contends it has waived the enforcement of that provision by submitting the issue of the enforceability of the agreement to this Court. Defendant also argues that the arbitrability provision should be stricken and the unoffending provisions of the agreement enforced. The Court agrees that this provision is substantively unconscionable, but finds that it should be severed from the remaining provisions of the agreement.

Finally, Plaintiff argues that Defendant's failure to attach the rules of the American Arbitration Association (AAA) to the agreement constitutes substantive unconscionability. However, courts have held that failure to attach AAA rules that are incorporated by reference in an arbitration agreement "adds a bit to the procedural unconscionability," not substantive unconscionability. (*Zullo v. Superior Court* (2011) Cal.App. LEXIS 909 at *13.) While it may be somewhat "oppressive to require the party to make an independent inquiry to find the applicable rules in order to fully understand what she was about to sign," here there is no evidence that the rules contained in the arbitration agreement were inconsistent with the AAA rules. (*Id*. at *14; *Cf. Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 721.) Accordingly, the failure to attach the AAA rules, while adding a degree of procedural unconscionability, is not in itself sufficient to render the agreement unenforceable.

In determining whether to sever or restrict unconscionable provision or whether to refuse to enforce the entire agreement, a court is to adopt "the latter course only when an agreement is 'permeated' by unconscionability." (*Dotson*, *supra*, 181 Cal.App.4th at 986.) The presence of the unconscionable provisions noted above does not "indicate a systemic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." (*Id.*, citations omitted.) Here, the objectionable provisions can be severed.

The Court concludes that the agreement is not unenforceable by reason of unconscionability.

Waiver

Additionally, Plaintiff argues that Defendant has waived its right to compel arbitration by waiting more than six months after the complaint was filed to bring the instant petition. Plaintiff argues that in the interim, Defendant instituted preliminary settlement negotiations, responded to discovery, and engaged in meet and confer efforts which culminated in Plaintiff filing a motion to compel discovery. Defendant responds that the Supreme Court's decision in *AT&T* on April 27, 2011 factored into its decision to petition to compel arbitration, and that Defendant informed Plaintiff during meet and confer negotiations that the petition would be forthcoming.

"Although a written agreement to arbitrate an existing or future dispute is generally enforceable, a petition to compel arbitration will be denied when the right has been waived by the proponent's failure to properly and timely assert it. (Code Civ. Proc., § 1281, 1281.2, (a).) This may happen in a variety of contexts, ranging from situations in which the proponent of arbitration has previously taken steps inconsistent with an intent to invoke arbitration, to instances in which the proponent has unreasonably delayed in undertaking the procedure. There is no single determinative test of waiver, and the question for the trial court is one of fact." (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557.)

Here, Defendant's participation in settlement negotiations for approximately two months, and responses to one set of discovery requests prior to filing the instant petition does not constitute conduct "inconsistent with an intent to invoke arbitration," or that "unreasonably delayed undertaking the

procedure." Accordingly, the Court concludes that Defendant did not waive its right to invoke arbitration.

[end of previous tentative ruling]

The previous tentative ruling is adopted with the following additional comments:

Defendant's request for judicial notice is granted.

Application of *Gentry* in light of *AT&T*

The first unresolved issue is whether *Gentry* remains good law after *AT&T.* The Court finds that, potentially, it does. As an initial matter, the issue addressed by the Supreme Court in *AT&T* was narrow: "The question in this case is whether §2 [of the Federal Arbitration Act] preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule." (*AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, 1746.) The Court expressly prescribed the scope of its decision as evaluating preemption of the *Discover Bank* rule. *Discover Bank* embodied a presumption that class-action waivers in arbitration agreements in consumer contracts are unconscionable. In *Gentry v. Superior Court* (2007) 42 Cal.4th 443, unlike *Discover Bank*, the court was concerned not with whether the class action waiver in the arbitration agreement at issue was unconscionable, but "whether a class action or class arbitration waiver would undermine the plaintiff's *statutory* rights." (*Gentry*, 42 Cal.4th at 455 (emphasis added); *see also Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 172 n.9 ("*Gentry* analyzed the enforceability of a class arbitration waiver by considering its effect on unwaivable statutory rights rather than unconscionability because in *Gentry*, unlike *Discover Bank* [citation omitted], the plaintiff sought to vindicate unwaivable rights."); *Arguelles-Romero v. Superior Court* (2010) 184 Cal. App. 4th 825, 836-837 ("Yet while *Discover Bank* is a case about unconscionability, the rule set forth in *Gentry* is concerned with the effect of a class action waiver on unwaivable statutory rights regardless of unconscionability.") As the *Arguelles-Romero* court noted, "While, in certain circumstances, a class action waiver may be both unconscionable and violate the rule of *Gentry*, the Supreme Court has [through *Gentry* and *Discover Bank*] established two separate tests which should be considered separately." (*Arguelles-Romero v. Superior Court*, 148 Cal.4th at 836-837.)

In *AT&T*, the Court was concerned with the *Discover Bank* rule, that is, whether "a doctrine normally thought to be generally applicable, such as duress, or as relevant here, unconscionability, is...applied in a fashion that disfavors arbitration." (*AT&T*, 131 S.Ct. at 1747.) The Court did not consider the question at issue in *Gentry*, e.g. the effect of an adhesive employment contract containing a class action waiver pertaining to statutory rights. Post *AT&T,* at least one of this state's appellate courts has adopted a narrow construction of *AT&T .* (*See Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, *20, fn 4 ("Defendants appear to argue that *AT&T* essentially preempts all California law relating to unconscionability. We disagree, as the case simply does not go that far.") Here, Plaintiffs' claims under Labor Code §2802 have been determined to be unwaivable statutory rights. (*See Sanchez,* 172 Cal.App.4th at 170, ("An employee's statutory right to reimbursement of job expenses is unwaivable".).) Having determined that *AT&T* did not address the issues at play in *Gentry*, the Court concludes that *Gentry* remains good law and controls the facts of this case.

Thus, the Court turns to the second unresolved question, whether Plaintiffs have met their evidentiary burden with regard to the four *Gentry* factors. At the outset, Plaintiffs argue that the *Brown* court's statement "there was no evidence, let alone *substantial* evidence, supporting the trial court's finding" (emphasis added) is indicative of the standard of review to be applied by the appellate court in assessing the trial court's determination, not the standard of review to be applied by this Court to the Plaintiffs' evidentiary showing. (*Brown*, 197 Cal.App.4th at 497.) The Court agrees. Nothing in *Gentry*

indicates that plaintiffs must present substantial evidence - instead *Gentry* instructs that "the trial court must consider the factors" and "[i]f it concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means vindicating the rights of the affected employees," that it must invalidate the class action waiver. *Brown* appears to have clarified that application of *Gentry* "require[s] a factual showing under the four-factor test established in that case." (*Brown*, 197 Cal.App.4th at 497.)

*First Gentry Factor: Modest Size of Individual Award*
Plaintiffs have presented evidence that Ms. Anderson's loss is $15.00, and that no individual claim is likely to exceed $50.00. (Anderson Decl.; Lambert Decl.) This is sufficient to establish the modest size of the individual awards of the class members.

*Second Gentry Factor*: *Potential Retaliation Against Class Members*
Here, Plaintiffs rely on the theory that because the class members are "low on the totem pole," they reasonably fear employer retaliation. Plaintiffs appear to concede that they have not submitted factual evidence in support of the assertion that the class members may fear retaliation. However, Plaintiffs point to language in *Gentry* acknowledging that it is "widely recognized that fear of retaliation for individual suits against an employer is a justification for class certification in the arena of employment litigation." Plaintiffs also contend that the evidence that employees may fear retaliation is currently in Defendant's possession and request permission to conduct limited discovery in the event the Court considers the evidentiary record underdeveloped.

Regarding this factor, it appears undisputed that the class members are or were low-level, minimum-wage employees with little or no bargaining power. The Court agrees with the *Gentry* court's observation that "[I]t needs no argument to show that fear of economic retaliation will often operate to induce aggrieved employees quietly to accept substandard conditions." (*Gentry*, 42 Cal.4th at 460, quoting *Mitchell v. DeMario Jewelry* (1960) 361 U.S. 288, 292.) Given the current economic conditions, and given the clear disparity in bargaining power between the class members and their employer, and the absence of any contrary evidentiary showing by Defendant, Plaintiffs have adequately satisfied the second factor.

*Third Gentry Factor: Absent Class Members' Ignorance of Their Rights*
Plaintiffs present evidence that Ms. Anderson was not aware of her legal rights until after leaving her employment with Defendant, and argue that this indicates that additional absent class members may be similarly uninformed about their legal rights. (Anderson Decl. ¶5.) Plaintiffs again contend that additional evidence relevant to this factor is currently in Defendant's possession, as Defendant has not provided discovery as to absent class members. Defendant responds that Plaintiffs previously agreed to forestall discovery until after the determination of the instant motion, and should not be permitted "a second bite at the apple" to argue this motion.

However, the Court agrees with Plaintiffs that it would be unduly onerous to require Plaintiffs to present evidence of the *Gentry* factors, including the third, at this early stage of litigation, prior to Plaintiffs' discovery. Evidence regarding class members' fear of retaliation and ignorance of their rights, particularly for absent class members, is likely in Defendants' possession at this stage of the litigation. To require a showing of evidence that is presently unavailable to Plaintiffs in order to defeat a motion to compel arbitration is not consistent with the *Gentry* framework. Plaintiff's evidentiary showing is sufficient to satisfy the third factor.

*Fourth Gentry Factor: Other "Real World" Obstacles*
Under *Gentry*, other obstacles to employees' vindication of their individual rights include lack of adequate financial resources or access to lawyers, their fear of reprisals, the transient nature of their work. Additionally, the *Gentry* court discussed the concern that regarding statutory rights, "absent

effective enforcement, the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings" of statutory noncompliance. (*Gentry*, 42 Cal.4th at 462.) Plaintiffs present evidence that the class members are and were minimum wage employees, and that Plaintiffs' counsel charges an hourly billable rate of $500 per hour and does not accept individual wage and hour claims on a contingency basis. (Anderson Decl. ¶3; Lambert Decl. ¶10.) Plaintiffs contend that given the expense required to prove Defendants' alleged violations, there is no viable practical mechanism for pursuing the class members' claims on an individual basis. Absent the availability of a class action, Plaintiffs contend, the class members will be effectively prevented from pursuing their individual claims. Based on Plaintiffs' factual showing, these practical considerations militate in favor resolving Plaintiffs' statutory claims on a class basis, thus satisfying the fourth factor.

Plaintiffs have made a sufficient factual showing in support of the *Gentry* factors, which, under *Gentry*, the trial court considers in the aggregate. This case is distinguishable from *Brown*, where the court noted that the plaintiffs had made *no factual showing* in support of the four *Gentry* factors. Accordingly, the Court concludes that the statutory rights at issue here are appropriately addressed on a class basis. Defendant's motion for an order requiring Plaintiff to submit her claims to bilateral arbitration and staying all proceedings in this action is denied.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

**COURT RULING**

The matter was argued and submitted.

The matter was taken under submission.

**RULING ON SUBMITTED MATTER**

The tentative ruling was affirmed

**Declaration of Mailing**

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: August 17, 2011

E. Brown, Deputy Clerk s/ E. Brown

MELISSA L. GRIFFIN
APPLE AMERICAN GROUP LLP
225 BUSH STREET, SUITE 1470
SAN FRANCISCO, CA 94104

GENE J. STONEBARGER
STONEBARGER LAW
75 IRON POINT CIRCLE, SUITE 145
FOLSOM, CA 95630