2005 WL 658984
United States District Court,
N.D. California.

Robert RAMIREZ, et al. Plaintiff,
v.
CINTAS CORPORATION, Defendant.

No. C 04-00281 JSW. | March 22, 2005.

Attorneys and Law Firms

Paul Strauss, Miner Barnhill & Galland, Chicago, IL, for Plaintiff.

Nancy L. Abell, Paul, Hastings, Janofsky & Walker LLP, Los Angeles, CA, for Defendant.

Opinion

ORDER GRANTING IN PART AND DENYING IN PART MOTION OF DEFENDANT CINTAS CORPORATION TO (A) DISMISS CLAIMS OF PLAINTIFFS SALCEDO, THOMPSON, SILVERS, AND SEVERSON, OR IN THE ALTERNATIVE, (B) STAY THEIR CLAIMS AND COMPEL ARBITRATION.

WHITE, J.

I. INTRODUCTION

***1** This matter comes before the Court upon consideration of Cintas Corporation's ("Cintas") motion to dismiss the claims of plaintiffs Jose Salcedo ("Salcedo"), A. Shappelle Thompson ("Thompson"), and Coretta Silvers ("Silvers") (collectively the "Arbitration Plaintiffs'), or in the alternative to compel arbitration and stay the Arbitration Plaintiffs' claims. Having considered the parties' pleadings, relevant legal authority, and having had the benefit of oral argument, for the reasons set forth in the remainder of this Order, the Court GRANTS the motion to compel arbitration and HEREBY STAYS this action only as to plaintiffs Salcedo, Thompson, and Silvers. The Court DENIES Cintas' motion to the extent it seeks to dismiss the Arbitration Plaintiffs' claims.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On January 21, 2004, the Arbitration Plaintiffs filed suit against Cintas as members of a purported class to pursue claims of employment discrimination under 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, Title VII, California's Fair Housing and Discrimination Act, and California Business and Professions Code § 17200, *et seq.*

On July 30, 2004, Cintas moved to dismiss the Arbitration Plaintiffs' claims on the grounds that they entered into an arbitration agreement with Cintas and, therefore, are bound to arbitrate their disputes with Cintas.[1] In the alternative, Cintas moved to compel arbitration and stay the Arbitration Plaintiffs' claims.

On November 17, 2004, pursuant to stipulation, Plaintiffs filed their Third Amended Complaint ("TAC"), the operative pleading in this action. Pursuant to that Stipulation, Cintas' motion to dismiss or compel applies to the TAC. In addition, pursuant to the TAC, the state law causes of action only apply to Cintas employees who applied for employment, resided, or worked in California. Accordingly, these causes of action are inapplicable to the Arbitration Plaintiffs.

According to the TAC, Salcedo was employed by Cintas as a production supervisor in Central Islip, New York, from approximately November 1999 to October 2002. (TAC, ¶ 11). Thompson was employed by Cintas as a driver in Rochester New York, from approximately April 2000 to January 2002. (*Id.,* ¶ 12). Silvers was employed by Cintas as an accounts receivable employee in Raleigh, North Carolina from approximately July 2002 through February 2003. (*Id.,* ¶ 13.)

Salcedo, Thompson, and Silvers all signed employment agreements that contained arbitration clauses (the "Arbitration Agreement"). Salcedo signed his employment agreement on November 15, 1999. (Declaration of Jenice Clendening ("Clendening Decl."), Ex. B.) Thompson signed his employment agreement on April 17, 2000. (*Id.,* Ex. C). These two employment agreements are referred to as the "1999 Version" of Cintas' employment and arbitration agreements and are identical in all material respects. Silvers signed her employment agreement in 2002, which is referred to as the "2002 Version" of Cintas' employment and arbitration agreements. (*Id.,* Ex. D.)

***2** The 1999 Version of the Arbitration Agreement provides:

> 5. EXCLUSIVE METHOD OF RESOLVING DISPUTES OR DIFFERENCES.
>
> Should any dispute or difference arise between Employee and Employer concerning whether Employer or any agent of Employer ever at any time violated any duty to Employee, right of Employee, law, regulation or public policy or breached this [Employment Agreement], Employee and Employer shall confer and attempt in good faith to resolve promptly such dispute or difference. To have a fair, timely, inexpensive and binding method of resolving any such dispute or difference remaining unresolved after Employee and Employer confer in good faith, should Employee desire to pursue Employee's claim, Employee shall, within one year of the date when the dispute or difference first arose or within one year of when Employee's employment ends, whichever occurs first, submit to Employer a written request to have such claim, dispute or difference resolved through impartial arbitration conducted in accordance with the American Arbitration Association's National Rules for the Resolution of Employment Disputes and held in the county and state where Employee currently works for Employer or most recently worked for employer. Employee's initial share of the arbitration filing fee shall not exceed one day's pay or $100, whichever is less, and the arbitrator shall have authority to direct Employer to reimburse Employee for that portion of the filing fee paid by Employee if the arbitrator upholds Employee's claim.
>
> In any arbitration proceeding, the arbitrator shall apply the terms of this Agreement as written, the Federal Arbitration Act and other relevant federal and state laws, including time limits on claims. If Employer loses the arbitration, Employer shall bear all fees, expenses, and charges of the American Arbitration Association and the arbitrator. The arbitrator also shall have the authority to award appropriate relief, including damages, costs and attorney's fees, as available under relevant laws, provided that the Arbitrator cannot direct Employee to pay more than a total of two days' pay as costs, expenses and attorney's fees to Employer, the arbitrator or the American Arbitration Association.
>
> Except for Employee's workers' compensation claim or unemployment benefits claim, the impartial arbitration proceeding, as provided in this Paragraph 5, shall be the exclusive, final and binding method of resolving any and all claims of Employee against Employer, but the arbitrator shall have authority to entertain and decide a motion for reconsideration of the arbitration award. A legal action either to maintain the status quo pending arbitration or to enforce the agreement to arbitrate or an arbitration award may be filed and pursued in any court having jurisdiction, but otherwise Employee shall not file in any court any lawsuit or counterclaim contending that Employer or any agent of Employer violated any duty, right, law, regulation or public policy or breached this Agreement.

***3** (*Id.,* Ex. B at 3-4, Ex. C at 3-4.)

The 2002 Version of the Arbitration Agreement provides:

> 5. EXCLUSIVE METHOD OF RESOLVING DISPUTES OR DIFFERENCES.
>
> Should any dispute or difference arise between Employee and Employer concerning whether employer or any agent of Employer ever at any time violated any duty to Employee, right of Employee, law, regulation or public policy or breached this Agreement, Employee and Employer will confer and attempt in good faith to resolve promptly such dispute or difference. To have a fair, timely, inexpensive and binding method of resolving any such dispute or difference remaining unresolved after Employee and Employer confer in good faith, *should either desire to pursue a claim against the other party,* the party making the claim will, within one year of the date when the dispute or difference first arose or within one year of when Employee's employment ends, whichever occurs first (*except when Employee or Employer claims a violation*

of a specific statute having its own specific statute of limitations, that statutory time limit will apply), submit to the other party a written request to have such claim, dispute or difference resolved through impartial arbitration conducted in accordance with the American Arbitration Association's National Rules for the Resolution of Employment Disputes and held in the county and state where Employee currently works for Employer or most recently worked for Employer. Employee's initial share of the arbitration filing fee will not exceed one day's pay or $100, whichever is less, and the arbitrator will have authority to direct Employer to reimburse Employee for that portion of the filing fee paid by Employee if the arbitrator upholds Employee's claim.

In any arbitration proceeding, the arbitrator will apply the terms of this Agreement as written, the Federal Arbitration Act and other relevant federal and state laws, including time limits on claims. If employer loses the arbitration, Employer will bear all fees, expenses and charges of the American Arbitration Association and the arbitrator. The arbitrator also will have the authority to award appropriate relief, including damages, costs and attorney's fees, as available under relevant laws, but the Arbitrator cannot direct Employee to pay more than *a total of $200 or two days of Employee's pay,* whichever is less, toward the fees of the arbitrator and the American Arbitration Association.

Except for Employee's workers' compensation claim or unemployment benefits claim *or a dispute concerning the interpretation, enforceability or enforcement of any provision in Paragraph 3 of the Agreement,* the impartial arbitration proceeding, as provided in this Paragraph 5, will be the exclusive, final and binding method of resolving any and all disputes between Employer and Employee, but the arbitrator will have authority to entertain and decide a motion for reconsideration of the arbitration award. A legal action either to maintain the status quo pending arbitration or to enforce the agreement to arbitrate or an arbitration award may be filed and pursued *either by Employee or Employer* in any court having jurisdiction, but otherwise *neither party* will file in any court any lawsuit or counterclaim contending that *Employee,* Employer or any agent of Employer violated any duty, right, law, regulation or public policy or breached any provision of this Agreement *other than those in Paragraph 3 of this Agreement.*

***4** (*Id.,* Ex. D at 4-5, emphasis added.)[2]

In addition to the Arbitration Agreement, each Employment Agreement contains a choice of law provision, which states that it shall be interpreted, governed and enforced according to the Federal Arbitration Act, and the law of the state where the employee is currently employed or was most recently employed by Cintas. (*Id.,* Exs. B at 3, C at 3, D at 4.) Thus, for plaintiffs Salcedo and Thompson, the agreements are to be interpreted and enforced under New York law. For plaintiff Silvers, the agreement is to be interpreted and enforced under North Carolina law.

III. DISCUSSION

A. Evidentiary Matters.

As a preliminary matter, the Court must address certain evidentiary issues raised in connection with the parties' submissions.

1. Cintas' Requests for Judicial Notice.

Cintas requests that the Court take judicial notice of: (1) an Order Granting in Part and Denying in Part Cintas' Motion to Compel Arbitration issued by Judge Armstrong in *Veliz, et al. v. Cintas Corporation, et al.,* No. 03-1180(SBA), relating to a similar motion to compel arbitration filed by Cintas in that action; (2) and the reply brief Cintas filed in support of its motion to compel in the *Veliz* action. (*See* Docket Nos. 18 (Att.2), and 52.) Plaintiffs objected to the first request on a number of grounds, including the fact that Judge Armstrong granted the *Veliz* plaintiffs leave to file a motion for reconsideration. Although under Federal Rule of Evidence 201, the Court properly could take judicial notice of the court records and proceedings in the *Veliz* action, these documents are not necessary to the resolution of this motion. Accordingly, the Court DENIES Cintas' requests for judicial notice.

2. Cintas' Objections to and Motion to Strike the Declarations of Michael Rubin and Betty Eberle.

Ms. Eberle offers testimony relating to what she has learned, in connection with an unrelated action, from the AAA about how a class arbitration might proceed and the fees that might be incurred in connection with such an arbitration. Mr. Rubin,

who is co-counsel in the *Veliz* action, offers testimony about the proceedings in the *Veliz* action, as well as testimony about the events that have occurred since plaintiffs initiated a class arbitration proceeding in *Veliz.*

Cintas asserts the testimony provided in these declarations is premature, speculative, and irrelevant. Cintas also asserts that certain portions of the testimony offered is improper expert testimony by lay witnesses and inadmissible hearsay. The testimony profferd by Mr. Rubin and Ms. Eberle is relevant because the Arbtration Plaintiffs bear the burden of showing that "the arbitration would be prohibitively expensive." *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 92, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). However, to the extent the declarations contain statements made by representatives from AAA to Mr. Rubin or Ms. Eberle, the Court concludes that such statements are hearsay not subject to any exception, and those statements have not been considered by the Court. Because Cintas has not objected on hearsay grounds to correspondence sent to or received from the AAA, the Court has considered that correspondence in conjunction with this motion.

***5** The Court does not find the facts contained in Ms. Eberle's and Mr. Rubin's declarations as to what is expected to occur in the *Veliz* arbitration to be speculative. To the extent Cintas objects to this evidence on the grounds that it is speculative as to what may occur in *this case,* the Court concurs that these matters are speculative but finds that objection to go to the weight to be accorded the declarations rather than their admissibility.

Accordingly, Cintas' objections to the Eberle and Rubin declarations are SUSTAINED IN PART. The Court DENIES the motion to strike the declarations.

B. Legal Standards Applicable to Motions to Compel Arbitration.

Pursuant to the Federal Arbitration Act ("FAA"), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Once the Court has determined that an arbitration agreement involves a transaction involving interstate commerce, thereby falling under the FAA, the Court's only role is to determine whether a valid arbitration agreement exists and whether the scope of the parties' dispute falls within that agreement. 9 U.S .C. § 4; *Chiron Corp. v. Ortho Diagnostic Sys., Inc.,* 207 F.3d 1126, 1130 (9th Cir.2000). The parties in this case do not dispute that the claims at issue would fall within the scope of the Arbitration Agreements; the only issue is whether the Arbitration Agreements are valid and enforceable.

The FAA represents the "liberal federal policy favoring arbitration agreements" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Under the FAA, "once [the Court] is satisfied that an agreement for arbitration has been made and has not been honored," and the dispute falls within the scope of that agreement, the Court must order arbitration. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 400, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). That the Court must order arbitration is true "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

Where, as here, a litigant sues to enforce statutory claims, that fact alone will not necessarily preclude arbitration. The Supreme Court has "recognized that federal statutory claims can be appropriately resolved through arbitration, and [it has] enforced agreements to arbitrate that involve such claims." *Randolph,* 531 U.S. at 89. If statutory claims are involved and an arbitration agreement exists, the agreement should be enforced "unless Congress itself has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue," and the litigant can effectively vindicate "[his or her] statutory *cause of action* in the arbitral forum." *Gilmer v. Interstate Johnson/Lane Corp.,* 500 U.S. 20, 26-28, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (emphasis added).

***6** Finally, notwithstanding the liberal policy favoring arbitration, by entering into an arbitration agreement, two parties are entering into a contract. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (noting that arbitration "is a matter of consent, not coercion"). Thus, as with any contract an arbitration agreement is "subject to all defenses to enforcement that apply to contracts generally." *Ingle v. Circuit City Stores, Inc.,* 328 F.3d 1165, 1170 (9th Cir.2003.) Although the Court can initially determine whether a valid agreement exists, disputes over the meaning of specific terms are matters for the arbitrator to decide. *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002); *Prima Paint,* 388 U.S. at 403-404 (holding that "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate").

C. The Arbitration Agreements Are Enforceable.
The Court must first determine whether an agreement to arbitrate exists by reference to principles of state contract law, here New York and North Carolina. *Ingle,* 328 F.3d at 1170. It is not disputed that each of the Arbitration Plaintiffs and Cintas executed an employment agreement containing an arbitration clause. (Clendening Decl., Exs. B-D.) Accordingly, an agreement to arbitrate exists, and the parties do not dispute that, to the extent they are enforceable, they are governed by the FAA.

The Arbitration Plaintiffs contend these agreements are not enforceable because: (1) they lack consideration in the form of a reciprocal commitment to arbitrate; (2) are unconscionable under both New York and North Carolina law; and (3) preclude them from effectively vindicating their statutory causes of action.

1. The Arbitration Agreements do not lack consideration.
The Court is not persuaded that the Arbitration Agreements are unenforceable because they lack consideration.

Under North Carolina law, where each party agrees to be bound by an agreement to arbitrate, there is sufficient consideration to uphold the agreement. *See Johnson v. Circuit City Stores,* 148 F.3d 373, 378-379 (4th Cir.1998); *Howard v. Oakwood Homes Corp.,* 134 N.C.App. 116, 119, 516 S.E.2d 879 (1999). The 2002 Version of the Arbitration Agreement, which applies to Silvers, states that if either the employee (Silvers) or employer (Cintas) has a dispute, and cannot resolve that dispute in good faith, *"should either desire to pursue a claim against the other party,* the party making the claim will, ... submit to the other party a written request to have such claim, dispute or difference resolved through impartial arbitration...." (Clendening Decl. Ex. C, emphasis added.) The Arbitration Agreement also provides that, apart from claims relating to paragraph 3 of the Employment Agreement, which addresses claims relating to misuse of Cintas' confidential information, "the impartial arbitration proceeding ... will be the exclusive, final and binding method of resolving any and all disputes between Employer and Employee." (*Id.*) Thus, Cintas and Silvers agreed to be bound by the agreement to arbitrate and the Arbitration Agreement is supported by adequate consideration.

***7** Under New York law, courts have determined that because mutuality of remedy is not required in arbitration agreements, if there is consideration for the entire agreement of which the arbitration agreement is a part, there is sufficient consideration. *In re Ball and SFX Broadcasting Inc.,* 236 A.D.2d 158, 665 N.Y.S.2d 444, 446 (1997); *Sablosky v. Edward S. Gordon Co., Inc.,* 73 N.Y.2d 133, 538 N.Y.S.2d 513, 516, 535 N.E.2d 643 (1989); *cf. Doctor's Associates, Inc. v. Distajo,* 66 F.3d 438, 452-453 (2d Cir.1995) (evaluating Connecticut law and interpreting *Prima Paint* to not require that arbitration clause itself be supported by independent consideration). Although the 1999 Version of the Arbitration Agreement does not contain the same language set forth above in the 2002 Version, it still states that "the impartial arbitration proceeding ... shall be the exclusive, final and binding method of resolving any and all claims of Employee against Employer." (Clendening Decl., Exs. B-C.) Thus, Cintas is bound to arbitrate disputes with its employees, and to the extent the agreements lack a mutuality of remedy, that does not preclude enforcement. Moreover, the employment agreements are supported by consideration. As such, the Court concludes that under New York law, the 1999 Version of the Arbitration Agreement is supported by adequate consideration.

2. The Arbitration Agreements Are Not Unconscionable.
The Arbitration Plaintiffs contend that the Arbitration Agreements are both procedurally and substantively unconscionable and are unenforceable for this reason as well. "A court will generally refuse to enforce a contract on the ground of unconscionability only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Brenner v. Little Red School House, Ltd.,* 302 N.C. 207, 210, 274 S.E.2d 206 (citing *Hume v. United States,* 132 U.S. 406, 10 S.Ct. 134, 33 L.Ed. 393 (1889)). *Cf. Ciago v. Ameriquest Mortgage Company,* 295 F.Supp.2d 324 (S.D.N.Y.2003).

To find a contract unenforceable on the grounds of unconscionability a court must find the contract to be both procedurally and substantively unconscionable. *Ciago,* 295 F.Supp.2d at 328 (quoting *Gilman v. Chase Manhattan Bank, N.A.,* 175 A.D.2d 578, 573 N.Y.S.2d 787, 791 (1988)); *King v. King,* 114 N.C.App. 454, 457, 442 S.E.2d 154 (1994). However, a contract may be unenforceable if there is little procedural unconscionability but great substantive unconscionability, and the

reverse is also true. *Browerv. Gateway 2000, Inc.,* 246 A.D.2d 246, 676 N.Y.S.2d 569, 574 (1998); *Rite Color Chemical Co. ., Inc. v. Velvet Textile, Inc.,* 105 N.C.App. 14, 19-20, 411 S.E.2d 645 (1992).

a. The Arbitration Agreements are not procedrually unconscionable.
A court looks to the contract formation process to determine if the contract is procedurally unconscionable. *Brower,* 676 N.Y.S.2d at 573 (court may take into "account setting of the transaction, the experience and education of the party claiming unconscionability, whether the contract contained 'fine-print,' whether the seller used 'high-pressured tactics,' and any disparity in the parties' bargaining power"); *King,* 114 N.C.App. at 457, 442 S.E.2d 154 ("[p]rocedural unconscionability involves bargaining naughtiness in the formation of the contract") (internal quotations omitted).

***8** Although the Court considers it beyond dispute that there is a measure of unequal bargaining power between Cintas and the Arbitration Plaintiffs, that fact alone will not render an arbitration agreement invalid. *Gilmer,* 500 U.S. at 33; *Ciago,* 295 F.Supp.2d at 329. Nor would the fact that accepting the Arbitration Agreements as a condition of employment necessarily render them procedurally unconscionable. *Ciago,* 295 F.Supp.2d at 329; *cf. Hightower v. GMRI, Inc.,* 272 F.3d 239, 243 (4th Cir.2001) (noting that continued employment with knowledge of arbitration agreement constitutes assent to agreement).

In this case, the Arbitration Agreements were not contained in a separate document nor were they hidden within "fine print" in the employment agreement. Rather, they were clearly identified by capitalized heading entitled "EXCLUSIVE METHOD OF RESOLVING DISPUTES OR DIFFERENCES." Finally, the Arbitration Agreements were signed in the presence of witnesses, one of whom was a witness for the employee. (Clendening Decl., Exs. B-D.)

Although each of the Arbitration Plaintiffs submits a declaration stating that they did not understand what it meant to agree to arbitration, only Ms. Silvers contends she was not "given any time" to read the employment agreement. The Arbitration Plaintiffs do not contend that they were precluded from asking questions about their employment agreements, which are no longer than six pages. Nor does Ms. Silver's statement suggest that she was not *permitted* to read the employment agreement or denied a request for additional time to read the agreement. The Court concludes that the evidence before it does not suggest that Cintas engaged in any high pressure tactics or otherwise attempted to coerce the Arbitration Plaintiffs into signing the employment agreements in which the Arbitration Agreements were contained. *Compare Brower,* 676 N.S.Y.2d at 573-574 (finding no procedural unconscionability where arbitration agreement was contained in document in which all paragraphs were in same size print that was not complex or inordinately long), *with Brennan v. Bally Total Fitness,* 198 F.Supp.2d 377, 383 (S.D.N.Y.2002) (invalidating arbitration agreement where plaintiff given only fifteen minutes to review fifteen page document and other high pressure tatics used to get plaintiff to sign agreement). *See also Martin v. Vance,* 133 N.C.App. 116, 121, 514 S.E.2d 306 (1999) (under North Carolina law, absent a showing that a person has been deceived with respect to the contents of a contract, that person is bound by the contents).

Thus, notwithstanding the inequality of bargaining power between the parties, the Court finds that the circumstances surrounding the execution of the Arbitration Agreements do not render them procedurally unconscionable. Moreover, for the reasons set forth in the following section, even if the Court were to conclude that the unequal bargaining power alone rendered the Arbitration Agreements procedurally unconscionable, the Court does not find the terms of the Arbitration Agreements to be substantively unconscionable.

b. The terms of the Arbitration Agreement do not render them substantively unconscionable.
***9** "Substantive unonscionability ... involves the harsh, oppressive, and one-sided terms of a contract, ... [which is] so manifest as to shock the judgment of a person of common sense, and the terms ... so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *King,* 114 N.C.App. at 457, 442 S.E.2d 154 (internal quotation marks omitted); *Avildsen v. Prystay,* 171 A.D.2d 13, 574 N.Y.S.2d 535 (1991). The Arbitration Plaintiffs claim the terms of the Arbitration Agreements are substantively unconscionable because: (1) they lack mutuality of remedy by requiring employees, but not Cintas, to arbitrate disputes; (2) they impose undue limitations on the time in which claims may be brought; (3) they eliminate the presumption that attorneys' fees will be awarded to a prevailing plaintiff; (4) as interpreted by Cintas, they impose unaffordably high costs for classwide arbitration; and (5) as interpreted by Cintas, their venue provisions make it impossible to pursue class claims.

i. Mutuality.
The Arbitration Plaintiffs' lack of mutuality argument is, for all intents and purposes, a restatement of the challenge to the Arbitration Agreements based upon lack of consideration. However, neither New York nor North Carolina require a mutuality of remedy in Arbitration Agreements. *In re Ball,* 665 N.Y.S.2d at 161; *Howard,* 134 N.C.App. at 119-120, 516 S.E.2d 879. Accordingly, the Court finds this argument unpersuasive.

ii. Time limitations.
The Arbitration Plaintiffs assert claims under 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991. Pursuant to 28 U.S.C. § 1968(a), those claims are subject to a four year statute of limitations period. *Jones v. R.R. Donnelly & Sons Co.,* 541 U.S. 369, 124 S.Ct. 1836, --- L.Ed.2d ---- (2004). The 1999 Version of the Arbitration Agreement, however, provides that if an employee and Cintas are unable to resolve a dispute through the informal process, the employee shall submit a request to resolve the dispute "within one year of the date when the dispute or difference first arose or within one year of when Employee's employment ends, whichever occurs first." (Clendening Decl., Exs. B-C.)

Although the 1999 Version of the Arbitration Agreement does state that an employee "shall" initiate an arbitration within a one year time frame, the Arbitration Agreement also provides that the arbitrator "shall apply the terms of this Agreement as written, the Federal Arbitration Act and other relevant federal and state laws, including time limits on claims." (*Id.*) Cintas claims that this latter provision modifies the requirement that a litigant bring a claim within one year of the time in which the dispute arose. Reading the Arbitration Agreement in its entirety, the Court agrees that the parties have not, in fact, bargained away their rights to apply an appropriate statute of limitations period to *any* claim asserted, and that this provision is not so manifestly unjust or oppressive as to render the Arbitration Agreement substantively unconscionable.

***10** Although the 2002 Version of the Arbitration Agreement contains the same "one year" language as the 1999 Version, it also provides that if an employee or Cintas has a statutory claim with its own statute of limitations, that limitations period is to control. (*Id .,* Ex. D.) Accordingly, the Court concludes this provision of the 2002 Version of the Arbitration is not so manifestly unjust or oppressive as to render it substantively unconscionable.

iii. Attorneys' fees.
Both the 1999 Version and the 2002 Version of the Arbitration Agreements permit the arbitrator, in his or her discretion, to award attorneys' fees and costs, as available under relevant law, to the prevailing party. If, however, the Employer prevails, such awards are limited to no more than a total of two days pay, under the 1999 Version of the Arbitration Agreement, or $200 or two days pay, whichever is less, under the 2002 Version of the Arbitration Agreement. (Clendening Decl., Exs. B-D.) The Court does not find these terms to be so manifestly unjust or oppressive as to render the Arbitration Agreements substantively unconscionable.

iv. Costs of arbitration
The Arbitration Agreements state that "Employee's initial share of the arbitration filing fee shall not exceed one day's pay or $100, whichever is less," and that the Employee cannot be directed "to pay more than a total of two days' pay as costs, expenses and attorneys' fees to Employer, the arbitrator or the" AAA", in the case of Salcedo and Thompson, and no more than "a total of $200 or two days of Employee's pay, which ever is less, toward the fees of the arbitrator and the" AAA. (Clendening Decl., Exs. B-D). The Court does not find these terms to be so manifestly unjust or oppressive as to render the Arbitration Agreements substantively unconscionable.

v. Venue.
The venue provisions state that the arbitration is to be held "in the county and state where the Employee currently works for Employer or most recently worked for Employer," presumably a county or state where the employee resides. The Court concludes that this term is not so oppressive that no reasonable person would make it nor a fair person agree to it. As such, the Court concludes that this term does not render the Arbitration Agreement substantively unconscionable.

Finally, considering the challenged provisions of the Arbitration Agreements in their entirety, the Court concludes that they

are not so manifestly unjust or oppressive that the Arbitration Agreements must be deemed substantively unconscionable and therefore unenforceable.

3. The Arbitration Agreements Do Not Preclude Effective Vindication of the Arbitration Plaintiffs' Statutory Causes of Action.

The Arbitration Plaintiffs contend that Cintas' interpretation of the Arbitration Agreements preclude them from proceeding by way of class arbitration. The Arbitration Agreements, however, neither expressly preclude nor expressly permit class arbitration. Rather, they are silent on the issue. The Arbitration Plaintiffs improperly seek to have this Court conclude that the Arbitration Agreements are not in fact "silent" about class arbitration and that the Arbitration Agreements in fact prohibit class arbitration. The Arbitration Plaintiffs focus their argument provisions relating to the cost of initiating an arbitration and venue, claiming that based on the manner in which Cintas asserts the terms should be interpreted, they would be required to pay much more than the limited filing fee called for in the Arbitration Agreements and could not maintain an arbitration on behalf of persons outside of the state or county in which the initiating litigant was employed.[3]

***11** Pursuant to the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), the question of whether the Arbitration Agreements can be interpreted to permit class arbitration is a matter for the arbitrator, and not the Court, to decide. *Bazzle,* 539 U.S. at 453. This Court is charged with the responsibility of ensuring that a party is able to effectively vindicate his or her statutory cause of action in an arbitral, rather than a judicial, forum. Indeed, in *Gilmer* the Supreme Court did not teach that a litigant has a right to litigate a statutory claim in a particular manner. Rather the Supreme Court stated that a court must look to whether Congress intended to prevent waiver of the judicial forum or whether there is an inherent conflict between the statute at issue and the FAA. *Gilmer,* 500 U .S. at 26-27; *cf. Randolph v. Green Tree Financial Corp.-Alabama,* 244 F.3d 814, 817-818 (11th Cir.2001) (holding that despite the fact that Truth in Lending Act contemplates proceeding by way of class action, Congress did not intend to preclude waiver of judicial forum, and thus plaintiffs could vindicate TILA cause of action through arbitration).

The Arbitration Plaintiffs do not contend Congress intended to preclude waiver of a judicial forum for claims nor do they contend that the Congress intended to grant them a non-waivable right to proceed by way of class action to pursue these claims. *Cf. Randolph,* 244 F.3d at 817-818 (concluding that Congress did not intend to grant non-waivable right to proceed by way of class action in pursuing TILA claim). Instead, the Arbitration Plaintiffs assert that class treatment of their statutory claims is often the most effective or most convenient manner in which to litigate such the statutory causes of action at issue. This argument is unpersuasive. Absent a finding that they cannot effectively vindicate their statutory causes of action in the arbitral forum, the fact that the Arbitration Plaintiffs assert statutory claims that they *wish* to pursue by way of class action does not prevent the Court from enforcing the Arbitration Agreements.

Considering the terms discussed above in Section III.C.2.b, outside of the context of a potential class arbitration, the Court finds that the time limitation, attorneys' fees, and venue provisions would not preclude the Arbitration Plaintiffs from effectively vindicating their statutory causes of action through an individual arbitration. The term regarding the costs of arbitration presents a closer question, but the Court finds that the Arbitration Plaintiffs have not met their burden of demonstrating an individual arbitration would be prohibitively expensive. Accordingly, the Court concludes, based on the record before it, that the Arbitration Plaintiffs could effectively vindicate their statutory causes of action through arbitration, and the Arbitration Agreements are therefore enforceable on this basis as well.

IV. VENUE FOR ARBITRATION

***12** One final question remains, which pertains to where the arbitration proceeding shall take place. The FAA provides that "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed." 9 U.S.C. § 4. In this case, the Arbitration Agreements contain a venue provision that, if enforced, would require Salcedo and Thompson to arbitrate in various counties in New York. Silvers would be required to arbitrate in North Carolina. Cintas, however, in accordance with the FAA filed a petition to compel within this district, albeit it did so as an alternative to its motion to dismiss.

The Ninth Circuit has interpreted this provision of 9 U.S.C. § 4 to require that a court compelling arbitration under the FAA,

order the arbitration to proceed within the district in which the petition to compel has been filed. *Continental Grain Co. v. Dant & Russell,* 118 F.2d 967, 968-69 (9th Cir.1941); *see also Homestake Lead Company of Missouri v. Doe Run Resources Corp.,* 282 F.Supp.2d 1131, 1143-1144 (N.D.Cal.2003) (noting concern with this interpretation but finding that court was precluded from ordering arbitration in contractually designated forum).

Although the Court recognizes that Cintas has moved in the first instance to dismiss this action, it is within the Court's discretion to determine whether dismissal is appropriate. *See Sparling v. Hoffman Construction Co.,* 864 F.2d 635, 637-638 (9th Cir.1988). The Arbitration Plaintiffs filed suit as members of a purported class, and the Court has not yet been called upon to determine the appropriate members of that class. Thus, at this time, the Court is unwilling to dismiss the Arbitration Plaintiffs from this suit. As such, because Cintas petitioned within this district to compel arbitration, the Court concludes that it is bound by *Continental Grain Co.*. Because, for the reasons set forth above, the Court has determined that the motion to compel arbitration should be granted, the Court also orders that any such arbitration shall take place within this judicial district.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Cintas' motion to compel plaintiffs Salcedo, Silvers and Thompson to arbitrate their claims, and HEREBY STAYS this action as to those plaintiffs pending completion of an arbitration proceeding within this judicial district. The Court DENIES Cintas' motion to dismiss to the extent it seeks to dismiss those plaintiffs from this action.

IT IS SO ORDERED.

Parallel Citations

95 Fair Empl.Prac.Cas. (BNA) 921

Footnotes

[1] Cintas also sought to dismiss the claims of Plaintiff Amy Severson on this basis as well. Pursuant to the stipulation of the parties, Cintas has currently deferred this motion as to Severson, but may renew it subject to certain conditions. (*See* Docket Nos. 34 at p. 11, 75 at p. 4-5.)

[2] The emphasized portions of the 2002 Version of the Arbitration Agreement highlight the differences between the 1999 Version and the 2002 Version.

[3] The Court notes that at least one New York state court has concluded that arbitration agreements that prohibit class arbitration are not unconscionable. *See Ranieri v. Bell Atlantic Mobile,* 304 A.D.2d 353, 759 N.Y.S.2d 448 (2003).