

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLAUDE BRYANT, *et al.*

No. C 08-01190 SI

Plaintiffs,

**ORDER GRANTING MOTION TO
AMEND JUDGMENT**

v.

SERVICE CORPORATION
INTERNATIONAL, *et al.*

Defendants.

On July 12, 2011, the Court granted plaintiffs Biernacki, Farmer, and Holland’s motion to compel arbitration and dismissed their claims without prejudice. *See* Doc. 380. The Court also dismissed the claims of the remaining plaintiffs in the suit and entered judgment accordingly on July 14. *See* Doc. 381. On August 11, defendants filed a timely motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.¹ Defendants’ motion is currently scheduled for hearing on September 22, 2011. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and hereby VACATES the hearing. Having considered the papers submitted, and for good cause shown, the Court hereby GRANTS defendants’ motion.

In opposing plaintiffs’ motion to compel arbitration, defendants argued that plaintiffs Biernacki,

¹ Although plaintiffs have filed a notice of appeal in this case, the Court retains jurisdiction to entertain defendants’ timely Rule 59 motion. *See* Fed. R. App. P. 4(a)(4); *Tripati v. Henman*, 845 F.2d 205, 206 (9th Cir. 1988) (per curiam) ; *Trinidad Corp. v. Maru*, 781 F.2d 1360, 1361–62 (9th Cir.1986).

1 Farmer, and Holland had waived their right to compel arbitration. Defendants argued that plaintiffs'
2 conduct met all three prongs of the Ninth Circuit's waiver test, which is laid out in *Fisher v. A. G.*
3 *Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986) and *Hoffman Const. Co. of Oregon v. Active*
4 *Erectors and Installers, Inc.*, 969 F.2d 796, 798 (9th Cir. 1992) (quoting *Fisher*). See Def. Oppo. to Pl.
5 Mot. to Compel Arbitration (Doc. 363), at 16–17. Neither party addressed the question of whether the
6 recent U.S. Supreme Court decision in *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011), which overruled
7 the California Supreme Court case *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), should
8 have any bearing on the outcome of the motion.

9 The Court agreed that the *Fisher* test applied, but determined that plaintiffs had not waived their
10 right to compel arbitration under the test. The Court explained its reasoning as follows:

11 The arbitration agreement that plaintiffs are seeking to enforce in this case appears not
12 to permit class action arbitration, and therefore until recently would not have been
13 enforceable according to its terms. Defendants do not cite *Concepcion* in their papers
14 or explain how it is that plaintiffs acted inconsistently with a known right by not moving
15 to compel arbitration before the decision in *Concepcion*. They have failed to meet their
16 "heavy burden" to prove waiver. *Fisher*, 791 F.2d at 694.

17 Doc. 380 at 8.

18 In their Rule 59(e) motion, defendants argue that the Court made a manifest error of law. See
19 *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (explaining the possible grounds for
20 granting a Rule 59(e) motion). They argue that while *defendants* could not have enforced the arbitration
21 agreements as written before *Concepcion*, *plaintiffs* could have. Therefore, by litigating their claims
22 for three years, plaintiffs acted inconsistently with a known right, and defendants were prejudiced by
23 plaintiffs' actions.

24 Plaintiffs oppose the motion. Plaintiffs argue that "prior to *Concepcion*, arbitration agreements
25 that d[id] not permit class arbitration [we]re unenforceable" and "[r]egardless of which party sought to
26 compel arbitration, the law would have applied equally to invalidate the arbitration agreement because
27 it did not permit class arbitration." Pl. Oppo. at 2, 7. Finally, they argue that even if defendants are
28 correct legally, they have not carried their burden to prove waiver factually.

Prior to *Concepcion*, defendants in certain types of actions could not enforce as written
arbitration agreements that did not permit class arbitration. The arbitration agreement itself would

1 remain enforceable, however, unless the agreement itself prohibited the severing of the unconscionable
2 term, or if the arbitration agreement had an “insidious pattern” of unconscionable terms. *See, e.g.,*
3 *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 986–87 (9th Cir. 2007) (voiding
4 agreement where it contained “a nonseverability clause, which states that if the ‘specific proviso’ that
5 ‘the arbitrator may not . . . preside over any form of a representative or class proceeding,’ ‘is found to
6 be unenforceable, then the entirety of this arbitration clause shall be null and void’” (omission in
7 *Shroyer*) (emphasis removed)), *overruled by AT&T v. Concepcion*, 131 S.Ct. 1740 (2011); *Ingle v.*
8 *Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (citing seven “unconscionable aspects”
9 of the arbitration agreement to explain why the court was “compelled to find the entire contract
10 unenforceable”), *overruled in part by AT&T v. Concepcion*, 131 S.Ct. 1740 (2011). There is no such
11 non-severance clause in plaintiffs’ arbitration provision, and plaintiffs have not argued that there is an
12 “insidious pattern” in this case.

13 The *Discover Bank* rule evolved out of California’s laws regarding unconscionability. The rule
14 only applied where the arbitration provision was “imposed and drafted by the party of superior
15 bargaining strength.” 36 Cal. 4th at 160. Thus, it protected the party of lesser bargaining strength: the
16 plaintiff/consumer. The *Discover Bank* Court based its decision in part on the fact that it was “difficult
17 to envision the circumstances under which the provision might negatively impact” the defendant-drafter
18 of the provision. *See* 36 Cal. 4th at 161. The California Supreme Court announced a similar RULE IN
19 the area of employment law in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). The Supreme Court
20 explained that “under some circumstances such a provision would lead to a de facto waiver [of
21 unwaivable statutory rights] and would impermissibly interfere with employees’ ability to vindicate
22 unwaivable rights and to enforce the overtime laws.” *Id.* at 457.

23 It is not at all clear that a defendant—the party of the greater bargaining strength—could have
24 utilized the protections afforded by *Discover Bank* and *Genrty* to compel one or more individual
25 plaintiffs to arbitrate their claims as a class. Plaintiffs have not cited, and the Court is not aware of, any
26 case where a defendant attempted to do so. Nor, as a practical matter, is it easy to envision a situation
27 in which a defendant would wish to do so or could try to do so.

28 The cases cited by plaintiffs in opposition to defendants’ motion involve *defendants* moving to

1 compel arbitration. *See, e.g., Swift v. Zynga Game Network, Inc.*, --- F. Supp. 2d ----, 2011 WL 3419499
2 (N.D. Cal. 2011) (defendant’s motion); *In re Cal. Title Ins. Antitrust Litig.*, No. 08-01341, 2011 WL
3 2566449, at *3 (N.D. Cal. June 27, 2011) (defendants’ motion); *Villegas v. US Bancorp*, No. C 10-1762
4 RS, 2011 WL 2679610, (N.D. Cal. June 20, 2011) (defendants’ motion); *Estrella v. Freedom Fin.*, No.
5 C. 09-03156, 2011 WL 2633643 (N.D. Cal. July 5, 2011) (defendants’ motion). Plaintiffs have not
6 successfully explained how those cases can be analogized to this case, where it is plaintiffs who are
7 moving to compel arbitration, and where it appears that plaintiffs could have arbitrated their claims on
8 an individual basis when they filed suit in 2008.

9 Defendants successfully met their burden to show that plaintiffs acted inconsistently with a
10 known right when they litigated this case for over three years: filing this case in federal court, filing an
11 amended complaint, undertaking considerable discovery including filing a motion to compel, and filing
12 a motion for class certification. Defendants have also successfully met their burden to show that they
13 were prejudiced by the time and expense of litigating this case for the past three years.

14 For the foregoing reasons, and for good cause shown, the Court hereby GRANTS defendants’
15 motion and WITHDRAWS the Judgment entered in this case on July 14, 2011. (Doc. 385.)
16 Additionally, the Court AMENDS its Order of July 12, 2011 as follows:

17 The Court previously granted defendants’ motion to sever the claims of plaintiffs Stickle, Riggio,
18 Acuna, Lamasters, Allen, Fulcher, Levine, and Thompson, and dismissed them ““without prejudice to
19 the institution of new, separate lawsuits by the dropped plaintiffs against some or all of the present
20 defendants based on the claim or claims attempted to be set forth in the present complaint.”” Order
21 (Doc. 380) at 5 (quoting *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997) (internal quotation
22 marks omitted)). For the reasons stated in the July 12 Order, that part of the Order remains unchanged.

23 The Court previously denied defendants’ motion to sever the claims of plaintiffs Biernacki,
24 Farmer, and Holland, finding that the permissive joinder test was satisfied. For the reasons stated in the
25 July 12 Order, that part of the Order remains unchanged.

26 The Court previously found that plaintiffs Biernacki, Farmer, and Holland had carried their
27 burden to establish the existence of enforceable arbitration agreements. For the reasons stated in the
28 July 12 Order, that part of the Order remains unchanged.

1 The Court previously found that plaintiffs Biernacki, Farmer, and Holland had not waived their
2 right to arbitration and granted in part plaintiffs' motion to compel arbitration. For the above reasons,
3 the Court AMENDS its Order, finds that plaintiffs Biernacki, Farmer, and Holland did waive their right
4 to arbitration, and DENIES their motion to compel arbitration.

5 Finally, in the July 12 Order, the Court GRANTED plaintiff Bryant's unopposed request for his
6 claims to be dismissed with prejudice. Because the request was made in order to permit the Court to
7 enter judgment in this case, so that plaintiff Bryant might appeal the Court's denial of class certification,
8 the Court AMENDS its Order and DENIES plaintiff Bryant's request for his claims to be dismissed at
9 this point.

10 Plaintiffs Bryant, Biernacki, Farmer, and Holland are hereby ORDERED to file a statement to
11 the Court by **5:00 p.m. on Friday, September 16, 2011**, informing the Court whether plaintiffs wish
12 to pursue their claims individually, or whether they would like their claims to be dismissed with
13 prejudice in order to facilitate appeal.

14 Because the judgment in this case has been withdrawn, plaintiffs' objections to defendants' bill
15 of costs is OVERRULED without prejudice. (Doc. 383.)

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17 **IT IS SO ORDERED.**

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19 Dated: September 12, 2011

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SUSAN ILLSTON
United States District Judge

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