

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

STEVEN MCARDLE, an individual, on behalf
of himself, the general public and those
similarly situated,

Plaintiff,

v.

AT&T MOBILITY LLC; NEW CINGULAR WIRELESS
PCS LLC; and NEW CINGULAR WIRELESS
SERVICES, INC.,

Defendants.

No. C 09-1117 CW

ORDER GRANTING
DEFENDANTS'
RENEWED MOTION TO
COMPEL ARBITRATION
AND STAY ACTION

United States District Court
For the Northern District of California

Defendants AT&T Mobility LLC, New Cingular Wireless PCS LLC,
and New Cingular Wireless Services, Inc. (collectively, ATTM) have
filed a renewed motion to compel arbitration of Plaintiff Steven
McArdle's claims.¹ Plaintiff opposes the motion. Having
considered the parties' papers and oral argument on the matter,
the Court GRANTS Defendants' motion.

BACKGROUND

ATTM is a cellular telephone service provider. It owns New
Cingular Wireless PCS LLC and New Cingular Wireless Services, Inc.
McArdle is a customer of ATTM who asserts claims, on behalf of
himself and all others similarly situated, under California law

¹ In a separately filed order, the Court granted Defendants'
unopposed motion to compel arbitration of Kenneth Thelian's claims
in the related case, Thelian v. AT&T Mobility LLC, No. 10-3440.

1 for false advertising, unfair business practices, fraud and
2 violation of the Consumers Legal Remedies Act.

3 McArdle's service agreement with ATTM contains a provision
4 that requires the parties to the agreement to arbitrate "all
5 disputes and claims" between them. The provision prohibits ATTM's
6 customers from pursuing claims in arbitration on behalf of a class
7 of individuals. According to its express terms, the prohibition
8 on class arbitration is not severable from the rest of the
9 arbitration provision.

10 Relying upon Discover Bank v. Superior Court, 36 Cal. 4th 148
11 (2005), and Shroyer v. New Cingular Wireless Services, Inc., 498
12 F.3d 976 (9th Cir. 2007), the Court entered an order dated
13 September 14, 2009, finding that the class arbitration waiver was
14 unconscionable. Moreover, because the class arbitration provision
15 was expressly not severable from the other portions of the
16 arbitration provision, the Court found that the arbitration
17 provision as a whole was not enforceable.

18 ATTM filed an interlocutory appeal of the Court's order and,
19 when the United States Supreme Court granted certiorari in AT&T
20 Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), this Court
21 stayed the case pending the Supreme Court's decision in that case.

22 Following the April 27, 2011 decision in Concepcion, in which
23 the Supreme Court held that the Discover Bank rule was preempted
24 by the Federal Arbitration Act, the Ninth Circuit reversed and
25 remanded. See McArdle v. AT&T Mobility, 2012 U.S. App. LEXIS
26 18517 (9th Cir.). The purpose of the remand was for this Court
27 "to consider in the first instance McArdle's arguments based on
28 generally applicable contract defenses." Id. at *2.

1 On April 11, 2013, ATTM filed a renewed motion to compel
2 arbitration and stay the action.

3 LEGAL STANDARD

4 Under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, et
5 seq., written agreements that controversies between the parties
6 shall be settled by arbitration are valid, irrevocable and
7 enforceable. 9 U.S.C. § 2. A party aggrieved by the refusal of
8 another to arbitrate under a written arbitration agreement may
9 petition the district court which would, save for the arbitration
10 agreement, have jurisdiction over that action, for an order
11 directing that arbitration proceed as provided for in the
12 agreement. Id. § 4. See Bridge Fund Capital Corp. v. Fastbucks
13 Franchise Corp., 622 F.3d 996, 1005 (9th Cir. 2010) (noting that
14 the party seeking to compel arbitration bears the burden of
15 proving the existence of a valid arbitration agreement by a
16 preponderance of the evidence). The FAA further provides:

17 If any suit or proceeding be brought in any of the
18 courts of the United States upon any issue referable to
19 arbitration under an agreement in writing for such
20 arbitration, the court in which such suit is pending,
21 upon being satisfied that the issue involved in such
22 suit or proceeding is referable to arbitration under
such an agreement, shall on application of one of the
parties stay the trial of the action until such
arbitration has been had in accordance with the terms of
the agreement

23 9 U.S.C. § 3. If the court is satisfied "that the making of the
24 arbitration agreement or the failure to comply with the agreement
25 is not in issue, the court shall make an order directing the
26 parties to proceed to arbitration in accordance with the terms of
27 the agreement." Id. § 4. "Unless the parties clearly and
28 unmistakably provide otherwise, the question of whether the

1 parties agreed to arbitrate is to be decided by the court, not the
2 arbitrator." AT&T Technologies, Inc. v. Communications Workers of
3 America, 475 U.S. 643, 649 (1986) (citations omitted).

4 The FAA reflects a "liberal federal policy favoring
5 arbitration agreements." Concepcion, 131 S. Ct. at 1745
6 (citations and internal quotation marks omitted). A district
7 court must compel arbitration under the FAA if it determines that:
8 (1) there is a valid agreement to arbitrate; and (2) the dispute
9 falls within its terms. Stern v. Cingular Wireless Corp., 453 F.
10 Supp. 2d 1138, 1143 (C.D. Cal. 2006) (citing Chiron Corp. v. Ortho
11 Diagnostic Sys., 207 F.3d 1126, 1130 (9th Cir. 2000)).

12 The FAA "permits agreements to arbitrate to be invalidated by
13 'generally applicable contract defenses, such as fraud, duress, or
14 unconscionability,' but not by defenses that apply only to
15 arbitration or that derive their meaning from the fact that an
16 agreement to arbitrate is at issue." Concepcion, 131 S. Ct. at
17 1746. The party opposing arbitration bears the burden of proving
18 that the arbitration provision is unconscionable. Arguelles-
19 Romero v. Superior Court, 184 Cal. App. 4th 825, 836 (2010).

20 DISCUSSION

21 I. Broughton-Cruz Doctrine

22 McArdle first argues that arbitration is foreclosed by
23 California's Broughton-Cruz rule which prohibits arbitration of
24 public injunctive relief claims under the Consumer Legal Remedies
25 Act (CLRA), Cal. Civ. Code § 1750 et seq., and the Unfair
26 Competition Law (UCL), Cal. Bus. and Prof. Code § 17200 et seq.,
27 because such claims are "designed to prevent further harm to the
28 public at large rather than to redress or prevent injury to a

1 plaintiff." Cruz v. PacificCare Health Systems, Inc., 30 Cal. 4th
2 303, 316 (2003); see also Broughton v. Cigna Healthplans of
3 California, 21 Cal. 4th 1066 (1999).

4 ATTM argues that the Broughton-Cruz doctrine is not a
5 generally applicable contract defense because it applies only to
6 certain types of cases and only to arbitration. Accordingly, ATTM
7 argues, the Court lacks authority to consider McArdle's Broughton-
8 Cruz argument because that argument exceeds the scope of the Ninth
9 Circuit's mandate. See Mendez-Guttierrez v. Gonzalez, 444 F.3d
10 1168, 1172 (9th Cir. 2006) ("[A] district court is limited by this
11 court's remand in situations where the scope of the remand is
12 clear.").

13 McArdle responds that the Court could find that the
14 arbitration provision is unenforceable because it violates the
15 public policy set out in the Broughton-Cruz doctrine. In support
16 of this argument, McArdle cites Fisher v. DCH Temecula Imports
17 LLC, 187 Cal. App. 4th 601, 617 (2010), which holds that there is
18 a "generally available contract defense" in California that
19 "private contracts that violate public policy are unenforceable."

20 The Broughton court relied on the United States Supreme
21 Court's holding that "not . . . all controversies implicating
22 statutory rights are suitable for arbitration." 21 Cal. 4th at
23 1075 (quoting Mitsubishi Motors v. Soler Chrysler-Plymouth, 473
24 U.S. 614, 627 (1985)).² The Broughton court held that the issue of

25 ² As discussed more fully below, both the majority and the
26 dissent in American Express Co. v. Italian Colors Restaurant, 133
27 S. Ct. 2304 (2013), made clear that Mitsubishi Motors applies only
28 to federal statutory claims. This further calls into question the
continuing viability of the Broughton-Cruz rule.

1 suitability "turns on congressional intent, which can be
2 discovered in the text of the statute in question, its legislative
3 history or in an inherent conflict between arbitration and the
4 statute's underlying purposes." 21 Cal. 4th at 1075 (citing
5 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991))
6 (internal quotation marks omitted). The Broughton court went on
7 to hold that "two factors taken in combination" evidenced an
8 inherent conflict "between arbitration and the underlying purpose
9 of the CLRA's injunctive relief remedy." 21 Cal. 4th at 1082.
10 The two factors were that the relief sought was "for the benefit
11 of the general public rather than the party bringing the action"
12 and that "the judicial forum [had] significant institutional
13 advantages over arbitration in administering a public injunctive
14 remedy." Id. In Cruz, the California Supreme Court held that
15 Broughton remained good law in the wake of intervening United
16 States Supreme Court decisions and extended its holding to public
17 injunctive relief claims under the UCL. 30 Cal. 4th at 311-16.

18 The Broughton-Cruz doctrine applies only to arbitration
19 agreements and only to certain claims brought pursuant to the CLRA
20 and UCL. Although the Broughton-Cruz doctrine is based on public
21 policy concerns, it is not a generally applicable contract defense
22 as contemplated by the FAA. See Concepcion, 131 S. Ct. at 1746-47
23 (holding that, even though the Discover Bank rule finds "its
24 origins in California's unconscionability doctrine and
25 California's policy against exculpation," it is not a generally
26 applicable contract defense). Because the Broughton-Cruz rule is
27 not a generally applicable contract defense, it does not survive
28 Concepcion.

1 McArdle argues that the Ninth Circuit’s en banc opinion in
2 Kilgore v. Key Bank, 718 F.3d 1052 (9th Cir. 2013) (Kilgore II),
3 “preserved the viability of” the Broughton-Cruz doctrine.
4 Opposition at 8. This argument is based on the fact that the
5 panel opinion in Kilgore v. Key Bank, 673 F.3d 947 (9th Cir. 2010)
6 (Kilgore I), held that the Broughton-Cruz doctrine was preempted
7 by the FAA in light of Concepcion. McArdle notes that the en banc
8 decision did not reach the preemption issue and contends that this
9 indicates that the Broughton-Cruz rule survives Concepcion. In
10 fact, the en banc court held, “Even assuming the continued
11 viability of the Broughton-Cruz rule, Plaintiffs’ claims do not
12 fall within its purview.” Kilgore II, 718 F.3d at 1060. Kilgore
13 II expressly did not decide the continued viability of the
14 Broughton-Cruz rule. For the reasons stated above, the Court
15 finds that the Broughton-Cruz rule is preempted by the FAA in
16 light of Concepcion.

17 II. Bar to Public Injunctive Relief

18 McArdle next argues that the arbitration agreement is
19 unenforceable because it “purports to bar customers from seeking
20 public injunctive relief in any forum.” Opposition at 15. The
21 arbitration agreement provides, “The arbitrator may award
22 declaratory or injunctive relief only in favor of the individual
23 party seeking relief and only to the extent necessary to provide
24 relief warranted by that party’s individual claim.” Figueroa
25 Dec., Ex. 2, ¶ 2.2(6). McArdle argues that this waiver of the
26 right to seek public injunctive relief under the CLRA and UCL is
27 unconscionable because it undermines the purposes of the statutes,
28

1 which provide that individuals may seek public injunctive relief.
2 See Cal. Bus. & Prof. Code § 17203; Cal. Civ. Code § 1780(a)(2).

3 In other words, McArdle argues, even if Concepcion permits
4 ATTM to compel arbitration of his CLRA and UCL claims, ATTM cannot
5 preclude the arbitrator from awarding public injunctive relief.
6 However, this argument relies on the United States Supreme Court's
7 decision in Mitsubishi Motors for the proposition that "by
8 agreeing to arbitrate a statutory claim, a party does not forego
9 the substantive rights afforded by statute; it only submits to
10 their resolution in an arbitral, rather than a judicial forum."
11 473 U.S. at 628. Some courts have limited this "effective
12 vindication" rule, applying it only to federal statutory rights,
13 while others extended the rule to state statutory rights, such as
14 the rights McArdle asserts in this case. However, in a recent
15 Supreme Court case, American Express Co. v. Italian Colors
16 Restaurant, the majority strongly suggested that the effective
17 vindication rule applies only to federal statutory rights,
18 repeatedly referring to federal rights or the pursuit of federal
19 remedies. See, e.g., 133 S. Ct. at 2310 n.2 (discussing
20 "potential deprivation of a claimant's right to pursue federal
21 remedies"); id. at 2311 (discussing "'effective vindication' of a
22 federal right"). The dissenting justices in American Express
23 stated the point even more clearly in their effort to distinguish
24 the case they were considering from Concepcion.

25 And if that is not enough, [Concepcion] involved a state
26 law, and therefore could not possibly implicate the
27 effective-vindication rule. When a state rule allegedly
28 conflicts with the FAA, we apply standard preemption
principles, asking whether the state law frustrates the
FAA's purposes and objectives. If the state rule does
so—as the Court found in [Concepcion]-the Supremacy

1 Clause requires its invalidation. We have no earthly
2 interest (quite the contrary) in vindicating that law.
3 Our effective-vindication rule comes into play only when
the FAA is alleged to conflict with another federal law,
like the Sherman Act here.

4 American Express, 133 S. Ct. at 2320 (Kagan, J. dissenting).

5 Moreover, the other cases McArdle cites are distinguishable.
6 McArdle relies on Bridge Fund Capital Corp. v. Fastbucks Franchise
7 Corp., 622 F.3d 996 (9th Cir. 2010), for the proposition that a
8 waiver of a statutory right to injunctive relief is substantively
9 unconscionable and accordingly unenforceable. In Bridge Fund, the
10 Ninth Circuit affirmed the district court's finding that class
11 action and injunctive relief waivers in the arbitration provision
12 of a franchise contract were unconscionable and unenforceable.
13 However, Bridge Fund relied in large part on a California Court of
14 Appeal case which held that such waivers were unenforceable by
15 applying the California Supreme Court's decision in Discover Bank
16 to the California Franchise Investment Law. Bridge Fund, 622 F.3d
17 at 1004 (citing Independent Ass'n of Mailbox Center Owners, Inc.
18 v. Superior Court, 133 Cal. App. 4th 396 (2005)). As discussed
19 above, the Discover Bank rule is preempted by the FAA.

20 McArdle also relies on a line of cases in which courts have
21 found that representative action waivers cannot apply to
22 California Private Attorney General Act (PAGA) claims. However,
23 McArdle fails to address a key difference between, on the one
24 hand, the CLRA and UCL, which permit an individual to seek public
25 injunctive relief and, on the other, PAGA, which allows an
26 individual to seek penalties under the Labor Code in an action
27 brought "on behalf of himself or herself and other current or
28 former employees." Cal. Lab. Code § 2699. The courts that have

1 found representative action waivers unconscionable in PAGA cases
2 have specifically noted this limitation. See, e.g., Urbino v.
3 Orkin Servs. of Cal, 882 F. Supp. 2d 1152, 1167 (C.D. Cal. 2011)
4 (noting that a court that found such waivers enforceable under
5 Concepcion "failed to take into account that there are no separate
6 individual claims in a PAGA action"), rev'd on other grounds, 2013
7 U.S. App. LEXIS 16718 (9th Cir.); Brown v. Ralph's Grocery Co.,
8 197 Cal. App. 4th 489, 503 (2011). The Court finds that these
9 cases are not applicable here.

10 CONCLUSION

11 For the reasons stated above, the Court GRANTS ATTM's motion
12 to compel arbitration and stay the action. (Docket No. 222) The
13 case is stayed pending arbitration, which must be diligently
14 pursued.³ Nothing contained in this order shall be considered a
15 dismissal or disposition of this action, and, should further
16 proceedings become necessary or desirable, any party may move to
17 restore the case to the Court's calendar.

18 IT IS SO ORDERED.

19
20 Dated: 9/25/2013

21 
22 CLAUDIA WILKEN
23 United States District Judge
24
25

26 _____
27 ³ There appears to be no further reason at this time to
28 maintain the file as open for statistical purposes, and the Clerk
is instructed to submit a JS-6 Form to the Administrative Office.