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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DESIREE KNATT and SARAH  
LOWE,

Plaintiffs,

v.

J. C. PENNEY CORPORATION,  
INC.,

Defendant.

CASE NO. 15cv2516 JM(KSC)

ORDER GRANTING MOTION TO  
COMPEL ARBITRATION

Defendant J. C. Penney Corporation, Inc. (“JCP”) moves to compel arbitration of Plaintiffs Desiree Knatt and Sarah Lowe’s claims asserted in the class action Complaint. Plaintiffs oppose the motion. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below the court grants the motion to compel arbitration. The Clerk of Court is instructed to administratively close the file.

**BACKGROUND**

On November 6, 2015, Plaintiffs commenced this diversity action by alleging two claims for relief against JCP: (1) violation of Cal. Labor Code §227.3 and (2) violation of Cal. Bus. and Prof. Code §17200 et seq. The underlying claims of Plaintiffs are related, if not identical to, those asserted in Tschudy v. J. C. Penney Corp., Inc., No. 11cv1011 JM(KSC) (“Tschudy”).

Plaintiffs are former employees of JCP and classified as Part-Time Non-

1 Management Associates (“PTNMA”). In broad brush, Plaintiffs allege that JCP’s My  
2 Time Off Vacation Policy (“MTO Policy”) violates Labor Code §227.3 and constitutes  
3 an unlawful business practice under Bus. and Prof. Code §17200. Plaintiffs allege that  
4 the 12 month waiting period and the minimum average hours of work requirement of  
5 the MTO Policy are invalid under Labor Code §227.3.

6 Unlike the Tschudy plaintiffs, each Plaintiff executed an arbitration provision  
7 which provides, in pertinent part:

8 J. C. Penney Company, Inc., including its subsidiaries (hereinafter  
9 “JCPenney”), and I voluntarily agree to resolve disputes arising from,  
10 related to, or asserted after the termination of my employment with  
11 JCPenney through mandatory binding arbitration under the JCPenney  
12 Rules of Employment Arbitration. JCPenney and I voluntarily waive the  
13 right to resolve these disputes in courts.

14 I acknowledge that I was given the opportunity to review the Rules and  
15 consult with an attorney prior to signing this Agreement. I understand  
16 that I will, however, be bound by this Agreement and the Rules once I  
17 sign electronically, regardless of whether I have reviewed the Rules, or  
18 consulted with an attorney prior to signing. I hereby agree to arbitrate  
19 disputes covered by and pursuant to the JCPenney Rules of Employment  
20 Arbitration.

21 (Buckingham Decl. Exhs. B and C).

22 JCP now moves to compel arbitration of Plaintiffs’ claims. Plaintiffs oppose the  
23 motion.

## 24 DISCUSSION

25 The Federal Arbitration Act (“FAA”) provides that:

26 a written provision in . . . a contract evidencing a transaction involving  
27 commerce to settle by arbitration a controversy thereafter arising . . . shall  
28 be valid, irrevocable and enforceable, save upon such grounds as exist at  
law or equity for the revocation of any contract.

9 U.S.C. §2. The FAA establishes federal policy favoring arbitration of disputes.  
Federal courts are required to “rigorously” enforce the parties agreement to arbitrate.  
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987). Indeed, “any  
doubts concerning the scope of arbitrable issues should be resolved in favor of  
arbitration, whether the problem at hand is the construction of the contract language

1 or an allegation of waiver, delay, or a like defense to arbitrability.” Moses H. Cone  
2 Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983).

3 [W]here a contract contains an arbitration clause, there is a presumption  
4 of arbitrability in a sense that [a]n order to arbitrate the particular  
5 grievance should not be denied unless it may be said with positive  
6 assurance that the arbitration clause is not susceptible of an interpretation  
7 that covers the asserted dispute. Doubts should be resolved in favor of  
8 coverage.

9 A.T.&T. Tech. Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986)  
10 (citations omitted).

11 The FAA creates “a body of federal substantive law of arbitrability,” enforceable  
12 in both state and federal courts and preempting any state laws or policies to the  
13 contrary. Moses H. Cone, 460 U.S. at 24. “The availability and validity of defenses  
14 against arbitration are therefore to be governed by application of federal standards.”  
15 Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 285 (9th Cir. 1988). This body  
16 of federal law also requires that federal courts apply state law, “whether of legislative  
17 or judicial origin [] if that law arose to govern issues concerning the validity,  
18 revocability and enforceability of contracts generally.” Perry v. Thomas, 482 U.S. 483,  
19 493, fn. 9 (1987). Thus, state law applies to interpret arbitration agreements as long  
20 as those state laws are generally applicable to all contracts, and not just agreements to  
21 arbitrate.

22 In opposing the motion to compel arbitration, Plaintiffs generally contend that  
23 the arbitration provision is unconscionable and their claims are excluded from the  
24 scope of the FAA by the National Labor Relations Act (“NLRA”), 29 U.S.C. § 157 et  
25 seq.

### 26 **Unconscionability**

27 Under California state law the court may invalidate an unconscionable contract  
28 provision. Civil Code section 1670.5, subdivision (a) states: “If the court as a matter  
of law finds the contract or any clause of the contract to be unconscionable at the time  
it was made the court may refuse to enforce the contract, or it may enforce the

1 remainder of the contract without the unconscionable clause, or it may so limit the  
2 application of any unconscionable clause as to avoid any unconscionable result.”

3 Unconscionability has both a procedural and a substantive element. Stirlen v.  
4 Supercuts, Inc., 51 Cal.App.4th 1519,1531 (1997). Both elements must be present for  
5 a contract or a clause therein to be invalidated, but they need not be present in the same  
6 degree. Armendariz v. Found Health Psychare Servs., 24 Cal.4th 83, 114 (2000);  
7 Stirlen, 51 Cal.App.4th at 1533. A sliding scale is utilized so that, for example, the  
8 more substantively oppressive a contract is, the lesser the showing of procedural  
9 unconscionability is required to conclude the contract is unconscionable. Armendariz,  
10 24 Cal.4th at 114.

#### 11 Procedural Unconscionability

12 Procedural unconscionability is oppression or surprise arising out of unequal  
13 bargaining power, which results from a lack of real negotiations and the absence of  
14 meaningful choice. Stirlen, 51 Cal.App.4th at 1532. Procedural unconscionability  
15 often arises when the contract in question is one of adhesion. Id. at 1533. A contract  
16 of adhesion is a “a standardized contract, which, imposed and drafted by the party of  
17 superior bargaining strength, relegates to the subscribing party only the opportunity to  
18 adhere to the contract or reject it.” Id.

19 Here, as noted by Plaintiffs, the arbitration provision is an adhesive contract and  
20 was presented to Plaintiffs on a take-it-or-leave-it basis. This factor favors a finding  
21 of procedural unconscionability. However, the fact that it was presented on a take-it-  
22 or-leave-it basis does not render the arbitration provision unenforceable. See Dotson  
23 v. Amgen, 181 Cal.App. 4th 975, 981 (2010) (“A contract of adhesion is not per se  
24 unenforceable.”).

25 Another factor is surprise. Plaintiffs testified that they were provided with the  
26 opportunity to access and read the arbitration provision as well as JCP’s Rules of  
27 Employment Arbitration before executing the document. Further, Plaintiffs were  
28 provided with up to seven days to review and execute the documents after they started

1 their employment. While Plaintiffs contend that they had no “meaningful opportunity”  
2 to review the documents, the evidence shows that Plaintiffs had an adequate  
3 opportunity to review the arbitration provision (whether Plaintiffs took advantage of  
4 this opportunity is another matter, not relevant to the present discussion). See Kinney  
5 v. United Healthcare Servs., Inc., 70 Cal.App. 4th 348, 352-53) (to determine  
6 procedural unconscionability, the court considers the manner in which the contract was  
7 negotiated and relevant circumstances of the parties). This factor weighs against a  
8 finding of procedural unconscionability.

9 Another factor is choice. JCP, by any stretch of the imagination, does not  
10 control the labor market nor possess monopoly power to lock Plaintiffs out of the labor  
11 market. JCP is one employer among thousands of employers in San Diego County.  
12 Plaintiffs were, and are, free to seek private or government employment of their choice.  
13 Plaintiffs were presented with sufficient information upon which prospective  
14 employees could make an informed decision whether to accept employment with JCP,  
15 subject to an arbitration provision or, alternatively, seek employment elsewhere. This  
16 factor weighs against a finding of procedural unconscionability.

17 In sum, the court concludes, under the sliding scale articulated in Armendariz,  
18 that the arbitration provision is minimally procedurally unconscionable such that  
19 Plaintiffs must make a substantial showing of substantive unconscionability.

#### 20 Substantive Unconscionability

21 Substantive unconscionability arises when (1) the contract terms are so one-sided  
22 as to shock the conscience or (2) the contract terms imposed are harsh or oppressive.  
23 Stirlen, 51 Cal.App.4th at 1532. Plaintiffs contend that the arbitration provision is  
24 substantively unconscionable because (1) the arbitration provision and Rules of  
25 Arbitration “are presumed to be substantively unconscionable” and not bilateral, (2) the  
26 Rules of Arbitration have different filing deadlines than either the Federal Rules of  
27 Civil Procedure or California’s Rules of Court, and (3) several miscellaneous reasons  
28 favor litigation over arbitration. The court concludes that the grounds of substantive

1 unconscionability identified by Plaintiffs are insufficient to invalidate the arbitration  
2 provision.

3 Plaintiffs first argue that the Rules of Arbitration are not bilateral because  
4 employees are more likely to commence arbitration proceedings than JCP. As the  
5 Rules of Arbitration contain certain limitations, such as the number of pages in a  
6 complaint and a nine-point font, Plaintiffs conclude that the arbitration provision  
7 overwhelmingly burdens Plaintiffs and is, therefore, substantively unconscionable.<sup>1</sup>  
8 Plaintiffs' reliance on Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003)  
9 to support this argument is misplaced. In Ingle, the Ninth Circuit concluded that  
10 arbitration provisions in the employment context "are grossly one-sided, and therefore  
11 presumptively substantively unconscionable." Id. at 1174 n.10. The court declines  
12 to follow this portion of Ingle because the Supreme Court has repeatedly instructed that  
13 agreements to arbitrate are to be "rigorously enforced," Shearson/American Express,  
14 482 U.S. 220, and the Ninth Circuit's presumption that arbitration provisions in the  
15 employment context are substantively unconscionable runs counter to Supreme Court  
16 precedent that arbitration provisions should be treated no differently than other  
17 contracts. DirecTV, Inc. v. Imburgia, 136 S.Ct. 463, 471 (2015) (unique interpretation  
18 of arbitration contract was invalid because it did not apply to non-arbitration contracts);  
19 Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 581-82 (2008) (The very  
20 purpose of the FAA was to reverse perceived "judicial indisposition" to arbitration  
21 agreements and to place those agreements on equal footing with all other contracts.).

22 Next, Plaintiffs contend that the arbitration agreement is substantively  
23 unconscionable because the time periods to file an answer, oppositions for motions to  
24 dismiss, and oppositions to motions for summary judgment are different under the  
25 Rules of Arbitration than either the Federal Rules of Civil Procedure or California

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27 <sup>1</sup> As noted by Plaintiffs, neither JCP nor any employee has ever commenced an  
28 arbitration proceeding against the other party. This evidence undermines Plaintiffs'  
argument that employees are more likely to commence arbitration proceedings than  
JCP.

1 Rules of Court. While these three sets of procedural rules contain different filing  
2 deadlines, Plaintiffs make no showing that the time periods provided in the Rules of  
3 Arbitration are insufficient to accomplish the objective of the filing or, are in any other  
4 manner, harsh or oppressive. As such, this argument fails to establish substantive  
5 unconscionability.

6 Finally, Plaintiffs raise a number of miscellaneous arguments that the arbitration  
7 provision is substantively unconscionable because (1) employees are prohibited from  
8 resorting to Small Claims Court, (2) there is a \$75 filing fee, (3) the statute of  
9 limitations is not tolled unless an aggrieved employee files a complaint and pays the  
10 filing fee, and (4) no employee has ever commenced an arbitration proceeding against  
11 JCP. The court gives short shrift to these arguments: (1) arbitration, by its very nature,  
12 precludes access to government courts, including Small Claims Court; (2) the filing fee  
13 is substantially lower than the filing fee in federal court (\$400) and cannot reasonably  
14 be construed as overly harsh or oppressive; (3) there is no showing that the tolling of  
15 the statute of limitations is overly harsh or burdensome (or even applicable under the  
16 present circumstances) and (4) the fact that no employee or JCP has ever commenced  
17 an arbitration provision against the other party does not demonstrate overly harsh or  
18 oppressive conduct that would invalidate the arbitration provision.

19 In sum, the arbitration provision is not unconscionable.

## 20 **The NLRA**


21 In broad brush, Plaintiffs characterize their claims as arising under the NLRA,  
22 which expressly provides that employees have the right to engage in collective actions,  
23 29 U.S.C. §157, and are therefore not subject to arbitration under Rule of Arbitration  
24 3.A.4. The difficulty with this argument is that Plaintiffs' claims do not arise under the  
25 NLRA. JCP's MTO Policy is a non-ERISA welfare benefit plan, not subject to the  
26 scope of ERISA. Under ERISA, a "welfare benefit plan" is a term of art that expressly  
27 excludes "payroll practices" such as vacation time compensation paid out of an  
28 employer's "general assets." 29 C.F.R. §2510.3-1(b)(3)(i); see Massachusetts v.

1 Morash, 490 U.S. 107, 120-21 (1989) (“a single employer’s administration of a  
2 vacation pay policy from its general assets does not possess the characteristics of a  
3 welfare benefit plan”). As Plaintiffs’ claims do not relate to an ERISA welfare benefit  
4 plan, the court does not reach other NLRA-related arguments raised by Plaintiffs.

5 In sum, the court grants the motion to compel arbitration. The court instructs the  
6 Clerk of Court to dismiss the complaint and to close the file. In the event any party  
7 desires to stay, rather than to dismiss the complaint, that party shall make a timely  
8 application to stay this proceeding. See 9 U.S.C. §3.

9 **IT IS SO ORDERED.**

10 DATED: March 30, 2016

  
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Hon. Jeffrey T. Miller  
United States District Judge

11  
12 cc: All parties

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