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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ZENIA CHAVARRIA, individually, and on behalf of other members of the general public similarly situated,)	Case No. CV 11-02109 DDP (VBKx)
)	
)	ORDER DENYING DEFENDANT'S MOTION
)	TO COMPEL ARBITRATION ON AN
)	INDIVIDUAL BASIS; AND TO DISMISS
)	OR STAY ACTION
Plaintiff,)	
)	[Motion filed on July 11, 2011]
v.)	
)	
RALPHS GROCER COMPANY, an Ohio corporation,)	
)	
Defendants.)	
_____)	

In March 2011, Zenia Chavarria ("Plaintiff") brought suit individually and on behalf of others similarly situated against her employer, Ralphs Grocery Company ("Ralphs"). Plaintiff alleges various wage and hour violations of California law and seeks compensation for unpaid wages. (Compl. ¶¶ 30-88.) Ralphs now brings a Motion to Compel Arbitration on an Individual Basis and to Dismiss or Stay Action under the Federal Arbitration Act ("FAA"). (Dkt. No. 6.)

Having read the parties' papers, considered the arguments therein, and heard oral argument, the court concludes that the

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1 arbitration agreement Ralphs seeks to enforce is procedurally and
2 substantively unconscionable, and DENIES Ralphs' motion.

3 **I. Background**

4 On September 22, 2008, Plaintiff applied for a job at Ralphs.
5 To that end, she completed and signed Ralphs' employment
6 application (the "Employment Application" or "Application").
7 (Def.'s Motion, Ex. 1, Employment Application.)

8 The Employment Application includes a paragraph stating that
9 Ralphs has a Dispute Resolution Program. The Application states
10 that the prospective employee agrees that the "Dispute Resolution
11 Program [] includes a Mediation & Binding Arbitration Policy (the
12 'Policy')," which is "incorporated into this Employment Application
13 by this reference as though it is set forth in full"

14 (Def.'s Motion, Ex. 1, Employment Application.) The Employment
15 Application concludes with language stating that the applicant has
16 either "received a copy of the Policy or one has been made
17 available to [her] through the Company's Director of Personnel &
18 Benefits, 1100 West Artesia Boulevard, Compton, CA 90220"

19 At some point after September 22, 2008, Plaintiff was
20 interviewed and hired by Ralphs.¹ On October 14, 2008, at a new
21 employee orientation attended by Plaintiff, Plaintiff wrote her
22 initials on a form, which acknowledged receipt of twenty-two
23 different forms and manuals. (Decl. Cotes, Ex. A.) Included in
24 that list was an acknowledgment of receipt of the full terms of the
25 "Mediation & Binding Arbitration Policy" (i.e the "Arbitration
26 Policy" or the "Policy").

27 _____

28 ¹ Neither Ralphs nor Plaintiff provided the court an exact date of hire.

1 The Policy is four single-spaced pages long and provides,
2 inter alia:

3 **Policy Preamble, 1., 2., & 4. All employment and**
4 **pre-employment disputes including civil rights**
5 **claims, harassment claims, and wage and hour**
6 **claims will be arbitrated²**

7 [T]his Arbitration Policy is the
8 exclusive mechanism for formal resolution of
9 disputes and awards of relief that otherwise
10 would be available to Employees or the Company
11 in a court of law or equity or in an
12 administrative agency.

13 . . .
14 Covered Disputes are employment-related
15 disputes . . . which involve the
16 interpretation or application of this
17 Arbitration Policy, the employer/employee
18 relationship, an Employee's actual or alleged
19 employment with Ralphs . . . , the termination
20 of such employment, or applying for or seeking
21 such employment.

22 . . .
23 Covered Disputes include, for example and
24 without limitation, disputes having anything
25 to do with the interpretation or application
26 of this Arbitration Policy . . . , and
27 disputes, claims or causes of action for
28 unfair competition, unfair business practices
29 . . . fraud, breach of contract, injunctive
30 relief, unlawful harassment, unlawful
31 discrimination, unlawful retaliation, failure
32 to provide reasonable accomodation(s), unpaid
33 wages or failure to pay overtime or other
34 compensation (or the computation thereof),
35 failure to provide family or medical (or other
36 required) leave, failure to consider for
37 hiring, failure to hire for employment and
38 actual or constructive termination of the
39 employment relationship. Covered Disputes . .
40 . [also] include all Employee's individual
41 statutory claims or disputes under federal,
42 state and local laws including, for example
43 and without limitation, any claims or disputes
44 arising under the California Fair Employment
45 and Housing Act; . . . the Civil Rights Act of
46 1964; the Americans With Disabilities Act; the

2 The court uses the Policy's numbering for ease of reference. The headings are the court's own. The excerpts below the headings are from Ralphs' Arbitration Policy. (See Def.'s Motion, Ex. 2, Mediation & Binding Arbitration Policy.)

1 Age Discrimination in Employment Act; the
2 Family Medical Leave Act; the California
3 Family Rights Act; the California Labor Code .
4 . . . ; the Fair Labor Standards Act; the
Employee Retirement Income Security Act; . . .
and the United States Code, as enacted and
amended.

5 **3. Jury trial waiver**

6 There are no judge or jury trials
7 permitted under this Arbitration Policy. The
8 Company [i.e. Ralphp] and Employees waive any
right that they have or may have to a judge or
jury trial of any Covered Disputes

9 **7. The arbitrator must be a retired federal or**
10 **state judge, and the arbitrator may not be an**
organization such as JAMS or AAA

11 [T]he 'Qualified Arbitrator' must be a
12 retired state or federal judge . . . from the
13 state jurisdiction or federal jurisdiction in
which the Covered Dispute(s) arose or will be
arbitrated.

14 [N]either the American Arbitration
15 Association ("AAA") nor the Judicial
16 Arbitration & Mediation Service ("JAMS") will
be permitted to administer any arbitration
held under or pursuant to this Arbitration
17 Policy.

18 **7. Selection of an arbitrator: Ralphp will always**
19 **select the arbitrator for any employee-initiated**
dispute, absent mutual agreement to the contrary

20 If the parties do not mutually agree on
21 the selection and appointment of a Qualified
22 Arbitrator, the following selection method
will be used to select and appoint a Qualified
23 Arbitrator: (1) Each party to the arbitration
proceeding will propose a list of three
24 Qualified Arbitrators that they want appointed
to hear and decide the Covered Dispute(s); and
25 (2) The parties will alternate in striking one
name from any other party's list of proposed
26 Qualified Arbitrators, with the first strike
to be made by a party who has not demanded
27 arbitration pursuant to this Arbitration
Policy, followed by a continuing rotation of
alternating adverse parties until there is
28 only one proposed Qualified Arbitrator that
has not been stricken, who will be deemed to
be the parties' selected and appointed

1 Qualified Arbitrator to hear and decide the
2 Covered Dispute(s) that are the subject of the
arbitration proceedings.

3 **8. Discovery**

4 [T]he parties will have the right to
5 conduct normal discovery and to bring motions,
as provided by the [Federal Rules of Civil
6 Procedure].

7 . . .

8 **8. Class action waiver**

9 [T]here is no right or authority for any
10 Covered Disputes to be heard or arbitrated on
a class action basis, as a private attorney
11 general, or on bases involving claims or
disputes brought in a representative capacity
on behalf of the general public

12 . . .

13 **9. The Policy trumps any longer statutory statute
of limitations**

14 In the event that the applicable statute
of limitations period as provided under
governing law is longer than one year

15 . . . [Ralphs] and Employees agree that the
16 applicable state of limitations period is
shortened to one year.

17 **10. Each party must bear their own attorney's
18 fees.³ The Arbitrator's fees and any
19 arbitration fees must be allocated and paid
"up front" before evidence is received. Any
20 fee dispute is resolved by the Arbitrator, but
the Arbitrator is stripped of any authority to
21 allocate fees other than 50/50 absent
"settled" authority coming only from the
Supreme Court. The decisions of all inferior
22 courts are to be disregarded.**

23 Each party to the arbitration will pay the
fees for his or its own attorneys, subject to
24 the remedies to which that party may later be
entitled under applicable law. Ralphs . . .

25 _____
26 ³ This clause contains a provision stating that it is subject
27 to "any remedies to which that party may later be entitled under
applicable law." It is unclear what is meant by "later" because
28 the Arbitrator is not granted authority to address issues involving
whether attorney's fees must be paid to the prevailing party and,
if so, in what amount. "Later" may mean in a court of law.

1 in all cases where required by settled and
2 controlling legal authority will pay up to all
3 of the Qualified Arbitrator's and arbitration
4 fees, as apportioned by the Qualified
5 Arbitrator at the outset of the arbitration
6 proceeding In all instances in which
7 there is a dispute over the apportionment of
8 the . . . arbitration fees, such dispute is a
9 Covered Dispute under this Arbitration Policy
10 which must be resolved by the Qualified
11 Arbitrator, who must apply and follow only
12 decisions of the United States Supreme Court
13 in resolving such dispute In the
14 event settled and controlling [Supreme Court]
15 legal authority does not require that one
16 party or another bear a greater share of the
17 Qualified Arbitrator's or arbitration fees,
18 such fees will be apportioned equally between
19 each set of adverse parties.

20 (Def.'s Motion, Ex. 2, Mediation & Binding Arbitration Policy.)

21 From October 2008 to March 2009, Plaintiff worked for Ralphs
22 in Los Angeles as a Service Deli Clerk. (Compl. ¶ 17.)
23 Plaintiff's regular duties included preparing and roasting
24 rotisserie chicken, preparing sandwiches, maintaining food safety
25 standards, and keeping the service deli area clean. (Id.)

26 In March 2011, Plaintiff brought suit against Ralphs for
27 failure to pay Plaintiff overtime compensation, failure to pay
28 Plaintiff for meal and rest periods during which she worked, and
29 failure to provide complete and accurate wage statements in
30 violation of the California Labor Code. (Id. ¶¶ 21-22.)
31 Plaintiff seeks relief on behalf of herself and others similarly
32 situated, and she argues that the Arbitration Policy is
33 unenforceable as unconscionable and that the Policy's class action
34 waiver violates the National Labor Relations Act and California
35 law. Ralphs moves this court to compel individual arbitration.

36 (Def.'s Motion 2:9-21.)

37

1 **II. Legal Standard**

2 Under the FAA, 9 U.S.C. § 1 et seq., a written agreement that
3 controversies between the parties shall be settled by arbitration
4 is "valid, irrevocable, and enforceable, save upon such grounds as
5 exist at law or in equity for the revocation of any contract." 9
6 U.S.C. § 2. A party aggrieved by the refusal of another to
7 arbitrate under a written arbitration agreement may petition the
8 court for an order directing that arbitration proceed as provided
9 for in the agreement. 9 U.S.C. § 4; see e.g. Stirlen v.
10 Supercuts, Inc., 51 Cal. App. 4th 1519, 1526-27 (1997)
11 (considering a motion to compel arbitration). In considering a
12 motion to compel arbitration, the court must determine whether
13 there is a duty to arbitrate the controversy, and "this
14 determination necessarily requires the court to examine and, to a
15 limited extent, construe the underlying agreement." Stirlen, 51
16 Cal. App. 4th at 1527. The determination of the validity of an
17 arbitration clause, which may be made only "upon such grounds as
18 exist for the revocation of any contract," is solely a judicial
19 function. Id. (internal citation omitted).

20 If the court is satisfied that the making of the arbitration
21 agreement or the failure to comply with the agreement is not at
22 issue, the court shall order the parties to proceed to arbitration
23 in accordance with the terms of the agreement. 9 U.S.C. § 3. The
24 FAA reflects a "federal policy favoring arbitration agreements."
25 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991)
26 (quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460
27 U.S. 1, 24 (1983)).

28

1 **III. Discussion**

2 Plaintiff signed Ralphs' Employment Application on September
3 22, 2008. (Vega Decl. ¶ 4.) That Application contained a
4 requirement to resolve disputes through Ralphs' Dispute Resolution
5 Program, which includes an Arbitration Policy. Ralphs now moves
6 this court to compel Plaintiff to arbitrate her wage and hour
7 violation claims on an individual basis. Plaintiff argues that
8 Ralphs' Arbitration Policy is procedurally and substantively
9 unconscionable and, therefore, unenforceable. The court agrees.

10 Unconscionability has generally been recognized to include
11 (1) an absence of meaningful choice on the part of one of the
12 parties and (2) contract terms which are unreasonably favorable to
13 the other party. Stirlen, 51 Cal. App. 4th at 1531. Put another
14 way, unconscionability has a "procedural" and "substantive"
15 element. See Davis v. O'Melveny & Myers, 485 F.3d 1066, 1072 (9th
16 Cir. 2007).

17 California courts apply a "sliding scale" analysis in making
18 this determination: "the more substantively oppressive the
19 contract term, the less evidence of procedural unconscionability
20 is required to come to the conclusion that the term is
21 unenforceable, and vice versa." Id. (quoting Armendariz v. Found.
22 Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. App. 2000)).
23 Both procedural and substantive unconscionability must be present
24 for a contract to be declared unenforceable, but they need not be
25 present to the same degree. Harper v. Ultimo, 113 Cal. App. 4th
26 1402, 1406 (2003).

27 **A. Procedural Unconscionability**

28

1 Procedural unconscionability focuses on the factors of
2 surprise and oppression, "with surprise being a function of the
3 disappointed reasonable expectations of the weaker party."
4 Harper, 113 Cal. App. 4th at 1406.

5 Here, Plaintiff was required – in order to complete the
6 Employment Application and apply for a job at Ralphs – to agree to
7 the terms of Ralphs' Arbitration Policy. The Employment
8 Application states at its top that by signing the Application, the
9 Applicant acknowledges that she has "read, understood, and
10 agree[d]" that the Arbitration Policy is incorporated into the
11 Application. The Application further states in small type that
12 the prospective employee has "received a copy of the Policy or one
13 has been made available" to the employee at the Company's Director
14 of Personnel and Benefits, located at a physical address in
15 Compton, California. (Def.'s Motion, Ex. 1, Employment Application
16 (emphasis added).)

17 The actual terms of the Arbitration Policy were first
18 provided to Plaintiff at a new employee orientation more than
19 three weeks after she signed the Employment Application – i.e.,
20 after she was hired and after she had agreed to arbitrate all
21 future disputes with Ralphs.

22 Ralphs' position in structuring the Application as it did
23 appears to be that a prospective employee can be compelled to
24 arbitrate pre-employment hiring disputes,⁴ and that making the
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26 ⁴ Although not raised here, the court questions whether, in
27 circumstances such as those here, an Applicant has received
28 consideration in exchange for waiving all potential claims,
including those involving discrimination, arising from the hiring
process.

1 terms of the Arbitration Policy "available" at some other location
2 is the equivalent of physically handing an applicant the terms.
3 The court disagrees.

4 Here, the Policy was not provided to Plaintiff until after
5 she had already agreed to be bound by it. For this reason, the
6 court finds that Plaintiff was reasonably "surprised" by the terms
7 and conditions of Ralphs's Arbitration Policy. See Pokorny v.
8 Quixtar, Inc., 601 F.3d 987, 996-97 (9th Cir. 2010) (holding that
9 arbitration agreements were unconscionable where, among other
10 factors, the full terms of those agreements were not attached to
11 the agreement).

12 Further, the Policy was presented to the Plaintiff on a take
13 it or leave it basis.

14 An agreement or any portion thereof is
15 procedurally unconscionable if 'the weaker
16 party is presented the clause and told to take
17 it or leave it without the opportunity for
18 meaningful negotiation.' Thus, we have said
19 that a contract is procedurally unconscionable
under California law if it is 'a standardized
contract drafted by the party of superior
bargaining strength, that relegates to the
subscribing party only the opportunity to
adhere to the contract or reject it.'

20 Id. at 996 (internal citations omitted).

21 Ralphs required Plaintiff to accept the "available"
22 Arbitration Policy not only as a condition of employment, but as a
23 condition of Plaintiff's application for employment. Plaintiff
24 could not even present herself for consideration without first
25 acceding to the terms of the Policy. There is, therefore, no
26 question that Ralphs is the party of superior bargaining power, or
27 as described in Pokorny, the "stronger" party. Id. (explaining
28 that in assessing procedural unconscionability, the court must

1 consider "whether the contract was one drafted by the stronger
2 party and whether the weaker party had an opportunity to
3 negotiate"). Indeed, describing Ralphs' bargaining power here as
4 simply "stronger" than or "superior" to Plaintiff's belies the
5 total imbalance between the parties' relative positions. Ralphs
6 does not have merely superior or stronger bargaining power, it has
7 all of the bargaining power.

8 Accordingly, because the Policy was presented as "take it or
9 leave it," the Policy is procedurally unconscionable.⁵
10 Additionally, because the Plaintiff was not given the opportunity
11 to review the full Policy before she was hired, this additional
12 defect acts to "multiply" the degree of procedural
13 unconscionability.⁶ See Id. at 997 (explaining that the
14 defendant's failures, including failure to supply the plaintiff
15 with the full terms of the binding arbitration process, "multiply
16 the degree of procedural unconscionability of the ADR agreements").

17 **B. Substantive Unconscionability**

18 Substantive unconscionability focuses on the one-sidedness of
19 the contract terms. Armendariz, 6 P. 3d at 690. "Where an
20 arbitration agreement is concerned, the agreement is unconscionable
21 unless the arbitration remedy contains a 'modicum of
22 bilaterality.'" Ting, 319 F.3d at 1149 (citing Armendariz, 6 P.3d

23
24 ⁵ The fact that the Policy is characterized by Ralphs as its
25 "policy" is also notable. An "agreement" carries with it at least
26 the theoretical opportunity to negotiate. A "policy," in contrast,
27 suggests a firm set of established procedures and, implicit
28 therein, a reduced openness to negotiation.

27 ⁶ As discussed above, the fact that the Policy was
28 theoretically "available" at some other physical location is not an
adequate substitute for disclosure of the actual terms of the
Policy.

1 at 692). Put another way, the doctrine of substantive
2 unconscionability limits "the extent to which a stronger party may
3 . . . impose the arbitration forum on the weaker party without
4 accepting that forum for itself." Id. The court finds the Policy
5 is substantively unconscionable for the reasons below.

6 First, the court finds the method devised by Ralphs to select
7 a "qualified arbitrator" to be a sham. (See Def.'s Motion, Ex. 2,
8 Mediation & Binding Arbitration Policy ¶ 7.) If the parties do not
9 mutually agree on an arbitrator, an arbitrator will be selected
10 according to the following procedure: (1) Each party will propose
11 three arbitrators; (2) the parties will alternate in striking one
12 name from a the other party's list of proposed arbitrators until
13 one arbitrator is remaining; and (3) the first strike will be made
14 by the party who has not demanded arbitration pursuant to the
15 Arbitration Policy. (Id.)

16 In every instance in which an employee seeks arbitration, the
17 employee will strike second and, therefore, will strike two of
18 Defendant's proposed arbitrators in the time that Defendant strikes
19 all three of the employee's arbitrators.⁷ The end result is that
20 the "last arbitrator standing" will always be one of the three
21 proposed by Ralphs.

22
23

24 ⁷ Suppose, for example, that Ralphs lists Arbitrators A, B,
25 and C, and an employee lists Arbitrators 1, 2, and 3. Ralphs
26 strikes first, and eliminates Arbitrator 1. The employee goes
27 next, striking Arbitrator A. Ralphs then proceeds to strike
28 Arbitrator 2. The employee then eliminates Arbitrator B from
consideration. Ralphs then strikes Arbitrator 3. At that point,
Arbitrator C, chosen by Ralphs, is the last arbitrator standing,
and is therefore selected. The employee does not have the
opportunity to exercise his third strike.

1 Defendant argues that this provision is not one-sided because
2 "one party or the other must strike first" and "either party is
3 free to demand arbitration and thereby secure the right to strike
4 second." (Def.'s Reply 16:21-24.) As illustrated above, the
5 "right" to "strike second" is not much of a "right" at all.
6 Furthermore, the court is not persuaded that Ralphs is equally
7 likely as one of its employees to request arbitration. Ralphs is
8 the employer of at will employees. The Policy governs claims that
9 are overwhelmingly likely to be raised by an employee – not by an
10 employer. Ralphs is unlikely to bring a claim against its employee
11 for, for example, unfair competition, unfair business practices,
12 unlawful harassment, unlawful discrimination, unlawful retaliation,
13 unpaid wages or failure to pay overtime or other compensation,
14 failure to consider for hiring, failure to hire, violation of the
15 California Fair Employment and Housing Act, violation of the Civil
16 Rights Act of 1964, or violation of the American with Disabilities
17 Act, all of which must be arbitrated under the terms of the Policy.
18 (See Def.'s Motion, Ex. 2, Mediation & Binding Arbitration Policy ¶
19 4.)

20 The Policy's provisions regarding the eligibility of potential
21 arbitrators also raise fundamental unconscionability concerns.
22 Under the terms of the Policy, paragraph 7, "the 'Qualified
23 Arbitrator' must be a retired state or federal judge," . . . "and
24 neither the American Arbitration Association ("AAA") nor the
25 Judicial Arbitration & Mediation Services ("JAMS") will be
26 permitted to administer any arbitration held under or pursuant to
27 this Arbitration Policy." (Def.'s Motion, Ex. 2, Mediation &
28 Binding Arbitration Policy ¶ 7.) By eliminating the ability of an

1 institutional arbitrator to serve, Ralphs eliminates any
2 uncertainty concerning the selection of the ultimate arbitrator.
3 The AAA, for example, has its own process for selecting a neutral
4 arbitrator when the parties disagree.⁸ Further, institutional
5 arbitrators are less likely to be influenced by a well-paying
6 repeat party, such as Ralphs, than are hand-picked individual
7 arbitrators who stand to benefit from Ralphs' frequent patronage.
8 In short, the Policy's restrictions mandating private, individual
9 arbitrators outside the AAA and JAMS organizational framework,
10 coupled with the arbitration selection "process," ensure that the
11 arbitrator will be a person selected by Ralphs.

12 These consequences are compounded by the fact that under
13 paragraph 10 of Ralphs' Arbitration Policy, the arbitrator
14 apportions the arbitration and arbitrator's fees between the
15 parties at the outset of the arbitration proceedings and before the
16 introduction of evidence, regardless of the merits of the claim.
17 The default allocation is a fifty-fifty fee split. In the event of
18

19 ⁸ The court takes judicial notice of AAA's Employment
20 Arbitration Rules and Mediation Procedures. If the parties to a
21 AAA arbitration are unable to agree upon an arbitrator, AAA
provides:

22 [E]ach party to the dispute shall have 15 days
23 from the transmittal date in which to strike
24 names objected to, number the remaining names
25 in order of preference, and return the list to
26 the AAA. . . . From among the persons who
27 have been approved on both lists . . . the AAA
28 shall invite the acceptance of an arbitrator
to serve. If the parties fail to agree on any
of the persons named, or if acceptable
arbitrators are unable to act, or if for any
reasons the appointment cannot be made from
the submitted list, the AAA shall have the
power to make the appointment from among other
members of the panel without the submission of
additional lists."

1 a dispute regarding the apportionment of fees (which is almost
2 universally the case), the arbitrator is empowered to resolve the
3 dispute only if there is settled and controlling United States
4 Supreme Court authority requiring a particular resolution.
5 Authority from any other court, no matter how relevant, is barred
6 from consideration. In the absence of a specific United States
7 Supreme Court mandate for a particular resolution, the arbitrator
8 "will" divide the fees equally between the parties.⁹ (Def.'s
9 Motion, Ex. 2, Mediation & Binding Arbitration Policy ¶ 7.)

10 The above Policy provision is a model of how employers can
11 draft fee provisions to price almost any employee out of the
12 dispute resolution process. At the hearing on August 29, 2011, the
13 court inquired of Ralphs as to the fees charged by the arbitrators
14 employed by Ralphs. Ralphs estimated those fees to range from
15 \$7,000 to \$14,000 per day. Plaintiff worked at a Ralphs service
16 deli for five months. She claims she was not paid for rest and
17 meal breaks during which she worked. Her monetary claims likely
18 total well under ten thousand dollars. Assuming a two day
19 arbitration, Plaintiff would be required to pay somewhere between
20

21 ⁹ The court rejects Ralphs' assertion that a purported savings
22 clause in any way alleviates the economic fairness issues raised by
23 the Policy's fee structure. The Policy merely states that Ralphs
24 will pay a higher share of fees "where required by settled and
25 controlling legal authority." (Def.'s Motion, Ex. 2, Mediation &
26 Binding Arbitration Policy ¶ 10.) First, a plaintiff's reasonable
27 fear of incurring thousands of dollars in fees is unlikely to be
28 assuaged by the mere possibility that some unknown legal authority
might allow the plaintiff to avoid those fees. Second, the
question whether any such authority is sufficiently "settled and
controlling" will often give rise to disputes over apportionment,
which, under the terms of the Policy, may then only be settled by
the arbitrator with reference to a Supreme Court decision. In the
absence of a Supreme Court decision precisely on point, the fees
"will" be split fifty-fifty.

1 \$7,000 and \$14,000 in arbitrator's fees alone. She also faces the
2 prospect of being required to pay those fees before she has any
3 opportunity to present her case. Nor is there any guarantee that
4 Plaintiff will be able to resolve her claim in a matter of days.
5 As set forth in paragraph 8, the parties are permitted to conduct
6 discovery and bring motions. Under these conditions, Ralphs, as
7 the economically stronger party, would have the ability and
8 incentive to file numerous pre-hearing and post-hearing motions
9 before the arbitrator, thus forcing a plaintiff to incur additional
10 fees that she could ill afford to pay.

11 By way of contrast, Plaintiff's filing fee in the present
12 action, filed in federal court, was \$350.¹⁰ The fee to file a
13 complaint in California Superior Court is roughly the same.

14 The Policy's fee allocation structure creates a substantial
15 economic barrier to justice. The terms of the Policy therefore
16 defeat the very purpose of arbitration as an alternative dispute
17 resolution system and method of preserving private and judicial
18 resources. It is well settled that one of the fundamental purposes
19 of resorting to arbitration is to reduce the cost and delay of
20 litigation. See Rodriguez de Quijas v. Shearson/American Exp.,
21 Inc., 490 U.S. 477, 479-80 (1989) (explaining that the Arbitration
22 Act strongly favors the enforcement of agreements to arbitrate as a
23 means of securing economical solution of controversies). When, as
24 here, "the potential for individual gain is small, very few
25 plaintiffs, if any, will pursue individual arbitration," reducing
26 the aggregate liability an employer faces and effectively closing

27
28 ¹⁰ Plaintiffs who are unable to pay this filing fee may move
to file in forma pauperis. C.D. Cal. L.R. 5-2.

1 the arbitration doors. Shroyer, 498 F.3d at 986; see also Kaliroy
2 Produce Co., Inc. v. Pacific Tomato Growers, Inc., 730 F. Supp. 2d
3 1036, 1041 (D. Ariz. 2010) (internal citation omitted).

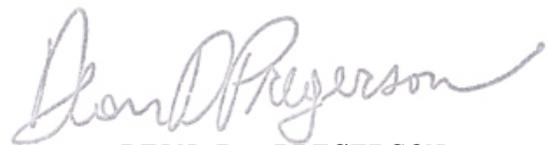
4 **IV. Conclusion**

5 Our legal institutions depend on legitimate process and the
6 real possibility for redress. Federal policy strongly encourages
7 arbitration that is "prompt, economical, and adequate." A.G.
8 Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 n.2 (9th
9 Cir. 1992) (quotation marks omitted) (emphasis added). The Ralphs
10 Policy is not economical or adequate. Arbitration is intended to
11 be a fair and efficient means of resolving disputes, not a sham
12 having no "modicum of bilaterality." Ting, 319 F.3d at 1149.
13 Ralphs' arbitration policy lacks any semblance of fairness and
14 eviscerates the right to seek civil redress, rendering it a right
15 that exists in name only. To condone such a policy would be a
16 disservice to the legitimate practice of arbitration and a stain on
17 the credibility of our system of justice.

18 Because the Arbitration Policy is both procedurally and
19 substantively unconscionable, Defendant's Motion to Compel
20 Arbitration on an Individual Basis; and to Dismiss or Stay Action
21 is DENIED.¹¹

22 IT IS SO ORDERED.

23 Dated: September 15, 2011



DEAN D. PREGERSON
United States District Judge

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27 ¹¹ Because the court finds the Policy unconscionable, the
28 court does not proceed to consider Plaintiff's alternative argument
under the National Labor Relations Act and Gentry v. Superior
Court, 42 Cal. App. 4th 433, 463 (2007).