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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

JANE ROES 1-4, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Deja Vu Services, Inc., et al.,

Defendant.

Case No. 37-2018-28044-CU-OE-CTL

DEFENDANTS' REPLY IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION

Assigned to: Hon. Timothy Taylor
Dept: C-72
Complaint Filed: July 6, 2018

Hearing date: January 18, 2019
Hearing time: 1:30 p.m.

Defendants hereby submit the following reply to Plaintiffs' Opposition to Defendants' Motion to Compel Arbitration[1].

INTRODUCTION

Plaintiffs challenge Defendants' Motion to Compel arbitration on two grounds. First, by virtue of their participation in seeking approval of the class action settlement they have waived their right to arbitration; and second, Roes 2 and 4 did not agree to arbitrate their individual claims at all and certainly not against non-signatory Defendants. These arguments are undermined by the facts of the proceedings, public policy and the terms of the Arbitration Agreement that were clearly offered and accepted by Plaintiffs here. In fact, the Supreme Court earlier this week ruled that a "delegation" clause like the one at issue here (which delegates "gateway" questions of arbitrability to an *arbitrator* as opposed to a court), must be zealously enforced under the Federal Arbitration Act. Respectfully, if the Plaintiffs want to litigate gateway questions of arbitrability they must do so before an arbitrator and not before this Court.

From the outset of this Action, Defendants have asserted a right to resolve the individual claims of the Plaintiffs through arbitration. This is admitted by Plaintiffs. Defendants' Motion to Compel Arbitration was filed as their first appearance in this Action. The only other "litigation" that has occurred came as a result of the intervenors' proposed intervention in this action and their support of Plaintiffs' motion seeking a settlement without an admission of liability (the settlement itself containing an acknowledgment by Plaintiffs that Defendants were not waiving the right to arbitrate by seeking a settlement). There has been no litigation of the merits of Plaintiffs' claims. This does not constitute waiver under California law and a contrary result would undermine the strong public policy favoring settlement of disputes.

Additionally, Plaintiffs' arguments that the non-signatory Defendants to the Club/Performer Contracts cannot enforce the arbitration clause directly contradict the agency allegations of their First Amended Complaint ("Complaint"). Furthermore, the arbitration clause as agreed to by Roes 2 and 4 does *not* exclude this action from arbitration, and in fact was specifically agreed to by each of the Roes with the understanding that they were waiving their ability to file an action on a class or

[1] Originally, this Motion was brought to compel arbitration of the individual claims of Roes 1 through 4; however, now that the Plaintiffs have filed a First Amended Complaint, only Roes 2 and 4 are relevant to this motion.

collective basis. The arbitration agreements signed by Roes 2 and 4 expressly require them to resolve all disputes through individual arbitration and those Agreements should be enforced.

ARGUMENT

1. The Delegation Clause Confers Exclusive Authority on the Arbitrator to Resolve Disputes Over the Enforceability of the Arbitration Agreement.

Respectfully, the arguments fielded by the Plaintiffs are to be resolved by an arbitrator, and not by this Court. The Performer Contracts in question (at Section VIII(3)) contain the following "delegation" clause: "THE ARBITRATOR SHALL HAVE EXCLUSIVE AUTHORITY TO RESOLVE ANY DISPUTES OVER THE ENFORCEABILITY OF THIS CONTRACT AND THE TERMS HEREIN, *INCLUDING THIS ARBITRATION PROVISION*." Up until this week, some courts had determined that certain "gateway" questions of arbitrability were, irrespective of such a delegation clause, to nevertheless be decided by the court. No More. In the *unanimous* decision of *Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272 (Slip. Op. attached as Ex. 1 to Declaration of Tammara N. Bokmuller submitted herewith), the Supreme Court ruled that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." Slip, Op. at 2.

While Plaintiffs assert that because they did not agree to arbitrate these claims against non-signatories that the delegation clause doesn't apply, and because the claims are styled as a class action they are beyond the scope of the Agreement, any such questions here are reserved for the arbitrator under *Schein*.

There is nothing ambiguous about the fact that the Agreements require the claims here to be resolved by arbitration. Irrespective of the clearly enforceable delegation clause, however, Defendants respond to the Plaintiffs' substantive arguments below in an abundance of caution.

2. Defendants' Participation in the Settlement Approval Process Does Not Waive Their Right to Arbitrate These Claims.

Plaintiffs argue that when Defendants responded to the intervenors' opposition to the motion for preliminary approval of settlement, they waived their right to arbitration. "Waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." *St. Agnes Medical Center v. PacifiCare of California*, 31 Cal. 4th 1187, 1195 (2003). "Because arbitration is a highly favored means of settling such disputes, the courts have been admonished to 'closely

scrutinize any allegation of waiver of such favored right' [citations omitted] and to 'indulge every intendment to give effect to such proceedings [citations omitted]." *Doers v. Golden Gate Bridge, Highway and Transportation District*, 23 Cal.3d 180, 189 (1979). Mere participation in litigation and discovery does not necessarily compel a finding of waiver. *Sobremonte v. Superior Court* 61 Cal.App.4th 980, 995 (1998). As set forth in *St. Agnes Medical Center v. PacifiCare of California*, when a court considers the issue of waiver, the following factors apply:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party.

Plaintiffs acknowledge that the fourth factor does not apply here, but then ignore that Defendants demanded arbitration before they were ever served with the complaint and filed this Motion to Compel Arbitration as their first appearance such that the second and third factors requiring a delay in disclosing an intent to proceed with arbitration are equally inapplicable. (See Declaration of Tammara Nicole Bokmuller in Support of Defendants' Motion to Compel Arbitration at ¶ 3 and Motion to Compel Arbitration filed October 18, 2018.)

The remaining factors require Defendants' conduct to be inconsistent with arbitration and for the Court to determine whether the delay prejudiced Plaintiffs. The Court is to look at the totality of the circumstances to determine whether the party requesting arbitration has acted inconsistently with the right to arbitrate. See *Aviation Data v. American Express*, 152 Cal. App. 4th 1522, 1537 (2007). Plaintiffs contend that when Defendants filed papers responding to the intervenors' objections to Plaintiffs' motion for preliminary approval of the settlement that Defendants "substantially invoked the litigation machinery" and took "important intervening steps" that were not available in arbitration. *St. Agnes Medical Center v. PacifiCare of California*, *supra*, 31 Cal. 4th at 1196.

What is lacking in Plaintiffs' argument is any indication that Defendants have sought a judicial decision of the **merits**. "A waiver occurs when the *merits* of the dispute have been *litigated* by the parties." *Doers v. Golden Gate Bridge, Highway and Transportation District, supra,* 23 Cal.3d

at 186. "[I]t is the judicial *litigation* of the *merits* of arbitrable issues which waives a party's right to arbitration." *Id*. at 188; See also *St. Agnes Medical Center v. PacifiCare of California*, *supra*, 31 Cal. 4th at 1201 ("*Doers* reiterated the rule that waiver generally does not occur where the arbitrable issues have not been litigated to judgment.") Here, there has been no request that this Court decide the merits of the claims that are subject of the arbitration agreement; there has been no request that this Court determine whether Roes 2 or 4 were misclassified as independent contractors. Rather, all that has been requested is that the Court preliminarily bless the settlement that has been conditionally negotiated by the Plaintiffs and the Defendants on a class wide basis (with the Release and Settlement Agreement itself stating that the *parties agreed* that in the event that the Court denied approval – which it has done – "no prejudice shall occur to any motion to arbitrate that may be filed by the Defendants" (§ 4.5(a)), and that "no prejudice shall attach to any motions by the Defendants, either filed or unfiled, to compel the named Plaintiffs into individualized arbitration and to dismiss and/or stay the Action" (§ 12.2 (d)). In that there has not been a request for a judicial determination of the merits, no waiver is present.

Moreover, the fact that the only "litigation" of this claim has revolved around the settlement further supports that no waiver has occurred. A party does not waive its right to arbitration by "invoking the judicial forum to pursue settlement." *Aviation Data v. American Express*, 152 Cal. App. 4th 1522, 1533 (2007). In *Aviation Data*, the trial court denied a motion to compel arbitration because the defendant mislead the plaintiff as part of a class action. Specifically, after a class action was filed, the parties engaged in mediation and ultimately reached a proposed settlement. A preliminary approval was granted and the court certified the class solely for purposes of settlement. A third party filed objections to the settlement and successfully intervened. The defendant filed a memorandum in support of final approval of the settlement and submitted declarations in support of the settlement. At the final approval hearing the court deferred a ruling to allow discovery on the proposed settlement and objections. During discovery it was revealed that the defendant had made misrepresentations about the settlement and the plaintiffs withdrew their support. Soon after, the defendant moved to compel arbitration. Although the appellate court upheld the trial court's decision denying arbitration, that decision was based on the fact that defendant had mislead the court about the

terms of the settlement, not because they were required to, and did, seek court affirmation of the settlement. In fact, the court noted, "Observing that court involvement is necessary to settlement of class claims and citing federal case law that suggests settlement efforts generally are not interpreted as waiving the right to arbitrate, the court concluded that Amex's settlement efforts, without more, did not constitute a waiver." *Id*. at 1539. The appellate court recognized that "Amex cites numerous cases holding that settlement attempts do not preclude the right to arbitrate if settlement fails. [citations omitted] We have no reservations about this line of authority. Such holdings are premised on the strong public policy favoring settlement. 'Offers to settle, like arbitration, are to be favored, as they encourage the amicable and quick settlement of suits outside the judicial system.'[citations omitted]" *Id*. (emphasis added). This case is no different. Defendants' conduct in filing papers in support of the class action settlement does not constitute a waiver as a matter of policy and practice. The settlement is a benefit to both Plaintiffs and Defendants, as Plaintiffs clearly agree on by virtue of their seeking preliminary approval in this matter. Should this Court deny the motion to compel arbitration on the grounds that Defendants sought the judicially required approval of the settlement, this will discourage litigants in class actions from attempting an early resolution.

Even if there was a finding that supporting a class action settlement was inconsistent with arbitration, this does not mean that a waiver has occurred. Under California law, the prejudice factor is critical in waiver determinations. *See St. Agnes Medical Center v. PacifiCare of California, supra* 31 Cal.4th at 1203. California's arbitration laws reflect a public policy in favor of arbitration. *Id.* at p. 1204. "Prejudice is typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration. For example, courts have found prejudice where the petitioning party used the discovery processes to gain information about the other side's case that could not have been gained in arbitration [citation]; where a party unduly delayed and waited until the eve of trial to seek arbitration [citation]; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence." *Id*. None of these examples apply here. Plaintiffs assert that they have been prejudiced because "it leads Plaintiff to expend resources in one forum, only to be pulled to another at Defendants' whim." See Opposition at

p. 9. Clearly, whether or not to require the individual claims to be arbitrated is not being made at Defendants' "whim". Defendants were very clear that the motion to compel arbitration was made to preserve their rights should the settlement fail. See Motion to Compel Arbitration at p. 1. Second, Plaintiffs' do not even make any showing of prejudice – they simply argue that because we tried to settle this as a class action they have expended resources (which was really caused by the acts of the intervenors, not the Defendants). This is wholly insufficient to support a showing of prejudice for a determination of waiver of the right to compel arbitration. See *St. Agnes Medical Center v. PacifiCare of California, supra* 31 Cal.4th at 1203 ("Because merely participating in litigation, by itself, does not result in waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses.") Without any showing of prejudice, waiver cannot be found here.

3. **The Allegations of the FAC and The Provisions in the Contracts Establish that the Non-Signatory Defendants Are Entitled to Arbitrate**.

Plaintiffs contend that because there are non-signatory defendants to the Arbitration Agreements these claims cannot be arbitrated. However, the Arbitration Agreements agreed to by the Plaintiffs specifically cover these third parties. They state in pertinent part:

> "Owners, its officers, principals, agents and related entities (collectively "Owner") agree to resolve any disputes with you through Binding Arbitration pursuant to FAA." Exhibits 2 and 5 to Declaration of Don Krontz at VIII.

The paragraph then continues on to give the Plaintiffs the option to sign if they agree to arbitration of all disputes, which both Roes 2 and 4 agreed to. *Id*. To argue that Roes 2 and 4 did not agree to arbitrate all claims against the non-signatories is inconsistent with the executed Agreements.

Additionally, the allegations of the complaint belie this contention. Under California law, it is well settled that a non-signatory sued as an agent of a signatory may enforce an arbitration agreement. *Rowe v. Exline,* 153 Cal.App.4th 1276, 1284 (2007); *Dryer v. Los Angeles Rams,* 40 Ca1.3d 406, 418 (1985) ["If, as the complaint alleges, the individual defendants, though not signatories, were acting as agents for the [defendant football team], then they are entitled to the benefit of the arbitration provisions"]; *Thomas v. Westlake,* 204 Cal.App.4th 605, 614-15 (2012) ["a plaintiffs allegations of an agency relationship among defendants is sufficient to allow the alleged agents to invoke the benefit of an arbitration agreement executed by their principal even though the

agents are not parties to the agreement."]; *Garcia v. Pexco, LLC, 11* Cal.App.5th 782, 788 (2017) ["The [agency] exception applies, and a defendant may enforce the arbitration agreement, 'when a plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement'"].)

Here, Plaintiffs allege that all Defendants are joint employers and agents of the others, all with liability for each and every cause of action. Specifically, Plaintiffs allege within the First Amended Complaint:

> 11. Defendants are business entities and/or individuals that jointly employ and control the work of members of the Class that work or have worked at Déjà Vu Affiliated Nightclubs throughout California. First Amended Complaint at ¶ 11.
>
> 33. Plaintiffs are informed and believe and thereon allege that each of the Defendants was acting as the agent, employee, partner, or servant of each of the remaining Defendants and was acting within the course and scope of that relationship, and gave consent to, ratified, and authorized the acts alleged herein to each of the remaining Defendants. First Amended Complaint at ¶ 33.
>
> 39. At all relevant times, all Defendants were the joint employers of Plaintiffs and members of the Class. First Amended Complaint at ¶ 39.

Furthermore, each of the 12 causes of action alleged by Plaintiffs are alleged against each Defendant such that the claims against the Defendants are inseparable and intertwined. See FAC. Based on these allegations, the claims against the non-signatories can be compelled to arbitration.

Garcia v. Pexco, supra, is instructive. There, the plaintiff signed an employment agreement, which contained an arbitration provision, with a staffing company (Real Time). Real Time then assigned plaintiff to work for Pexco. The plaintiff later sued Real Time and Pexco for Labor Code violations and unfair business practices alleging that they were joint employers. Although Pexco was not a signatory to the agreement between the plaintiff and Real Time, which contained the arbitration provision, the trial court compelled the plaintiff's claims against both Real Time and Pexco to arbitration, and the plaintiff appealed the court's order with respect to Pexco. *Id.* at 785. The Court of Appeal affirmed the trial court's order on the grounds that the plaintiff's claims against Pexco were "intimately founded in and intertwined with his employment relationship with Real Time," *Garcia, supra,* at 786-87. The Court found it would be inequitable to preclude Pexco from enforcing the arbitration provision because the plaintiff did not distinguish between Real Time and Pexco. *Id.* at 787-88. Specifically, the Court held:

> Garcia cannot attempt to link Pexco to Real Time to hold it liable for alleged wage and hour claims, while at the same time arguing the arbitration provision only applies to Real Time and not Pexco. Garcia

> agreed to arbitrate his wage and hour claims against his employer, and Garcia alleges Pexco and Real Time were his joint employers. Because the arbitration agreement controls Garcia's employment, he is equitably estopped from refusing to arbitrate his claims with Pexco. *Id.* at 788.

The allegations of Plaintiffs' First Amended Complaint that all Defendants are joint employers, agents of one another, and are liable for all the same claims, undermine any argument that the arbitration agreement should not be enforced because of the existence of non-signatory Defendants. Such an argument is clearly inequitable in light of the claims alleged by these Plaintiffs.

4. The Arbitration Clause Is Enforceable

Plaintiffs confusingly argue that because the arbitration clause excludes class and collective proceedings (which they have pled) *in arbitration*, arbitration cannot then be compelled. But this contorted logic conflicts with clear precedent. The Supreme Court has noted that even a *silent* arbitration clause (one that does not specifically state that class and collective proceedings are *permitted* in arbitration) mandates that arbitration must be limited to individualized claims. Simply put, the parties cannot be compelled to arbitrate on a class basis unless the agreement *specifically authorizes the same*. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 685. In addition, interpretation of an arbitration agreement as to whether it permits representative procedures is presumptively for the arbitrator to decide. *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247. This is consistent with the delegation clause [discussed, *supra*] and the provisions expressly instructing the arbitrator not to permit representative procedures. *Id.* at 243 ("who has the power to decide the availability of class arbitration turn upon what the parties agreed about the allocation of *that* power") (emphasis in original). If a *silent* arbitration agreement does not permit class and collective proceedings in arbitration, certainly an agreement that specifically eschews such matters (see Exhibits 2 and 5 to the Declaration of Don Krontz, clause VIII(4)) is fully enforceable. The controlling facet here is the *agreement to arbitrate*; not the waiver clauses. Clearly and unambiguously, Roes 2 and 4 agreed to arbitrate their claims, and further specifically agreed to waive their ability to proceed therein on a class or collective basis. And, they have generally also agreed not proceed *at all* on a class or collective action basis[2].

Moreover, whatever questions may have existed concerning the enforceability of mandated

[2] *See* Exhibits 2 and 5 to the Declaration of Don Krontz, at clause IX ("BOTH PARTIES AGREE THAT ANY CLAIM MADE AGAINST THE OTHER SHALL BE IN AN INDIVIDUAL CAPACITY, THIS MEANS YOUR AGREE THAT CLAIMS WILL NOT BE MADE AS A CLASS, REPRESENTATIVE OR CONSOLIDATED ACTION").

arbitration clauses with class and collective action waivers in employment agreements were laid to rest recently by the Supreme Court in *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612. Therefore, regardless of how this case is styled, Plaintiffs here have agreed to arbitrate their claims and have also agreed to waive in arbitration any right to bring a class or collective claim. Defendants are simply seeking enforcement of those terms of the contracts. The Motion to Compel Arbitration moves for Roes 2 and 4 to arbitrate their individual claims as agreed.

In addition, even though the Agreements state that PAGA claims "may be" excluded, that does not prohibit this Court from compelling arbitration as to the non-PAGA claims. As previously anticipated, Plaintiffs argue that their PAGA claims, as representative actions on behalf of the State, are not subject to arbitration pursuant to *Iskanian v. CLS Transp. Los Angeles*, LLC (2014) 59 Cal.4th 348. They are wrong. In *Epic*, the Court ruled that its comment in *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 565-66, that employees are absolutely entitled to litigate their claims "through resort to *administrative* and judicial forums" was "dicta" (the Court actually using the term "dicta" *three times* to make the point). *Epic*, 138 S.Ct. at 1628-29 (emphasis added). If claims that could otherwise be litigated administratively can be compelled into individual arbitration, so then can a qui tam action such as PAGA. *All* of Plaintiffs' claims are subject to individualized arbitration.

But even if the PAGA claims are not subject to arbitration, that does not mean that the remainder of the claims cannot be compelled to arbitration. Plaintiffs cite to *Williams v. Superior Court* 237 Cal. App. 4th 642 (2015) to argue that the PAGA claims can never be split; but that case is distinguishable from the present case and is not the state of the law. In *Williams*, the plaintiff alleged a single representative claim under PAGA. So even though the PAGA claims were contingent upon a finding of a Labor Code violation, because there was no other cause of action pled the court refused to order the underlying controversy to arbitration for a determination of whether he was an aggrieved employee with standing to bring a PAGA claim. And because only a representative claim was pled, and the court excluded it from arbitration (Pre- *Epic*), there was nothing left to arbitrate. That is not the case here. Rather, in this case, even if the PAGA claims may not be subject to arbitration, that does not prohibit the underlying claims from being compelled to arbitration. The court has authority to stay the PAGA claims pending the outcome of the underlying claims via arbitration. See *Franco v.*

Arakelian Enterprises, Inc. 234 Cal. App. 4th 947, 966 (2015) ("Because the issues subject to the litigation under the PAGA may overlap those that are subject to arbitration of Franco's individual claims, the trial court must order an appropriate stay of trial court proceedings.") The Court is not required to deny a motion to compel arbitration just because one of more of the claims may not be arbitrable. *Id*.

The arbitration agreement requires that all claims be subject to arbitration, except those that may be precluded by law, such as the argument Plaintiffs here assert with respect to PAGA. There is nothing ambiguous about what claims are covered by the agreement to render it unenforceable[3]. All disputes are covered, except those that are not subject to arbitration by law and which are set forth within the Agreements. Clearly, claims as to whether the Plaintiffs were properly classified as independent contractors under the Labor Code and/or Wage Orders were contemplated when executing the Agreement, and to argue otherwise is disingenuous.

CONCLUSION

Roes 2 and 4 freely and voluntarily entered into the Agreement to litigate claims against the Defendants in arbitration and to waive their rights to bring class or collective claims in arbitration. As affirmed by Supreme Court precedent only three days old, any questions of arbitrability are to be resolved by an arbitrator, not by this Court. Nevertheless, the Agreements are unambiguous and enforceable as to all Defendants. In trying to resolve this action on a class-wide basis (as pled in the complaint) using the procedures required by the State of California, these Defendants have not waived their right to enforce these contracts and the terms therein. A finding of unenforceability or waiver here would severely undermine public policies of this State.

Defendants respectfully request that their motion to compel arbitration be granted.

Dated: January 11, 2019

CLARK HILL LLP

By: _____

Tammara N. Bokmuller, Esq.
Attorneys for Defendants

[3] Had Defendants failed to include the PAGA language in the Agreements Plaintiffs would not doubt be arguing that the agreements were void because they included unenforceable PAGA waivers.