

**SUPERIOR COURT OF CALIFORNIA,**

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - August 18, 2011

EVENT DATE: 08/19/2011

EVENT TIME: 09:00:00 AM

DEPT.: C-75

JUDICIAL OFFICER: Richard E. L. Strauss

CASE NO.: 37-2010-00093577-CU-OE-CTL

CASE TITLE: TEIMOURI VS. MACYS INC

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Other employment

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED: Motion - Other, 06/10/2011

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Defendants Macy's, Inc., and Macy's West Stores, Inc.'s Motion to Compel Arbitration is DENIED. The Court declines to find that Defendants waived their right to move for arbitration of Plaintiff's claims. The Court finds it was reasonable for Defendants to conclude that it would be futile for them to move to compel arbitration prior to the holding in *AT&T v. Concepcion* (2011) 131 S.Ct. 1740; Defendants moved promptly thereafter to compel arbitration; and Plaintiff failed to meet her burden to support she suffered prejudice by any delay.

However, the Court finds that the waiver of Plaintiff's right to pursue a representative action under the PAGA is not enforceable. (*Brown v. Ralphs Grocery Co. (July 12, 2011) 197 Cal.App.4th 489.*) The court in *Brown v. Ralphs Grocery Co. ("Brown") (2011) 197 Cal.App.4th 489*, recently held that since PAGA claims are for the, "benefit of the general public," they, "do not conflict with the purposes of the FAA, and thus are not preempted by the Federal Arbitration Act." (*Id.*) The court thus found that the decision in *AT&T v. Concepcion* (2011) 131 S.Ct. 1740 ("*Concepcion*") where the United States Supreme Court held that the Federal Arbitration Act ("FAA") preempted the California Supreme Court's decision in *Discover Bank v. Super. Ct.*, (2005) 36 Cal. 4th 148, did not apply to representative actions brought pursuant to the California Labor Code's Private Attorneys General Act of 2004 (PAGA). *Brown* is the only California state court case to determine this issue post-*Concepcion* in the employment context and is binding on this Court. Therefore, the representative action waiver is unenforceable, and the motion to compel is denied with respect to the PAGA claims.

Additionally, while the court in *Brown* did not reach whether the rule set forth in *Gentry v. Superior Court* ("*Gentry*") (2007) 42 Cal.4th 443, is preempted by the FAA following the decision in *Concepcion*, the holding in *Brown* supports, and this Court is persuaded, that the rule in *Gentry* remains binding law in California. As discussed in *Brown*, the rules enunciated in *Discover Bank* and *Gentry* are distinguishable as *Discover Bank* concerns unconscionability, while *Gentry* is concerned with the effect of a class action waiver on unwaivable statutory rights regardless of unconscionability. Further, *Concepcion* involved a consumer contract of adhesion, not an agreement to arbitrate between an employer and employee, did not involve PAGA representative claims, and *Gentry* was not even discussed. These distinguishing facts support a narrow rather than broad application of the analysis in *Concepcion* to this case. Additionally, as recognized in *Brown*, although the future of the *Gentry* rule may be in doubt, "***Gentry remains the binding law of this state which we must follow.***" (*Brown* citing *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, the Court was not persuaded by Defendants' assertion that pursuant to *Concepcion*, the rule in *Gentry* is preempted by the FAA §2.

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Further, with respect to Plaintiff's non-PAGA claims, the Court also finds that Plaintiff met her burden to establish that the class action waiver at issue is unenforceable under *Gentry*. Plaintiff's claims involve non-waivable statutory rights under the Labor Code. Pursuant to *Gentry*, when it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class action waiver, the trial court must consider the following factors: (1) the modest size of the potential recovery; (2) the potential retaliation against members of the class; (3) the fact that absent members of the class may be ill informed about their rights; and (4) other real world obstacles to the vindication of class members' rights through individual arbitration. If the court determines that class arbitration would be a significantly more effective way of vindicating the employee's rights, then the class action waiver is unenforceable. (*Gentry v. Superior Court* (2007) 42 Cal.4<sup>th</sup> 443, 463.) Plaintiff submitted evidence to support each of the foregoing factors. (Declaration of Mehrnoosh Teimouri; Declaration of Gene Williams.) Thus, the Court finds that a class action/arbitration is likely to be a significantly more effective practical means of vindicating Plaintiff's statutory rights rather than individual litigation or arbitration. Therefore, as the class action waiver impairs Plaintiff's ability to vindicate her unwaivable statutory rights, it is unenforceable, and the motion to compel is denied with respect to the non-PAGA claims as well.

Parties wishing to argue before the Court must appear on the date and at the time noticed for the hearing. If none of the parties appears on the date and at the time noticed for the hearing, the tentative ruling shall be adopted as the final ruling of the Court.