APPENDICES

APPENDIX A

FILED AUG 3 2017

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK VARELA, on behalf of himself and all other similarly situated,
Plaintiff-Appellee,
v.
LAMPS PLUS, INC.; et al.,
Defendants-Appellants.

No. 16-56085

D.C. No. 5:16-cv-00577-DMG-KS

MEMORANDUM[1]

Appeal from the United States District Court for the Central District of California Dolly M. Gee, District Judge, Presiding

Argued and Submitted July 12, 2017 Pasadena, California

Before: REINHARDT, FERNANDEZ, and WARDLAW, Circuit Judges.

Lamps Plus appeals an order permitting class arbitration of claims related to a data breach of personal identifying information of its employees. After Lamps Plus released his personal information in response to a phishing scam, Frank Varela filed a class action complaint alleging negligence, breach of contract, invasion of privacy, and other claims. Lamps

[1] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Plus moved to compel bilateral arbitration pursuant to an arbitration agreement ("the Agreement") it drafted and required Varela to sign as a condition of his employment. The district court found that the Agreement is a contract of adhesion and ambiguous as to class arbitration. It construed the ambiguity against the drafter, Lamps Plus, and compelled arbitration of all claims, allowing class-wide arbitration to proceed.

On appeal, Lamps Plus argues that the parties did not agree to class arbitration. We disagree, and affirm the district court.

"[A] party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). The parties agree that the Agreement includes no express mention of class proceedings. However, as the Supreme Court stated, "silence" in its *Stolt-Nielsen* analysis constituted more than the mere absence of language explicitly referring to class arbitration; instead, it meant the absence of *agreement*. 559 U.S. at 687 ("[W]e see the question as being whether the parties *agreed to authorize* class arbitration."); *see also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2069-70 (2013). There, the Supreme Court accepted the parties' stipulation that silence meant "there's been no agreement that has been reached ...." 559 U.S. at 668-69. That the Agreement does not expressly refer to class arbitration is not the "silence" contemplated in *Stolt-Nielsen*.

We apply state law contract principles in order to interpret the Agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). In Califor-

nia, a contract is ambiguous "when it is capable of two or more constructions, both of which are reasonable." *Powerine Oil Co. v. Super. Ct.*, 118 P.3d 589, 571 (Cal. 2005). Contracts may be ambiguous as a whole despite terms and phrases that are not themselves inherently ambiguous. *See Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56, 60 (Cal. 2006). Ambiguity is construed against the drafter, a rule that "applies with peculiar force in the case of a contract of adhesion." *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016).

At its outset, the Agreement contains a paragraph outlining Varela's understanding of the terms in three sweeping phrases. First, it states Varela's assent to waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company." Second, it includes an additional waiver by Varela of "any right I may have to resolve employment disputes through trial by judge or jury." Third, "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." A reasonable – and perhaps *the most reasonable* – interpretation of this expansive language is that it authorizes class arbitration. It requires no act of interpretive acrobatics to include class proceedings as part of a "lawsuit or other civil legal proceeding[]." Class actions are certainly one of the means to resolve employment disputes in court. That arbitration will be "in lieu of" a set of actions that includes class actions can be reasonably read to allow for class arbitration.

This construction is supported by the paragraph below these broad statements, captioned "Claims Covered by the Arbitration Provision." The first sentence contemplates "claims or controversies" the par-

ties may have *against* each other, which Lamps Plus argues supports purely binary claims. Yet Varela's claims against the company include those that could be brought as part of a class. The Agreement then specifies that arbitrable claims are those that "would have been available to the parties by law," which obviously include claims as part of a class proceeding. The paragraph lists a non-limiting, vast array of claims covered by the arbitration provisions, including many types of claims for discrimination or harassment ("race, sex, sexual orientation . . .") that are frequently resolved through class proceedings. *See, e.g., E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) ("[S]uits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The paragraph concludes by excluding from the Agreement two types of claims, but not any class or collective proceedings.

Moreover, a class action is "a procedural device for resolving the claims of absent parties on a representative basis" rather than a separate or distinct "claim." *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 435 (9th Cir. 2015). The broad language of the Agreement is not limited to claims. Varela surrendered his right to bring all "lawsuit[s] or other civil action[s] or *proceeding*[*s*]." (emphasis added). Additionally, the Agreement authorizes the Arbitrator to "award any remedy allowed by applicable law." Those remedies include class-wide relief.

Because the Agreement is capable of two reasonable constructions, the district court correctly found ambiguity. State contract principles require construction against Lamps Plus, the drafter of the adhesive Agreement. By accepting the construction pos-

ited by Varela – that the ambiguous Agreement permits class arbitration – the district court properly found the necessary "contractual basis" for agreement to class arbitration. *Stolt-Nielsen*, 559 U.S. at 684.

We **AFFIRM** and **VACATE** the stay of arbitration.

Varela v. Lamps Plus, Inc., No. 16-56085

FERNANDEZ, Circuit Judge, dissenting:

I respectfully dissent because, as I see it, the Agreement was not ambiguous. We should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684–85, 130 S. Ct. 1758, 1775, 176 L. Ed. 2d 605 (2010).

APPENDIX B

FILED SEP 11 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK VARELA, on behalf of himself
and all other similarly situated,
Plaintiff-Appellee,
v.
LAMPS PLUS, INC.; et al.,
Defendants-Appellants.

No. 16-56085

D.C. No. 5:16-cv-00577-DMG-KS
Central District of California, Riverside

ORDER

Before: REINHARDT, FERNANDEZ, and WARDLAW, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge Reinhardt and Judge Wardlaw voted to deny the petition for rehearing en banc, and Judge Fernandez so recommended.

The full court was advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are **DENIED**. No further petitions for panel or en banc rehearing will be entertained.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 16-577-DMG (KSx) Date July 7, 2016

Title ***Frank Varela v. Lamps Plus, Inc., et al.***

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANT'S MOTION TO COMPEL ARBITRATION OR, ALTERNATIVELY, MOTION TO DISMISS [34]

I.
PROCEDURAL BACKGROUND

On March 29, 2016, Plaintiff Frank Varela filed a class action complaint ("Compl.") against Lamps Plus, Inc., Lamps Plus Centennial, Inc., and Lamps Plus Holdings, Inc. (collectively "Lamps Plus") for (1) negligence, (2) breach of implied contract, (3) violation of the California Consumer Records Act (Cal. Civ. Code §§ 1798.81.5, 1798.82), (4) violation of the California Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code § 17200 *et seq.*), (5) invasion of privacy, and (6) negligent violation of the Credit Reporting Act. [Doc. # 1.]

On May 31, 2016, Lamps Plus filed a Motion to Compel Arbitration on an individual basis ("MTC") or, alternatively, a Motion to Dismiss ("MTD"). [Doc. #34.] On June 10, 2016, Varela filed an Opposition ("Opp.") to Lamps Plus's motions. [Doc. #37.] On June 17, 2016, Lamps Plus filed a Reply. [Doc. #38.]

II.
FACTUAL BACKGROUND

Varela has been an employee of Lamps Plus for approximately nine years and is currently employed there as a Warehouseman at the Lamps Plus warehouse located in Redlands, California. (Compl. ¶ 7). As a condition of employment, Lamps Plus required Varela to provide it with his personal information. (*Id.* ¶ 11.) On Varela's first day of work, he signed multiple documents, including an arbitration agreement, as a condition of his employment with Lamps Plus. (Declaration of Frank Varela in Support of Plaintiff's Opposition to Motion to Compel Arbitration/Motion to Dismiss ("Varela Decl.") ¶ 6 [Doc. # 37-2]; Declaration of Lucenda Jo Beeson in Support of Defendant Lamps Plus, Inc.'s Motion to Compel Arbitration on an Individual Basis ("Beeson Decl.") ¶¶ 4, 7, Ex. 1 (Arb. Agreement) [Doc. # 34-2]). Varela contends that he does not remember signing this document or having its contents explained to him, but does not contest the fact that he signed it. (Varela ¶¶ 6-10.) Varela states that he does not remember being advised by anyone from Lamps Plus to consult an attorney prior to signing the arbitration provision and, even if he had been so advised, he could not have afforded to retain an attorney to review the arbitration provision. (*Id.* ¶ 8.) Lamps Plus Human Resources Director Lucenda Jo Beeson confirms that Lamps Plus employees generally must

sign an Arbitration Agreement as a condition of employment with Lamps Plus. (Beeson Decl. ¶ 3.) The Arbitration Agreement states that part of its "employment practice is agreeing to abide by the terms in the Arbitration Agreement" and an employee should therefore "read this agreement and be willing to sign it if an employment offer is made." (Arb. Agreement at 1.)

> The Arbitration Agreement provides in pertinent part:
>
> The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me. Specifically, the Company and I mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment, or any of the parties' rights and obligations arising under this Agreement.

(*Id.* at 1.) The Agreement states that "any and all disputes, claims, or controversies arising out of or relating to this Agreement … shall be resolved by final and binding arbitration as the exclusive remedy." (*Id.*) The then-current American Arbitration Association ("AAA") National Rules for the Resolution of Employment Disputes or the then-current J.A.M.S Arbitration Rules and Procedures for Employment Disputes apply to the arbitration. (*Id.*)

The Agreement further states, in all-capital letters: "I UNDERSTAND THAT I HAVE THREE (3)

DAYS FOLLOWING THE SIGNING OF THIS AGREEMENT TO REVOKE THIS AGREEMENT AND THAT THIS AGREEMENT SHALL NOT BECOME EFFECTIVE OR ENFORCEABLE UNTIL THE REVOCATION PERIOD HAS EXPIRED." (*Id.* at 2.) Beeson confirms that a Lamps Plus employee may revoke the Arbitration Agreement up to three days after signing it. (Beeson Decl. ¶ 9.) Varela did not revoke the Agreement during the three-day window. (*Id.*)

The Agreement also states that "[t]he Arbitrator is authorized to award any remedy allowed by applicable law" and the Agreement does not "prohibit or limit the parties from seeking injunctive relief in lieu of or in addition to arbitration at any time directly from a Court of competent jurisdiction." (Arb. Agreement at 1-2.) The Agreement further states that:

> The Company agrees to pay all fees associated with the arbitration that are unique to arbitration including the cost of the arbitrator. These costs do not include the initial filing fee if I initiate the arbitration costs or the costs of discovery, expert witnesses, or other costs which I would have been required to bear had the matter been filed in a court. The costs of arbitration are borne by the Company. The parties will be responsible for paying their own attorneys' fees, except as otherwise required by law and determined by the arbitrator in accord with applicable law.

(*Id.* at 2.) The Lamps Plus Employment Arbitration Rules and Procedures reiterate that the "fees, costs and expenses of ... the arbitrator shall be allocated between the parties as provided in … the Mutual

Agreement to Arbitrate Claims[.]" (Arb. Agreement, Ex. A ("Lamp Plus Rules") ¶ 5H [Doc. # 37-1].)

The final paragraph of the agreement provides, in all-capital letters: "I ACKNOWLEDGE THAT I HAVE BEEN ADVISED TO CONSULT WITH LEGAL COUNSEL BEFORE SIGNING THIS AGREEMENT. I UNDERSTAND THAT BY SIGNING THIS AGREEMENT I AM GIVING UP MY RIGHT TO FILE A LAWSUIT IN A COURT OF LAW AND TO HAVE MY CASE HEARD BY A JUDGE AND/OR JURY." (*Id.* at 2.)

The Lamps Plus Employment Arbitration Rules and Procedures provide that "[e]ach party has the right to take the deposition of one individual as well as any expert designated by either party." (Lamps Plus Rules ¶ 5B) The Lamps Plus Rules state that "[n]o other discovery shall be had, except upon order of the arbitrator and upon a showing of substantial need." (*Id.* ¶ 5D.)

On or around March 3, 2016, "a criminal" obtained unauthorized access to copies of current and former employees' W-2 income and tax withholding statements, compromising the security of sensitive personal information of approximately 1,300 employees. (Compl. ¶¶ 1,4.) Varela's information was stolen as a result of the Data Breach. (*Id.* ¶ 7.) As a result of the data breach, Varela's 2015 income taxes were fraudulently filed with the information that was stolen. (*Id.* ¶ 8.) The proposed class includes current and former employees of Lamps Plus, as well as family members and close friends who were affected by the information breach. (*Id.* ¶ 1.)

III.
LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[.]" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L.Ed.2d 742 (2011). "The basic role for courts under the FAA is to determine (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (internal citation and quotation marks omitted).

Federal substantive law governs questions concerning the interpretation and enforceability of arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22-24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). Courts apply ordinary state law contract principles, however, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability)[.]" *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995). "[C]lear and unmistakable evidence" is required for courts to conclude that the parties have agreed to arbitrate arbitrability. *Id.* (internal citations and quotations omitted). As long as an arbitration clause is not itself invalid under "generally applicable contract defenses, such as fraud, duress, or unconscionability," it must be enforced according to its terms. *Concepcion*, 563 U.S. at 343.

Under California law, "[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while

a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal. App. 4th 836, 842, 181 Cal. Rptr. 3d 781, 786 (2014) (internal citation omitted). "The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence[.]" *Id.* (internal citation omitted).

IV.
DISCUSSION

A. Scope of Arbitration Agreement

When there is a dispute regarding arbitrability, "[i]t is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate[.]" *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 651, 106 S. Ct. 1415, 1420, 89 L. Ed. 2d 648 (1986). Ambiguities in arbitration agreements are "to be resolved in favor of arbitrability[.]" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 288, 130 S. Ct. 2847, 2850, 177 L. Ed. 2d 567 (2010); *see also Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir. 1996) ("We interpret the contract by applying general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration.").

Varela contends that the motion to compel arbitration should be denied because the complaint is outside of the scope of his arbitration agreement with Lamps Plus. Varela asserts that the data breach is "an administrative task ancillary to the employment relationship" that falls outside of the scope of an employment claim.

When the scope of the arbitration agreement is broad, the matter should be submitted to arbitration. *See Bhd. of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distrib. Co.*, 832 F.2d 507, 511-12 (9th Cir. 1987); *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) ("factual allegations need only "touch matters" covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability."); *Bui v. Northrop Grumman Sys. Corp.*, Case No. 15-CV-1397-WQH-WVG, 2015 WL 8492502, at *7 (S.D. Cal. Dec. 10, 2015) ("based on the broad language of the Agreement, the court concludes that Plaintiff's…claim falls within the scope of the Arbitration Agreement.").

The Arbitration Agreement states that the parties agree to arbitrate "all claims or controversies" Varela may have against the Company or against its officers, directors, employees or agents. The Agreement goes on to specify that it applies to all claims that arise "in connection with [Varela's] employment." The language of the Arbitration Agreement is broad, encompassing *all* claims Varela may have against Lamps Plus or its officers. The claim at issue here also arises "in connection" with Varela's employment, in that Lamps Plus collected and stored his personal information in connection with his employment there. Based on the plain language of the Arbitration Agreement, the Court concludes that Varela's claims fall within the broad scope of the arbitration clause.

B. Unconscionability

Varela asserts that the Arbitration Agreement is invalid because it is unconscionable. Under California law, "the doctrine of unconscionability has both a

procedural and substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1133, 163 Cal. Rptr. 3d 269 (2013). Both procedural and substantive unconscionability are required to render a contract unenforceable, but they need not be present in the same degree. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745 (2000). "California law utilizes a sliding scale to determine unconscionability—greater substantive unconscionability may compensate for lesser procedural unconscionability." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013) (internal citation omitted). Whether a contract or provision is unconscionable is a question of law. *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 851, 113 Cal. Rptr. 2d 376 (2001). The party challenging the arbitration agreement bears the burden of establishing unconscionability. *Pinnacle Museum Tower Ass'n*, 55 Cal. 4th 223, 247, 145 Cal. Rptr. 3d 514 (2012).

1. Procedural Unconscionability

Varela contends that, because the contract that was drafted solely by Lamps Plus on a "take-it-or-leave-it" basis and he was never granted the opportunity to negotiate the terms, the agreement is procedurally unconscionable.

"[T]he critical factor in procedural unconscionability analysis is the manner in which the contract or the disputed clause was presented and negotiated[.]" *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1282 (9th Cir. 2006). In assessing procedural unconscionability, courts have considered whether a contract is one of adhesion, "i.e., a standardized con-

tract, 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." *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003). A court assessing procedural unconscionability also considers the factors of oppression and surprise due to unequal bargaining power. *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 783 (9th Cir. 2002). "Oppression addresses the weaker party's absence of choice and unequal bargaining power that results in 'no real negotiation.'" *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013). "Surprise involves the extent to which the contract clearly discloses its terms as well as the reasonable expectations of the weaker party." *Id.*

In this case, while signing the Agreement did appear to be a type of "take-it-or-leave-it" condition of employment, there was minimal oppression or surprise. The Agreement's terms were clearly disclosed, and it was a stand-alone Agreement, labeled as such, rather than being folded into a general employment contract in which its terms were more likely to be overlooked. *See Fouts v. Milgard Mfg., Inc.*, Case No. C11-06269 HRL, 2012 WL 1438817, at *6 (N.D. Cal. Apr. 25, 2012) ("although the Agreement was a contract of adhesion that Fouts had no opportunity to modify, the arbitration clauses are not hidden in the text but are written in the same typeface as the rest of the agreement, with clear headings to explain each section."). Varela has not suggested that he was in any way coerced or duped into signing the arbitration agreement, or urged not to read or ask questions about any of the forms he signed. *See Ulbrich v. Overstock.Com, Inc.*, 887 F. Supp. 2d 924, 932 (N.D. Cal. 2012); *see also Employee Painters' Trust v. J & B Finishes*, 77 F.3d 1188, 1192 (9th Cir.

1996) ("A party who signs a written agreement is bound by its terms, even though the party neither reads the agreement nor considers the legal consequences of signing it.").

Under the terms of the Agreement, Varela had three days in which to revoke the Agreement after signing it. The Ninth Circuit has observed that providing an employee with three days to *consider* the terms of an arbitration agreement is "irrelevant" where the employee has no other options available. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003) ("when a party who enjoys greater bargaining power than another party presents the weaker party with a contract without a meaningful opportunity to negotiate, oppression and, therefore, procedural unconscionability, are present.") (internal citations and quotation marks omitted). In this case, it is not clear what options Varela would have had if he had chosen to invoke the revocation clause during the three-day window, given that Lamps Plus does not contest that signing an arbitration agreement was a condition of employment. Under the circumstances, it does not appear that the three-day revocation window provided Varela with any additional ability to negotiate.

Because the Arbitration Agreement was written by Lamps Plus, Varela was required to sign it as a condition of employment, and Varela had no meaningful opportunity to negotiate, it is a contract of adhesion and some measure of procedural unconscionability is therefore present. Nonetheless, the terms of the stand-alone agreement were very clear and there was no evident pressure not to read the forms or ask questions about them. Thus, the

level of procedural unconscionability is "minimal." *See Nagrampa*, 469 F.3d at 1284.

2. Substantive Unconscionability

Varela contends that the Agreement is substantively unconscionable in part because the "fee-splitting" arrangement is "riddled with inconsistencies" in that it provides that Lamps Plus will pay for the cost of the arbitration, but also states that the Agreement does not include the costs for the filing fee if the employee initiates the arbitration, and that each party is responsible for paying for their own attorney's fees. (Opp. at 12.)

Varela's arguments are not well taken. Regardless of whether Varela resolves his dispute in court or in arbitration, he will be required to pay for his own attorney's fees. *See, e.g., Coleman v. Jenny Craig, Inc.*, No. 11CV1301-MMA DHB, 2012 WL 3140299, at *4 (S.D. Cal. May 15, 2012) (arbitration agreement including provision that each party be responsible for paying its own costs, including attorneys' fees, valid where it "preserves the same allocation of costs that a litigant would face if he filed in court."); *Fouts,* 2012 WL 1438817, at *4 (arbitration agreement requiring employee to pay own attorney's fees was valid). Similarly, the Arbitration Agreement requires the grievant to pay the cost of a filing fee regardless of whether his claims are brought in court or before an arbitrator. The Agreement imposes no greater cost on Varela than he would face in the absence of such an Agreement. Attorneys' fees and filing fees are generally distinguishable from the "costs of arbitration" which include forum fees and arbitrators' expenses. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 102, 99 Cal. Rptr.2d 745 (2000). The Agreement states that such

additional costs of arbitration will be paid by Lamps Plus, while Varela will bear responsibility for the types of costs and fees that he would pay regardless of the forum. This is entirely permissible.

Varela also asserts that the arbitration agreement is substantively unconscionable because it contains a provision permitting the parties to seek injunctive relief and "Lamps Plus is the more likely party to seek injunctive relief." (Opp. at 11). "An agreement may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party." *Lara v. Onsite Health, Inc.*, 896 F. Supp. 2d 831, 843 (N.D. Cal. 2012) (citing *Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 13 Cal. Rptr. 3d 88 (2004)). California courts have found that when an arbitration agreement permits *only* injunctive relief, this may unconscionably favor the employer, because an employer is more likely to seek injunctive relief. *See Lara*, 896 F. Supp. at 843 (collecting cases). That is not the case here. The Agreement states that the Arbitrator may award any remedy allowed by applicable law, including injunctive relief, and merely specifies that this does not prohibit the parties from going to court to seek injunctive relief as well. Both parties are entitled to any and all appropriate relief, and the availability of injunctive relief does not render the Agreement substantively unconscionable.

Finally, Varela contends that the arbitration agreement provides for "extremely limited" discovery. (Opp. at 12, n.7). Limitations on discovery do not necessarily render an Agreement substantively unconscionable. *See Morgan v. Xerox Corp.*, No. 2:13-

CV-00409-TLN-AC, 2013 WL 2151656, at *5 (E.D. Cal. May 16, 2013) ("even if Plaintiff's contention that discovery may be *potentially* limited is correct, that does not render the agreement substantively unconscionable."); *see also Armendariz*, 24 Cal. 4th at 106 ("lack of discovery is not grounds for holding a …. claim inarbitrable.").

Under the Lamps Plus Rules, each party has the right to depose one witness as well as any expert designated by the parties. The claims at issue are complex, and it is possible that this amount of discovery will prove inadequate. The Rules provide, however, that the arbitrator may order additional discovery upon a showing of substantial need. This safeguard is adequate to remedy any undue curtailment of neessary discovery. *See Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 984, 104 Cal. Rptr. 3d 341, 349 (2010) (giving arbitrator broad discretion over discovery does not render an arbitration agreement unconscionable) (collecting cases); *see also Stover-Davis v. Aetna Life Ins. Co.*, No. 1:15-CV-1938-BAM, 2016 WL 2756848, at *8 (E.D. Cal. May 12, 2016) (limitations on discovery do not render an arbitration provision unconscionable, particularly where arbitrator is authorized to increase discovery limits upon a showing of necessity).

The Arbitration Agreement is not substantively unconscionable, and raises only the most minimal concerns about procedural unconscionability. It will therefore not be invalidated on this basis.

3. Class Action Arbitration

Lamps Plus contends that arbitration should be compelled on an individual basis, asserting that there is no contractual basis for finding that the par-

ties intended to arbitrate on a class-wide basis. Varela responds that the Arbitration Agreement does not waive class-wide arbitration, and that the language stating that "all claims" arising in connection with Varela's employment shall be arbitrated is broad enough to encompass class claims as well as individual claims, or is at least ambiguous and should be construed against the drafter. Varela therefore contends that, if his individual claims are subject to arbitration, so are the class claims.

The Supreme Court has held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (emphasis in original). Where an arbitration clause is "silent" as to class arbitration, "the parties cannot be compelled to submit their dispute to class arbitration." *Id.* at 687. In *Stolt-Nielsen*, however, the parties expressly stipulated that there was "no agreement" as to the issue of class arbitration. *Id.* at 668-69, 687. Courts have therefore limited *Stolt-Nielsen* to cases where an arbitration agreement is "silent in the sense that [the parties] had not reached any agreement on the issue of class arbitration, not simply ... that the clause made no express reference to class arbitration." *Yahoo! Inc. v. Iversen*, 836 F. Supp. 2d 1007, 1011 (N.D. Cal. 2011) (internal citations and quotations omitted). The "failure to mention class arbitration in the arbitration clause itself does not necessarily equate with the 'silence' discussed in *Stolt-Nielsen*." *Vazquez v. ServiceMaster Global Holding, Inc.*, 2011 WL 2565574 at *3 n.1 (N.D. Cal. June 29, 2011).

The lack of an explicit mention of class arbitration here does not constitute the "silence" contemplated in *Stolt-Nielsen*, as the parties did not affirmatively agree to a waiver of class claims in arbitration. Indeed, such a waiver in the employment context would likely not be enforceable. *See Lewis v. Epic Sys. Corp.*, __ F.3d __, 2016 WL 3029464 (7th Cir. May 26, 2016) (class action waiver violates Section 7 of the National Labor Relations Act ("NLRA")); *Totten v. Kellogg Brown & Root, LLC*, 2016 WL 316019 (C.D. Cal. Jan. 22, 2016) (same); *but see D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (class action waiver does not violate NLRA).

In addition to the dubious enforceability of a class arbitration waiver in the employment context, the Court agrees with Varela that the language of the Arbitration Agreement is at least ambiguous as to class claims. The Court therefore construes the ambiguity against the drafter and finds that the parties may proceed to arbitrate class claims. *See Jacobs v. Fire Ins. Exch.*, 36 Cal. App. 4th 1258, 1281, 42 Cal. Rptr. 2d 906, 921 (1995) (the drafter of an adhesion contract must be held responsible for any ambiguity in the agreement).

C. Request for leave to conduct discovery on arbitration issues

Varela has requested leave to conduct limited discovery on arbitration-related issues. (Opp. at 15). The Court denies Varela's request, because Varela has not identified what type of facts he would seek, and the Court has sufficient facts to make its determination on the motion to compel arbitration.

D. Motion to Dismiss

Lamps Plus's motion to dismiss is premised in the alternative, as its primary contention is that Varela's claims are subject to arbitration. (MTC at 11). Given that the Court is granting the motion to compel arbitration, all of Varela's claims against Lamps Plus are dismissed without prejudice. *See Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (dismissal of claims subject to arbitration clause is appropriate).

V. CONCLUSION

In light of the foregoing, Lamps Plus motion to compel arbitration is **GRANTED**, and its motion to dismiss is **GRANTED** without prejudice.

IT IS SO ORDERED.

APPENDIX D

Lamps Plus is considering you as a prospective employee. Part of our employment practice is agreeing to abide by the terms in the Arbitration Agreement. Please read this agreement and be willing to sign it if an employment offer is made. Thank you for your cooperation.

LAMPS PLUS, INC.

ARBITRATION PROVISION

Except as provided below, the parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship, that are not resolved by their mutual agreement shall be resolved by final and binding arbitration as the exclusive remedy.

I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.

Claims Covered by the Arbitration Provision

The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me. Specifically, the Company and I mutually con-

sent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment, or any of the parties' rights and obligations arising under this Agreement. The only claims that are arbitrable are those that, in the absence of this Agreement, would have been available to the parties by law. The claims covered by this Agreement include, but are not limited to, claims for discrimination or harassment based on race, sex, sexual orientation, religion, national origin, age, marital status, or medical condition or disability (including claims under the California Fair Employment and Housing Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and any other local, state or federal law concerning employment or employment discrimination). This agreement does not affect the Employee's right to seek relief through the United States Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing.

The Arbitration Process

Either party may commence the arbitration process by filing a written demand for arbitration with J.A.M.S/ENDISPUTE ("J.A.M.S.") or the American Arbitration Association ("AAA") and sending a copy by personal delivery or certified mail to the other party. In the event I initiate the arbitration process, I will send the notice to the Human Resources Department. If the Company initiates arbitration, it will send the notice to my last known residence address as reflected in my personnel file. The Company and I agree that, except as provided in this Agreement, the arbitration shall be in accordance with the AAA's then-current National Rules for the Resolu-

tion of Employment Disputes (if AAA is designated) or the then-current J.A.M.S. Arbitration Rules and Procedures for Employment Disputes (if J.A.M.S. is designated). The arbitration shall be conducted by one arbitrator ("the Arbitrator") selected pursuance to the selection procedures provided by J.A.M.S. or AAA or by an arbitrator mutually selected by the parties.

The Arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the State of California, or federal law, or both, as applicable to the claim(s) asserted. The Arbitrator is without jurisdiction to apply any different substantive law, or law of remedies. The Arbitrator is authorized to award any remedy allowed by applicable law. The Arbitrator shall not have the power to modify any of the provisions of this Agreement. The Arbitrator shall issue a written and signed statement of the basis of his or her decision, including findings of fact and conclusions of law. The statement and award, if any, shall be based on the terms of this Agreement, the findings of fact and the statutory and decisional case law applicable to this dispute. Proceedings to enforce, confirm, modify, set aside or vacate an award or decision rendered by the Arbitrator will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 et seq, or applicable state law. Nothing in this paragraph shall prohibit or limit the parties from seeking injunctive relief in lieu of or in addition to arbitration at any time directly from a Court of competent jurisdiction. The arbitration shall be final and binding upon the parties, except as provided in this Agreement.

Arbitration Fees and Costs

The Company agrees to pay all fees associated with the arbitration that are unique to arbitration including the cost of the arbitrator. These costs do not include the initial filing fee if I initiate the arbitration costs or the cost of discovery, expert witnesses, or other costs which I would have been required to bear had the matter been filed in a court. The costs of arbitration are borne by the Company. The parties will be responsible for paying their own attorney's fees, except as otherwise required by law and determined by the arbitrator in accord with applicable law.

Voluntary Agreement

I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT, THAT I UNDERSTAND ITS TERMS, THAT ALL UNDERSTANDINGS AND AGREEMENTS BETWEEN THE COMPANY AND ME RELATING TO THE SUBJECTS COVERED IN THE AGREEMENT ARE CONTAINED IN IT, AND THAT I HAVE ENTERED INTO THE AGREEMENT VOLUNTARILY AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS BY THE COMPANY OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF. I UNDERSTAND THAT I HAVE THREE (3) DAYS FOLLOWING THE SIGNING OF THIS AGREEMENT TO REVOKE THIS AGREEMENT AND THAT THIS AGREEMENT SHALL NOT BECOME EFFECTIVE OR ENFORCEABLE UNTIL THE REVOCATION PERIOD HAS EXPIRED.

I ACKNOWLEDGE THAT I HAVE BEEN ADVISED TO CONSULT WITH LEGAL COUNSEL BEFORE SIGNING THIS AGREEMENT. I UN-

DERSTAND THAT BY SIGNING THIS AGREEMENT I AM GIVING UP MY RIGHT TO FILE A LAWSUIT IN A COURT OF LAW AND TO HAVE MY CASE HEARD BY A JUDGE AND/OR JURY.

THE EMPLOYEE	LAMPS PLUS
Frank R. Varela III	*/s/ Kathy Tomlinson*
Employee's Name	
/s/ Frank R. Varela III	4.09.07
Employee's Signature	Date

ATTACHMENT A
LAMPS PLUS EMPLOYMENT ARBITRATION RULES AND PROCEDURES

1. **Federal Arbitration Act**: Except as provided in this Agreement, the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act is inapplicable, California law pertaining to agreements to arbitrate shall apply.

2. **Arbitration Procedures**: A. The arbitration will be conducted by Judicial Arbitration & Mediation Services, Inc. ("J.A.M.S."). The Company and I agree that, except as provided in this agreement, the arbitration shall be in accordance with the then-current J.A.M.S. Employment Arbitration Rules. The arbitrator shall be either a retired judge, or an attorney licensed to practice law in the state in which the arbitration is convened. The arbitration shall take place in or near the city in which the Employee is or was last employed by the Company.

B. The arbitrator shall be selected as follows. J.A.M.S. shall give each party a list of 10 arbitrators drawn from its panel of employment dispute arbitrators. Each party may strike all names on the list it deems unacceptable. If only one common name remains on the lists of all parties, that individual shall be designated as the arbitrator. If more than one common name remains on the lists of all parties, the parties shall strike names alternately from the list of common names until only one remains. The party who did not initiate the claim shall strike first. If no common name exists on the lists of all parties, the sponsoring organization shall furnish an addi-

tional list and the process shall be repeated. If no arbitrator has been selected after two lists have been distributed, then the parties shall strike alternately from a third list, with the party initiating the claim striking first, until only one name remains. That person shall be designated as the arbitrator.

C. The arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the state in which the claim arose, or federal law, or both, as applicable to the claim(s) asserted. The arbitrator is without jurisdiction to apply any different substantive law, or law of remedies. The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable. The arbitration shall be final and binding upon the parties, except as provided in this Agreement.

D. The arbitrator shall have jurisdiction to hear and rule on pre-hearing disputes and is authorized to hold the prehearing conferences by telephone or in person, as the arbitrator deems necessary. The arbitrator shall have the authority to entertain a notice to dismiss and/or a motion for summary judgement by any party and shall apply the standards governing such motions under the Federal Rules of Civil Procedures.

E. Either party, at its expense, may arrange for and pay the cost of a court reporter to provide a stenographic record of proceedings.

F. Either party, upon request at the close of hearing, shall be given leave to file a post-hearing

brief. The time for filing such a brief shall be set by the arbitrator.

H. Either party shall have the right, within 20 days of issuance of the arbitrator's proposed opinion, to file with the arbitrator a motion to reconsider (accompanied by a supporting brief) where the party believes that the arbitrator's award violates public policy and/or the applicable arbitration procedures set forth herein and by J.A.M.S. The other party shall have 20 days from the date of the motion to respond. The arbitrator thereupon shall reconsider the issues raised by the motion and, promptly, either confirm or change the decision, which (except as provided by this Agreement) shall then be final and conclusive upon the parties. The costs of such a motion for reconsideration and written opinion of the arbitrator shall be borne by the party prevailing on the motion, unless the arbitrator orders otherwise.

3. **Hearing Date**: The arbitrator will promptly set a hearing date and time, and will mail written notice to each of the parties at least sixty (60) days in advance of the hearing unless the parties otherwise agree or mutually waive notice.

4. **Pleadings**: Formal pleadings are not required. However, the party initiating the claim shall put J.A.M.S. and the responding party on notice of the claims asserted and include a short and plain statement of (1) the factual and legal bases for the claims, and (2) the amount of damages being sought and a description of any other relief being sought.

5. **Discovery**: A. Witnesses/Documents: At least thirty (30) days before the arbitration, the parties shall exchange lists of witnesses, including any experts, as well as copies of all exhibits intended to be

used at the hearing. The arbitrator shall have discretion to order earlier and additional pre-hearing exchange of information.

B. Deposition: Each party shall have the right to take the deposition of one individual as well as any expert designated by either party.

C. Document Production: Each party shall have the right to require production of relevant documents from the other party.

D. Other Discovery: No other discovery shall be had, except upon order of the arbitrator and upon a showing of substantial need.

E. Discovery Motions: The arbitrator will establish an informal procedure to resolve discovery disputes. The procedure may include presentation of motions by letter as opposed to formal pleadings. Service of motions by facsimile transmission and rulings by telephonic conference calls also may be permitted at the arbitrator's discretion.

F. Subpoenas: The subpoena rights under Rule 7(D) shall apply to discovery.

G. Dispositive Motions: The Arbitrator shall have the jurisdiction and power to entertain a motion to dismiss and/or motion for summary judgement by any party and shall apply the standards governing such motions under the Federal Rules of Civil Procedures.

H. Fees: The fees, costs and expenses of J.A.M.S. and the arbitrator shall be allocated between the parties as provided in Section 6 of the Mutual Agreement to Arbitrate Claims (the "Arbitration Agreement").

6. **<u>Briefs</u>**: Concise pre-arbitration briefs are encouraged. Any such brief shall be filed and served ten (10) days before the arbitration date. Either party, upon request at the close of the hearing, may be given leave to file a post-hearing brief. The time for filing such a brief shall be set by the arbitrator. Reply briefs may not be filed unless the arbitrator specifies to the contrary at the close of the hearing. Briefs are limited to thirty (30) pages.

7. **<u>The Arbitration Hearing</u>**: A. Conduct of Hearing. The arbitrator shall preside at the hearing and rule on the admission and exclusion of evidence as well as questions of procedure, and may exercise all other powers conferred upon the arbitrator by the parties herein in the Arbitration Agreement. The hearing will be conducted as if it were an informal court trial. Proceedings may be adjourned from time to time.

B. Representation: Any party may be represented by an attorney or other representative selected by the party.

C. Attendance of Witnesses and Production of Evidence: The arbitrator may issue subpoenas for the attendance of witnesses and the production of documents for the hearing.

D. Order of Proof: The order of proof should generally follow that of a typical court trial, including an opportunity to make opening statements and closing arguments.

E. Presentation of Evidence: Judicial rules relating to the order of proof, the conduct of the hearing and the presentation and admissibility of evidence will not be applicable. Any relevant evidence, including hearsay, shall be admitted by the arbitra-

tor if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the admissibility of such evidence in a court of law.

F. Law: The arbitrator shall apply the substantive law and the law of remedies, if applicable, of the state in which the claim arose, or federal law or both, as may be applicable to the claim(s) being asserted.

G. Ancillary Services: Any party desiring a stenographic record may hire a court reporter to attend the proceedings. The same applies to any party desiring an interpreter. The requesting party must notify the other parties of the arrangements in advance of the hearing and must pay the costs incurred. If the other party desires a copy of the transcript, it shall be made available, but in that event the reporter's total charges shall be shared equally by all parties.

H. Payment of Attorney and Witness Expenses: Each party shall pay its own attorney's fees, witness fees and other expenses incurred for its own benefit, unless otherwise provided by contract or statute.

I. Arbitration in the Absence of a Party or Representative: The arbitration may proceed in the absence of any party or representative who, after due notice, fails to appear or fails to obtain a continuance. In such case, the arbitrator shall rule against the absent party.

J. Serving Notice: Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith or for the entry

of judgement on any award made under these rules, may be personally served or mailed to the party or its representative at the last known address, provided that a reasonable opportunity to be heard with regard to the processing has been granted to the party. The arbitrator may allow, and/or the parties may consent to, the use of facsimile transmission (FAX, telex, telegram, or other written forms of electronic communication to give notices required by these rules).

K. Waiver of Rules: Any party who proceeds with arbitration with knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection thereto in writing shall be deemed to have waived the right to object.

L. Jurisdiction: The arbitrator has the authority to resolve any dispute relating to the formation, interpretation, applicability or enforceability of the Arbitration Agreement.

8. **Award**: The arbitrator shall make the award and issue an opinion in the written form typically rendered in labor arbitration as soon as possible, and in no case more than thirty (30) days, after the close of evidence or the submission of posthearing briefs, whichever is later. The arbitrator may grant any remedy or relief, legal or equitable, that would have been available had the claim been asserted in court. The award shall include a brief statement of the factual and legal bases for the ruling.