

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

JANE ROE, et al.,
Plaintiffs,
v.
SFBCS MANAGEMENT, LLC,
Defendant.

Case No. [14-cv-03616-LB](#)

ORDER DENYING ARBITRATION
[ECF Nos. 25, 36]

INTRODUCTION

This is a labor dispute under federal and California law. The plaintiffs are or were exotic dancers who are suing their former employer. The court previously granted their motion to proceed anonymously. (ECF Nos. 17, 32.)¹ Defendant SFBCS Management, LLC (“BSC”), moves under the plaintiffs’ employment contracts to compel Jane Roe #1 and Jane Roe #2 to arbitrate their claims. (ECF No. 25.) The court held a hearing on this motion. (*See* ECF No. 48.) The plaintiffs move the court to judicially notice certain material in connection with the arbitration analysis. (ECF No. 36.) The court grants the plaintiffs’ request for judicial notice. The court holds that several parts of the arbitration agreement are unconscionable and declines to sever these from

¹ Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the tops of the documents.

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1 the rest of the contract. The court therefore denies BSC’s motion to compel arbitration.²

2 **STATEMENT**

3 **I. THE EMPLOYMENT CONTRACTS**

4 The plaintiffs allege that BSC “operated, controlled, and . . . dictated employment policies” at
5 several California nightclubs where the plaintiffs formerly worked. (Am. Compl. – ECF No. 11 at
6 1-2, ¶1.) BSC responds that it owned none of the clubs, but rather “provided consulting and
7 administrative services” to the clubs; this included “marketing and advertising, human resources
8 support, payroll coordination, and contract review and administration.” (Marlin Decl. – ECF No.
9 25-4 at 2, ¶ 3.) When the plaintiffs worked at the clubs, they signed “Performer Contracts” that
10 declared them independent contractors, rather than employees, and that generally set the rules
11 under which they would work.

12 These contracts went through different iterations. All contained arbitration agreements. The
13 short version of the arbitration clause, which appeared in some of the plaintiffs’ contracts, read as
14 follows:

15 All disputes between the parties, whether statutory, contractual
16 or tort, shall be decided by binding arbitration, shall be pursuant to
17 the Federal Arbitration Act, and shall be before a neutral arbitrator
18 agreed upon by the parties. Either party may demand an expert in
19 the adult industry. The arbitrator shall be permitted to award any
20 relief available in a Court. Owner [the given club] shall pay any cost
required by law. Any award may be entered as a judgment in any
court having jurisdiction. An arbitrator may not consolidate more
than one person’s claims, and may not preside over any form of
representative or class proceeding.

21 (*E.g.*, ECF No. 25-6 at 6.) A longer version added cost-shifting and cost-sharing terms
22 (emphasized here):

23 All disputes between the parties, whether statutory, contractual
24 or tort, shall be decided by binding arbitration, shall be pursuant to
25 the Federal Arbitration Act, and shall be before a neutral arbitrator
26 agreed upon by the parties. Either party may demand an expert in
the adult industry. The arbitrator shall be permitted to award any
relief available in a Court, ***including fees and costs for enforcing***

27 _____
28 ² The parties have made several sealing motions in connection with the arbitration issue. (ECF
Nos. 28, 35, 43.) The court has separately granted the parties’ various motions. (ECF No. 46.)

1 ***this term. The costs of arbitration shall be borne equally by***
 2 ***performer and owner unless the arbitrator concludes that a***
 3 ***different allocation is required by law.*** Any award may be entered
 4 as a judgment in any court having jurisdiction. An arbitrator may not
 consolidate more than one person's claims, and may not preside
 over any form of representative or class proceeding. NOTE: some
 agency claims may not be subject to arbitration.

5 (*E.g.*, ECF No. 25-6 at 4) (emphasis added). All the contracts contained this additional clause:

6 Waiver of Class Action. Performer agrees that any claim she may
 7 make against Owner shall be in her individual capacity, and not as a
 class or representative action; she agrees not to consolidate any
 8 claim she may have against Owner with the claims of others. This
 clause shall survive termination of the contract, but is severable if
 the law is deemed to prohibit such waiver.

9 (*E.g.*, *id.*) The arbitration provisions, and the class-action waiver, in all the contracts (that the court
 10 has seen) were printed wholly in boldface. (*E.g.*, ECF No. 25-5 at 4.) Some versions of the
 11 contracts added lines beneath both the arbitration clause, and the class-action waiver, that provided
 12 a space for the performer to "Accept" or "Reject" the respective terms by writing her initials.

13 (*E.g.*, ECF No. 35-1 at 7.)

14 After briefing on its motion closed, BSC found and filed two "extensions" to the plaintiffs'
 15 contracts. (ECF No. 43.) One of these extensions is signed by Jane Roe #1; it is dated January 26,
 16 2014, and purports to extend Roe #1's contract with the Gold Club that was set to expire on
 17 January 31, 2014. (ECF No. 43-2 at 2.) The other extension is signed by Jane Roe #2; it, too, is for
 18 the Gold Club, is dated January 26, 2014, and purports to extend her contract that was set to expire
 19 on January 31, 2014. (ECF No. 43-2 at 3.) Both documents extend the relevant original contracts
 20 by 90 days. They thus appear to be stopgap agreements covering periods after one full contract
 21 expired but before the parties signed a new full contract for the next year. More important for
 22 present purposes, both extensions refer to an "Addendum A" to the respective original contracts.
 23 (*Id.* at 2, 3.) No original contract that has appeared in this case refers to, or includes, an Addendum
 24 A. (*See* ECF No. 25-5 at 4, 7, 9; ECF No. 25-6 at 4, 6; ECF No. 25-7 at 2, 4, 6.)

25 The defendant later indicated that the Addendum A issue may in fact be a non-issue. On
 26 February 9, 2015, BSC filed the Third Supplemental Declaration of Gary Marlin. (ECF No. 49.)
 27 Mr. Marlin was BSC's president from 2004 to June 2013. (ECF No. 25-4 at 2, ¶ 1.) His new
 28 declaration makes two assertions concerning Addendum A. First, Mr. Marlin states that, by his

1 “understanding,” the BSC-run clubs “stopped using addenda to the Performer Contracts” after the
 2 2011-2012 contract year. (ECF No. 49 at 2, ¶¶ 3-4.) After that year, the information that
 3 Addendum A had contained was moved into the main body of the contracts. (*Id.*, ¶ 4.) The
 4 extensions to Jane Roe #1’s and Jane Roe #2’s Gold Club contracts were both signed in January
 5 2014, and purport to continue into 2014 contracts that had covered (roughly speaking) 2013. (ECF
 6 No. 43-2 at 2-3.) Mr. Marlin thus believes that the extensions’ reference to Addendum A is
 7 “erroneous.” (ECF No. 49 at 2, ¶¶ 4-5.)

8 The second thing that Mr. Marlin’s latest declaration does is to proffer a document labeled
 9 “Addendum A.” (*Id.* at 2 (¶ 6), 5 (addendum).) The top of the document carries the name and
 10 address of the Gold Club. (*Id.* at 5.) “To the best of [Mr. Marlin’s] knowledge,” this is the “only”
 11 addendum that BSC’s client clubs used in conjunction with Performer Contracts. (*Id.* at 2, ¶ 6.)
 12 The document in question is unsigned and refers to no particular performer. (*Id.* at 5.) It does not
 13 mention arbitration.

14 **II. THE PLAINTIFFS’ SPECIFIC CONTRACTS**

15 Jane Roe #1 entered into three Performer Contracts with BSC-managed nightclubs. She
 16 entered into one with the Gold Club dated March 6, 2013 (ECF No. 25-5 at 9); another with the
 17 Gold Club dated April 9, 2014 (ECF 25-5 at 7); and one with the Condor club dated June 21, 2014
 18 (ECF No. 25-5 at 4). She also signed the extension at ECF No. 43-2 at 2.

19 Jane Roe #2 entered into five Performer Contracts with BSC-run nightclubs. She entered into
 20 three with the Gold Club, respectively dated: February 11, 2013 (ECF No. 25-7 at 2); November
 21 5, 2013 (ECF No. 25-6 at 6); and April 11, 2014 (ECF No. 25-6 at 4). She also entered a contract
 22 with the Gold Club dated July 8, 2012 (ECF No. 25-7 at 4), and one with the Centerfolds club
 23 dated July 14, 2012 (ECF No. 25-7 at 6). In these last two contracts Jane Roe #2 rejected both the
 24 arbitration clause and the class-action waiver. She also signed the extension at ECF No. 43-2 at 3.

25 **III. SURROUNDING CIRCUMSTANCES**

26 According to the plaintiffs, management at the relevant clubs told them that all performers had
 27 to sign the contracts — and had to agree to the arbitration clause — in order to work. (ECF No. 33
 28 at 12.) They further allege that management presented them with the contracts when they were

1 “mostly naked.” (*Id.* at 13-14.) They were “rushed” to sign the agreements, or at least felt so; were
 2 told they could not take the contracts home to review; and believed that they could not review the
 3 contracts before signing them. (*Id.*) The plaintiffs further claim that management sometimes
 4 presented the contracts for signing when performers were intoxicated. (*Id.* at 14.) They do not
 5 allege, however, that they themselves were ever intoxicated when presented with a contract. Last
 6 in this area, the plaintiffs contend that the “accept or reject” choice on some contracts was
 7 effectively a sham. If a performer checked the “Reject” box, they claim, the club would purposely
 8 “lose” the agreement, and later present them with a new one, with a direction to fill it out
 9 “correctly” by accepting the arbitration and class-waiver terms. (ECF No. 33 at 12.) Or, say the
 10 plaintiffs, management would find a reason not to hire the performer, or to fire her if she had
 11 already started working. (*Id.*)

12 BSC denies all this. (ECF No. 38 at 14-15; Marlin Decl. – ECF No. 38-2 at 3-5, ¶¶ 8, 12-13;
 13 Calcagni Decl. – ECF No. 38-3 at 2- 4, ¶¶ 6-11; Bordeau Decl. – ECF No. 38-4 at 3-4, ¶¶ 10, 13-
 14 17.) It denies that employment was conditioned on performers’ accepting the arbitration
 15 agreement. (Marlin Supp. Decl. – ECF No. 38-2 at 3-5, ¶ 8, 12-13; Calcagni Decl. – ECF No. 38-3
 16 at 2-3, ¶¶ 6-7.) It rejects entirely the plaintiffs’ depiction of the circumstances under which they
 17 were asked to sign the contracts; it denies that performers are “rushed,” approached while
 18 intoxicated, purposely approached while “mostly naked,” and are prevented from reviewing the
 19 agreements before signing them.

20 JUDICIAL NOTICE

21 Before analyzing the arbitration issue, the court first addresses the plaintiffs’ related request
 22 for judicial notice. (ECF No. 36.) The plaintiffs ask the court to judicially notice the following
 23 eight items:

- 24 **A.** Letter from defendant’s lawyer to plaintiffs’ lawyer (dated 12/9/14) demanding arbitration
 25 of Jane Roe No. 1’s claims in this case, “relating to her performances at Gold Club SF,
 26 LLC.”
- 27 **B.** Letter from defendant’s lawyer to plaintiffs’ lawyer (dated 12/9/14) demanding arbitration
 28 of Jane Roe No. 1’s claims in this case, “relating to her performances at the Condor

1 Gentleman’s Club.”

2 C. Letter from defendant’s lawyer to plaintiffs’ lawyer (dated 12/9/14) demanding arbitration
3 of Jane Roe No. 2’s claims in this case, “relating to her performances at Gold Club SF,
4 LLC.”

5 D. Second Amended Counterclaim, filed in *Jane Does Nos. 1-4 v. Cin-Lan, Inc.*, No. 08-cv-
6 12719 (E.D. Mich.).

7 E. The court’s docket in *Jane Does Nos. 1-4 v. Cin-Lan, Inc.*, No. 08-cv-12719 (E.D. Mich.).

8 F. “Release and Settlement Agreement” filed in *Jane Does Nos. 1-4 v. Cin-Lan, Inc.*, No. 08-
9 cv-12719 (E.D. Mich.).

10 G. Letter from defendant’s lawyer to the California Department of Labor Standards
11 Enforcement (dated 9/2/11) in *Corbin v. Gold Club SF, LLC*, No. 11-39859 CT.

12 H. *Jackson v. S.A.W. Entertainment, Ltd.*, 629 F. Supp. 2d 1018 (N.D. Cal. 2008).

13 (ECF No. 36 at 1-2.) BSC has not opposed this motion.

14 The plaintiffs have removed personally identifying information from the exhibits to their
15 judicial-notice request. To the extent that it is necessary, the court holds that this material is
16 properly sealed in the judicial-notice request. (*See* ECF No. 32 (order granting anonymity).)

17 Judicial notice is governed by Rule 201 of the Federal Rules of Evidence. That rule, in relevant
18 part, allows courts to judicially notice facts that are “not subject to reasonable dispute” because
19 they “can be accurately and readily determined from sources whose accuracy cannot reasonably be
20 questioned.” Fed. R. Evid. 201(b)(2). If material meets this description, “the court must take
21 judicial notice if a party requests it and the court is supplied with the necessary information.” Fed.
22 R. Evid. 201(c)(2).

23 It is not clear that the three letters constituting Exhibits A-C need to be judicially noticed.
24 Presumably, the plaintiffs’ attorney could have submitted a declaration stating that he had received
25 these letters from defense counsel: the letters are not submitted to establish the truth of any
26 assertions that they contain, so that would have been enough. In any case, these letters, as well as
27 the letter constituting Exhibit G, are all proper objects of judicial notice. *See In re Forster*, 162
28 B.R. 478 (Bankr. N.D. Ohio 1993) (judicially noticing letter from debtor’s attorney); *Nw. Bypass*

1 *Group v. U.S. Army Corps of Eng'rs*, 488 F. Supp. 2d 22 (D.N.H. 2007) (letter from city counsel
2 noticed in absence of objection); *Von Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066
3 (E.D. Cal. 2010) (letter from Food and Drug Administration); *Jimenez v. Domino's Pizza, Inc.*,
4 238 F.R.D. 241 (C.D. Cal. 2006) ((opinion letter from California Department of Labor Standards
5 Enforcement).

6 All the court records — Exhibits D, E, and F — may be judicially noticed. *See, e.g.*,
7 *Delagarza v. Tesoro Ref. and Mktg. Co.*, 2011 WL 4017967, *18 (N.D. Cal. Sept. 8, 2011)
8 (judicially noticing filings from actions in various courts). The court can take judicial notice of
9 matters of public record, such as pleadings in another action and records and reports of
10 administrative bodies. *See Emrich v. Touche Ross Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988). Such
11 records are “not subject to reasonable dispute” because they “can be accurately and readily
12 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
13 201(b)(2). Indeed, Rule 201 was “drafted on the theory” that certain “particular matters” —
14 including court records and “other governmental facts” — “are included within the general
15 categories” that Rule 201(b) describes and so “need no specific mention” in the rule. Fed. R. Evid.
16 201(b) advisory comm. notes.

17 The court appreciates being pointed toward Exhibit H — *Jackson v. S.A.W. Entertainment,*
18 *Ltd.*, 629 F. Supp. 2d 1018 (N.D. Cal. 2008) — and has considered that case in analyzing BSC’s
19 motion to compel arbitration.

20 ANALYSIS

21 The Federal Arbitration Act (“FAA”) embodies a strong federal policy in favor of arbitration.
22 *E.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). “In
23 determining whether to issue an order compelling arbitration, the court may not review the merits
24 of the dispute but must limit its inquiry to (1) whether the contract containing the arbitration
25 agreement evidences a transaction involving interstate commerce, (2) whether there exists a valid
26 agreement to arbitrate, and (3) whether the dispute(s) fall within the scope of the agreement to
27 arbitrate.” *Soto v. Am. Honda Motor Co.*, 946 F. Supp. 2d 949, 953 (N.D. Cal. 2012) (citing
28 *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477-78 (9th Cir.1991)). If the answer

1 to each of these queries is affirmative, then the court must order the parties to arbitration in
2 accordance with the terms of their agreement. 9 U.S.C. § 4.

3 The FAA “does not confer a right to compel arbitration of any dispute at any time.” *Volt Info.*
4 *Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989).
5 “[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any
6 dispute which he has not agreed so to submit.” *United Steelworkers v. Warrior & Gulf Navigation*
7 *Co.*, 363 U.S. 574, 582 (1960). The FAA thus provides that arbitration agreements are
8 unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.”
9 9 U.S.C. § 2. “[G]enerally applicable contract defenses, such as fraud, duress, or
10 unconscionability, may be applied to invalidate arbitration agreements without contravening”
11 federal law. *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The court determines
12 whether the putative arbitration agreement is enforceable under the laws of the state where the
13 contract was formed. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Ingle v.*
14 *Circuit City Stores*, 328 F.3d 1165, 1170 (9th Cir. 2003). The party seeking to compel arbitration
15 bears the burden of proving the existence of a valid arbitration agreement by a preponderance of
16 the evidence. *See Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005
17 (9th Cir. 2010).

18 **I. SEVERAL TERMS IN THE ARBITRATION AGREEMENT ARE**

19 **UNCONSCIONABLE**

20 The plaintiffs argue that several parts of the arbitration agreement are unconscionable. (ECF
21 No. 33 at 19-27.) They further argue that the court should decline to sever these from the rest of
22 the contract, and instead hold the entire arbitration clause unenforceable. (*Id.* at 27-28.) Because
23 the court agrees that Ninth Circuit and California law require that result, it does not reach most of
24 the parties’ other arguments.

25 Contractual unconscionability has both a procedural and a substantive component. *E.g.*,
26 *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000). The “prevailing
27 view” is that both components must be present before a contract can be deemed unconscionable.
28 *Id.* As the plaintiffs correctly say, a “sliding scale” applies: “[T]he more substantively oppressive

1 the contract term, the less evidence of procedural unconscionability is required to come to the
2 conclusion that the term is unenforceable, and vice versa.” *Id.* The party opposing arbitration bears
3 the burden of proving that the arbitration provision is unconscionable. *Correa v. Firestone*
4 *Complete Auto Care*, 2013 WL 6173651, *2 (N.D. Cal. Nov. 25, 2013) (citing *Arguelles–Romero*
5 *v. Superior Court*, 184 Cal. App. 4th 825, 836 (2010)).

6 **A. Procedural Unconscionability**

7 Procedural unconscionability focuses on the circumstances surrounding the negotiation of the
8 contract. *Gatton v. T–Mobile USA, Inc.*, 152 Cal. App. 4th 571, 581 (2007). Specifically,
9 procedural unconscionability can arise from oppression or surprise. *Armendariz*, 24 Cal.4th at 114.
10 “Oppression arises from an inequality of bargaining power which results in no real negotiation and
11 an absence of meaningful choice.” *Bruni v. Didion*, 160 Cal. App. 4th 1272, 1288 (2008) (internal
12 quotations omitted). “Surprise involves the extent to which the supposedly agreed-upon terms of
13 the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the
14 disputed terms.” *Id.*; *Correa*, 2013 WL 6173651, at *2.

15 Surprise in this sense is not present here. The “Performer Contracts” are relatively short. The
16 arbitration clause, and the class-action waiver, are both set out in distinct paragraphs composed
17 entirely in boldface. (*See, e.g.*, ECF No. 25-5 at 7; (ECF No. 25-6 at 4.)

18 The claimed procedural deficiencies of these contracts are better treated under the
19 “oppression” rubric. The plaintiffs contend that, in the circumstances in which they signed the
20 agreements, there was “inequality in bargaining power” that resulted in “no real negotiation” and
21 no “meaningful choice.” (*See* ECF No. 33 at 21.) They complain most broadly that they had no
22 choice but to accept the contracts with their arbitration terms. According to the plaintiffs,
23 management at the relevant clubs told them that all performers had to sign the contracts in order to
24 work. (*Id.*) They further allege that management presented them with the contracts when they were
25 “mostly naked.” (*Id.* at 14, 21.) They were “rushed” to sign the agreements, or at least felt so, and
26 believed that they could not review the contracts before signing them. (*Id.* at 21.) The plaintiffs
27 further claim that management sometimes presented the contracts for signing when performers
28 were intoxicated. (*Id.*) They do not allege, however, that they themselves were ever intoxicated

1 when presented with a contract. Last in this area, the plaintiffs contend that the “accept or reject”
2 choice on some contracts was effectively a sham. If a performer checked the “Reject” box, they
3 claim, the club would purposely “lose” the agreement, and later present them with a new one, with
4 a direction to fill it out “correctly” by accepting the arbitration and class-waiver terms. (*Id.* at 12,
5 21.) Or, say the plaintiffs, management would find a reason to fire the performer. (*Id.* at 12.) For
6 the plaintiffs’ direct statements on the foregoing, see their declarations at ECF Nos. 35-1 and 35-3.

7 BSC denies all this. It denies that it “rushed” the performers into signing, that it made a
8 practice out of presenting contracts to them while they were “mostly naked,” much less
9 intoxicated, and that it denied them the chance to review the contracts before signing. (ECF No. 38
10 at 14-15.) Most fundamentally, it denies that accepting the arbitration agreement was a requisite of
11 working for the clubs. BSC notes in this regard that Jane Roe 2 rejected the arbitration term and
12 the class-action waiver on more than one occasion — and continued to work at BSC-run clubs
13 “without consequence.” (*E.g., id.* at 8.) The plaintiffs do not counter this last point. The relevant
14 contracts indeed show that, in her 2012 contracts with Centerfolds and the Gold Club, Jane Roe #2
15 rejected the pertinent terms. (ECF No. 25-7 at 4, 6.) For the defendant’s full evidence on all this,
16 see the declarations at ECF Nos. 38-2, 38-3, 38-4.

17 The parties addressed this point at oral argument. In their helpful and high-quality discussion,
18 the parties’ attorneys focused on the personal knowledge underlying certain evidence and the
19 question of evidentiary specificity.

20 BSC raised the issue. It cautioned that one should not buy into simple “clichés” about the
21 goings-on at clubs like the ones in question — and, more to the point, that the plaintiffs cannot
22 show procedural unconscionability, and thus avoid their arbitration commitments, on the strength
23 of general depictions of a “sex, drugs, and rock n’ roll” atmosphere at such clubs, including
24 broadly sketched pictures of “rampant drug use” and drunken performers. Were this the state of
25 affairs, BSC observed, the clubs could not run in an orderly fashion. And they are, after all,
26 functioning businesses. Turning to the analytical point, general accusations of this nature do not
27 show that the conditions under which *the plaintiffs’ specific contracts* were signed amounted to
28 the procedurally unconscionable.

1 These are sound points, fair caveats, and admonitions well taken. On the current record,
 2 though, a due insistence on evidentiary specificity undermines BSC’s case, more than the
 3 plaintiffs’, on the issue of procedural unconscionability. Former Gold Club manager Darius
 4 Rodrigues has submitted two declarations on the plaintiffs’ behalf. (ECF Nos. 34, 47-1.) Among
 5 other things, Mr. Rodrigues claims that, whatever the written policy, in practice drug use at the
 6 clubs was “rampant,” and that “management encouraged exotic dancers” to drink, partly to attain
 7 “the right ‘attitude’ . . . while performing” — which of course suggests some intoxication. (ECF
 8 No. 47-1 at 1-2, ¶¶ 3, 5.) He further claims:

9 Management would give exotic dancers the [contract] paperwork to
 10 sign or initial at times when they were mostly naked, and
 11 management rushed exotic dancers to initial and sign it.
 12 Management would not allow exotic dancers to take the paperwork
 13 home and read it before signing it.

14 (*Id.* at 2, ¶ 4.) BSC’s counsel correctly points out that Mr. Rodrigues’s charges are general. He
 15 says nothing specifically about the contracts with Jane Roe #1 and #2 — the only agreements in
 16 question. Yet both these plaintiffs have submitted declarations in which they allege that, when
 17 *they* signed *their* contracts, they were “mostly naked,” were told that the contracts were “time-
 18 sensitive,” were “rushed” into signing them, and were told that they could not bring the contracts
 19 home to review. (ECF No. 35-1 at 1-3, ¶¶ 2, 5-6; ECF No. 35-3 at 1-5, ¶¶ 2-7, 9.) BSC has not
 20 submitted specific evidence countering these specific allegations. The declarations that BSC has
 21 submitted — from Condor manager Mark Calcagni and Gold Club manager Craig Bordeau —
 22 both deny such charges in only general terms. These gentlemen state, for example, that there was
 23 no “policy” of rushing the performers to sign, for instance, or approaching them while they were
 24 not fully clothed, and that they are “not aware” of an occasion on which a dancer was inebriated
 25 while reviewing or signing a contract. (ECF No. 38-3 at 3-4, ¶¶ 13, 15-17; ECF No. 38-4 at 2-4,
 26 ¶¶ 6-7, 9-11.) It is BSC, in other words, who counters specific proof with general rebuttal.

27 (This may of course reflect an unavoidable reality: The plaintiffs will be very much aware of
 28 the specific conditions under which they signed their own contracts, while management oversees
 29 many workers over time. Still, that is the evidence on which the court must base its decision.)

30 The decision in *Jackson v. S.A.W. Entertainment, Ltd.*, 629 F. Supp. 2d 1018 (N.D. Cal. 2009)

1 is instructive on procedural unconscionability. That case, too, involved an exotic dancer claiming
2 that a nightclub where she used to work had violated labor laws by misclassifying her as an
3 independent contractor. *Id.* at 1021. The *Jackson* court denied the defendant’s motion to compel
4 arbitration. *Id.* Discussing procedural unconscionability, the *Jackson* court noted that “the critical
5 question” was whether the plaintiff “could have worked for [the defendant] in some capacity —
6 whether as an employee or as an independent contractor — without being subject to an arbitration
7 provision.” *Id.* at 1024. Like BSC in this case (ECF No. 38-2 at 3-5, ¶¶ 8-11), the *Jackson*
8 defendant noted that the plaintiff had had the option to become an employee. *Jackson*, 629 F.
9 Supp. 2d at 1024. It had not, however, “offer[ed] any evidence that employees are not subject to
10 arbitration.” *Id.* The same is true here. “[A]n employer-employee contract with” the BSC-run
11 clubs “might well have contained an arbitration provision, too.” *Id.* The fact that the plaintiffs
12 were offered employee status, in other words, does not by itself suggest that they were practically
13 free to decline contracts in which arbitration was on the face of the agreement mandatory.

14 The plaintiffs make two other arguments for finding the contracts procedurally
15 unconscionable. They complain that club management neither provided them the rules that
16 arbitration would proceed under nor explained that arbitration meant ceding their right to a jury
17 trial. (ECF No. 33 at 21-22.) Largely for the reasons that BSC identifies (*see* ECF No. 38 at 15-
18 16), the court finds these arguments unpersuasive. Furthermore, the plaintiffs’ contracts did not
19 refer to any specific set of arbitration rules; consequently, it cannot be said here that the plaintiffs
20 were agreeing to a set of rules that were not before them. This is an operative part of what has
21 driven other decisions that find procedural unconscionability in an employer’s failing to provide
22 arbitration rules along with their employment contracts. *See Poublon v. Robinson Co.*, 2015 WL
23 588515, *1, *4-*5 (C.D. Cal. Jan. 12, 2015) (discussing cases).

24 * * *

25 The closeness of this issue, and the precise analysis it evokes, testify to the fine work of both
26 sides’ lawyers. The court appreciates their quality discourse and has weighed their arguments
27 carefully. In the end, the plaintiffs have spoken more specifically; they have shown that they
28 signed their contracts under conditions in which ordinary people similarly situated would detect

1 “unequal bargaining power,” and would feel that they had no “real” chance to negotiate, no
 2 “meaningful choice” but to sign. The court concludes that under all the conditions that the
 3 plaintiffs describe there is at least mild procedural unconscionability.

4 **B. Substantive Unconscionability**

5 No matter how great the procedural unconscionability, a contract is enforceable under
 6 California law unless it is also substantively unconscionable. *Correa*, 2013 WL 6173651, at *3
 7 (citing *Armendariz*, 24 Cal.4th at 114). Substantive unconscionability focuses on the harshness
 8 and one-sidedness of a contract’s substantive terms. *Correa*, 2013 WL 6173651, at *3 (*A & M*
 9 *Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486-87 (1982)). The plaintiffs contend that
 10 several aspects of the arbitration clause are substantively unconscionable.

11 **1. The clubs did not specifically accept the challenged terms**

12 The plaintiffs correctly observe that, in contracts that featured an “accept or reject” choice,
 13 there was no specific place for the club to indicate its acceptance of the arbitration clause or the
 14 class-action waiver. (*See* ECF No. 33 at 23-24.) Only the performer was given a place to initial her
 15 agreement to (or rejection of) these terms. The club’s signature appeared only at the end of the
 16 whole contract. “[T]he employer did not agree to be bound by these terms,” the plaintiffs write,
 17 which in their view makes the agreement “one-sided, substantively unconscionable, and
 18 unenforceable.” (*Id.* at 24.)

19 The court disagrees. That the respective clubs did not initial their acceptance of the arbitration
 20 and class-waiver terms does not mean that they “did not agree to be bound by these terms.” The
 21 clubs proffered these terms and signed the contract containing them; this suggests that they
 22 assented to the whole contract, including those provisions. The plaintiffs here cite *Higgins v.*
 23 *Superior Court*, 140 Cal. App. 4th 1238 (2006). (ECF No. 33 at 24.) That case offers the helpful
 24 rule that, “an agreement may lack ‘a modicum of bilaterality’ and therefore be unconscionable if
 25 the agreement requires arbitration only for the claims of the weaker party but a choice of forums
 26 for the claims of the stronger party.” *Id.* at 1253 (partial quotation omitted). The circumstances in
 27 *Higgins*, however, show a unilateral obligation to arbitrate that is not present here. First, the
 28 agreements in *Higgins* “repeatedly” said “I agree” — meaning that the *Higgins* plaintiffs agreed

1 — to arbitrate. *Id.* at 1243-44, 1253. No similar, personally specific language bound the *Higgins*
 2 defendant. *See id.* (If that seems excessively technical, the fact nonetheless played an operative
 3 role in the *Higgins* analysis. *See id.* at 1253.) The *Higgins* defendant moreover did not sign the
 4 contract until after it had moved to compel arbitration. *Id.* at 1254 n. 11. Finally, the arbitration
 5 clause in *Higgins* was deeply lopsided. The clause gave the defendant, but only the defendant, the
 6 right to decline arbitration and choose a judicial forum, after all. *Id.* at 1254. None of these facts is
 7 present here. Nothing in *Higgins* suggests that the arbitration clause in this case is substantively
 8 unconscionable because the clubs did not assent to it as specifically as the plaintiffs were asked to.

9 **2. One-way ban on collective actions**

10 The plaintiffs also call substantively unconscionable the contracts' "one-way ban" on
 11 collective actions. (ECF No. 33 at 23-25.) The court agrees. The basic arbitration term is bilateral.
 12 The ban on the plaintiffs' consolidating claims, however, lacks even a "modicum of bilaterality."
 13 *See Armendariz*, 24 Cal. 4th at 115-18. Neither the contracts, nor BSC's submissions here,
 14 "justif[y]" this one-way ban in the "business realities" behind the contract. *See id.* "Without
 15 reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral
 16 dispute resolution and more as a means of maximizing employer advantage. Arbitration was not
 17 intended for this purpose." *Id.* at 118.

18 The agreement makes a point of driving home by repetition the ban on consolidating plaintiff
 19 claims. This underscores the imparity of this term. The arbitration clause itself states: "An
 20 arbitrator may not consolidate more than one person's claims, and may not preside over any form
 21 of representative or class proceeding." (*E.g.*, ECF No. 25-5 at 4.) The class-action waiver confirms
 22 that consolidation is forbidden only to *plaintiffs'* claims. That waiver provides:

23 *Performer agrees* that any claim *she may make* against Owner shall
 24 be in her individual capacity, and not as a class or representative
 25 action; *she agrees* not to consolidate any claim *she may have* against
 Owner with the claims of others. Owner shall be entitled to fees and
 costs for enforcing this term.

26 (*Id.*) (emphasis added).

27 BSC suggests that the court should not consider the class-action waiver in judging the
 28 arbitration clause. (ECF No. 38 at 16.) The law is to the contrary. In *Newton v. Am. Debt Servs.*,

1 *Inc.*, 549 Fed. App'x 692 (9th Cir. 2013), in “determining unconscionability of the arbitration
 2 agreement,” the Ninth Circuit looked to fee-shifting provisions and a damages limitations “located
 3 outside the specific arbitration clause.” *Id.* at 694 (citing *Rent-A-Center, West Inc. v. Jackson*,
 4 561 U.S. 63, 73 (2010)). The court in *Jackson, supra*, also looked to class-action and limitations-
 5 defense waivers that were strictly extrinsic to the arbitration clause that was being assessed.
 6 *Jackson*, 629 F. Supp. 2d at 1025-27. *Jackson* held that the waivers were “substantively
 7 unconscionable.” *Id.* (citing *Gentry v. Superior Court*, 42 Cal.4th 443 (2007) and *Murphy v. Check*
 8 *'N Go of Cal., Inc.*, 156 Cal. App. 4th 138 (2007)).

9 BSC implicitly acknowledges that it views the class-action waiver as unilateral, as, in other
 10 words, barring only the plaintiffs from combining claims. BSC argues that “a bilateral class-action
 11 waiver would make no practical sense.” (ECF No. 38 at 16.) BSC continues:

12 [A] class action is a procedural device that permits one or more
 13 plaintiffs to file and prosecute a lawsuit on behalf of a larger group,
 14 or “class.” . . . It is difficult to envision any circumstance in which
 BSC would join with a “class” of other similarly situated businesses
 to pursue class claims against an entertainer.

15 (*Id.*) But Rule 23 contemplates both plaintiff and *defendant* classes. *See, e.g.*, Fed. R. Civ. P. 23(a)
 16 (“One or more members of a class may sue *or be sued* as representative parties”) (emphasis
 17 added); *In re Gap Stores Secs. Litig.*, 79 F.R.D. 283 (N.D. Cal. 1978) (certifying defendant class
 18 of underwriters). The bilateral possibility is not so much that BSC would join with other similarly
 19 situated employers to sue a single performer (the scenario that BSC, probably correctly, finds
 20 “difficult to envision”). The bilateral possibility is that BSC — alone or with other employers —
 21 could sue a *defendant* class of performers to establish some right or liability. Indeed, BSC-
 22 managed nightclubs appear to have done just that. In *Doe v. Cin-Lan, Inc.*, 2:08-12719 (E.D.
 23 Mich.), BSC-affiliated clubs filed counterclaims against exotic dancers as a counterclaim-
 24 defendant class; the Gold Club later invoked the *Cin-Lan* settlement to bar an administrative claim
 25 by a performer who was an absent member of the counterclaim-defendant class. (*See* ECF No. 36;
 26 ECF No. 36-4 at 5-15, 67-115; ECF No. 36-5 at 1-7, 37-38.)

27 The instant contracts hold open the opportunity for consolidated action to the clubs alone; the
 28 plaintiffs are foreclosed from it. The class-action ban speaks only of performers’ claims. (*E.g.*,

1 ECF No. 25-5 at4.) And, although it may rest on a misapprehension of Rule 23, BSC’s own
2 understanding is that the clause is indeed unilateral.

3 **3. Cost-shifting and cost-sharing**

4 The plaintiffs also challenge the cost-shifting and cost-sharing aspects of the arbitration
5 provisions. Once again, those terms provide: “The arbitrator shall be permitted to award any relief
6 available in a Court, including fees and costs for enforcing this term. The costs of arbitration shall
7 be borne equally by performer and owner unless the arbitrator concludes that a different allocation
8 is required by law.” (*E.g.*, ECF No. 25-5 at 4.)

9 The Ninth Circuit has repeatedly found such provisions to be substantively unconscionable
10 and thus unenforceable under California law. *Newton v. Am. Debt Servs., Inc.*, 549 Fed. App’x
11 692, 694 (9th Cir. 2013); *Martin v. TeleTech Holdings, Inc.*, 213 Fed. App’x 581, 583 (9th Cir.
12 2006); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178 (9th Cir. 2003); *Ting v. AT&T*, 319
13 F.3d 1126, 1151 (9th Cir. 2003); *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 785 (9th
14 Cir. 2002); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) (reasoning that
15 term requiring employee to split arbitrator’s fees with employer “alone would render an arbitration
16 agreement unenforceable”); *see Armendariz*, 99 Cal. Rptr. 2d at 110 (“[T]he arbitration agreement
17 . . . cannot generally require the employee to bear any type of expense that the employee would
18 not be required to bear if he or she were free to bring the action in court.”) (emphasis removed).
19 The court sees no significant difference between the cost-allocation terms of the BSC arbitration
20 contracts in this case and those rejected in Ninth Circuit precedent.

21 **II. THE COURT WILL NOT SEVER THE UNCONSCIONABLE TERMS**

22 The question thus becomes whether to sever these three problematic elements from the
23 contract and enforce the remaining arbitration clause, or to decline severance and deem the entire
24 arbitration agreement unenforceable. The decision to sever, under both California and Ninth
25 Circuit law, ultimately rests in the trial court’s discretion. *Armendariz*, 99 Cal. Rptr. 2d at 114,
26 121-25; *Newton*, 549 Fed. App’x at 695. The “overarching inquiry is whether the interests of
27 justice . . . would be furthered by severance.” *Armendariz*, 99 Cal. Rptr. 2d at 124 (quotation
28 omitted). The *Armendariz* court found that a central feature, also present here, “weigh[ed] against

1 severance” — namely, that the arbitration agreement contained “more than one” unconscionable
 2 term. *Id.* (There were two such terms in *Armendariz. Id.*) “[M]ultiple defects,” the court wrote,
 3 “indicate a systematic effort to impose arbitration on an employee not simply as an alternative to
 4 litigation, but as an inferior forum that works to the employer’s advantage.” *Id.* The California
 5 high court concluded: “[G]iven the multiple unlawful provisions, the trial court did not abuse its
 6 discretion” in deciding not to sever but to deem the whole arbitration clause unenforceable. *Id.*

7 The Ninth Circuit’s decision in *Newton* is similar and effectively controls this analysis.
 8 *Newton* upheld the district court’s decision not to sever and enforce the remainder of an arbitration
 9 agreement. *Newton*, 549 Fed. App’x at 695. The Ninth Circuit’s language in *Newton* is relevant
 10 here:

11 The district court did not implausibly or illogically decline to
 12 sever the unconscionable parts of this arbitration agreement, despite
 13 Congress’s preference for arbitration. The arbitration agreement
 14 included four unconscionable provisions. To have severed all of
 them would have left a mere agreement to arbitrate, therefore
 requiring extensive reformation of the arbitration agreement.

15 *Id.* (citations omitted). Here, too, the arbitration agreement is riddled with multiple provisions that
 16 the court has found substantively unconscionable under governing law. It would constitute
 17 “extensive reformation” to redact all those terms, leaving little more than the “mere agreement to
 18 arbitrate.” *See Jackson*, 629 F. Supp. 2d at 1029-31 (declining to sever where arbitration clause
 19 had “more than one” unconscionable term).

20 Keeping in mind the “overarching” concern to do justice, and the fact that arbitration, however
 21 valuable and strongly preferred, is meant only to provide an alternative forum to litigation, not to
 22 overstuff one party’s quiver, the court declines to sever the problematic parts of the plaintiffs’
 23 contracts. The court instead holds the entire arbitration agreement unenforceable.

24 **III. THE THIRD MARLIN DECLARATION — ADDENDUM A**

25 Before BSC filed the Third Supplemental Declaration of Gary Marlin — the document that
 26 claims that the 2014 extensions to the plaintiffs’ Gold Club contracts “erroneously” refer to an
 27 Addendum A; and which filed an unsigned Addendum A (ECF No. 49) — the court had drafted
 28 an order in which it found that the missing Addendum A suggested that the plaintiffs’ whole

1 contracts were not before the court. This would have been an independent reason that the court
 2 could not compel arbitration. *See Branch Law Firm L.L.P. v. Osborn*, 447 S.W.3d 390, 397-98
 3 (Tex. App. 2014). Mr. Marlin’s new declaration changes the court’s analysis in this regard. The
 4 plaintiffs have briefed the issue (ECF No. 52) and so the court wishes to briefly explain its
 5 conclusions with respect to the newly found Addendum A.

6 First, on the record before it, the court is not willing to accept that the Addendum A that is
 7 attached to Mr. Marlin’s latest declaration is in fact the Addendum A to which the plaintiffs’
 8 contract extensions refer. The document is unsigned. It refers to no particular performer. The court
 9 cannot accept that this largely untethered piece of paper formed a part of anyone’s contract. This
 10 comment is potentially relevant to other performers and other contract extensions — those who
 11 worked under contracts in years up to and including 2011-2012; but, given the court’s next
 12 conclusion, it seemed worth stating this point clearly.

13 That next conclusion is this: the court accepts Mr. Marlin’s assertion that BSC’s client clubs
 14 stopped using addenda altogether after the 2011-2012 contract year. Mr. Marlin was BSC’s
 15 president from 2004 until June 2013. (ECF 25-4 at 2, ¶ 1.) He avers personal knowledge of the
 16 matters that he discusses. (*Id.*; ECF No. 49 at 2, ¶ 1.) The court therefore accepts Mr. Marlin’s
 17 follow-on conclusion that the references to Addendum A in the extensions to Jane Roe #1’s and
 18 Jane Roe #2’s 2014 Gold Club contracts are “erroneous.”

19 The extensions’ mistaken reference to Addendum A thus no longer gives an additional reason
 20 for refusing to compel arbitration. This does not affect the court’s unconscionability analysis. The
 21 plaintiffs argue that the whole Addendum A — BSC’s finding contract extensions only after the
 22 hearing; the extensions’ reference to a then-missing addendum; and Mr. Marlin’s subsequent third
 23 declaration dismissing that reference as erroneous — the plaintiffs contend that all this is “further
 24 evidence of procedural unconscionability” in the signing of the plaintiffs’ contracts. (ECF No. 52
 25 at 3-4.) The court disagrees. The authorities that the plaintiffs cite on this point (ECF No. 52 at 4)
 26 do not suggest a different conclusion.

27 ///

28 ///

CONCLUSION

The court takes judicial notice of Exhibits A-G to ECF No. 36. The court denies BSC's motion to compel arbitration (ECF No. 25).

This disposes of ECF Nos. 25 and 36.

IT IS SO ORDERED.

Dated: March 2, 2015



LAUREL BEELER
United States Magistrate Judge

United States District Court
Northern District of California

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