UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	2:24-cv-00733-MRA-JPR	Date	April 18, 2025
Title	Jose Madrigal v. Ferguson Enterprises, LLC et al.		

Present: The Honorable	MONICA RAMIREZ ALMADANI, UNITED STATES DISTRICT JUDGE

Gabriela Garcia	None Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
None Present	None Present

Proceedings: **(IN CHAMBERS) ORDER DENYING DEFENDANT'S PETITION TO COMPEL INDIVIDUAL ARBITRATION AND DISMISS CLASS CLAIMS [ECF 20]**

Before the Court is Defendant's Petition to Compel Individual Arbitration and Dismiss Class Claims. ECF 20. The Court has read and considered the moving, opposing, and reply papers, and held a hearing. ECF 28. For the reasons stated herein, the Court **DENIES** the Petition.

I. BACKGROUND

Plaintiff Jose Madrigal brings a putative class action for alleged violations of the California Labor Code and the California Business and Professions Code against his former employer, Defendant Ferguson Enterprises, LLC ("Defendant" or "Ferguson"). *See* ECF 1-2. Plaintiff worked as a delivery driver for Ferguson from March 2007 through March 2023. *Id.* ¶ 17. Plaintiff's work duties included transporting items (mostly plumbing and HVAC[1] parts or systems), completing paperwork, and responding to work-related messages. *Id.*

Plaintiff alleges that Defendant engaged in wage abuses against hourly employees, including requiring Plaintiff to work off-the-clock without compensation, failing to pay overtime and minimum wages for all hours worked, failing to provide meal and rest breaks, failing to pay meal and rest break premiums, and failing to timely pay wages. *Id.* ¶ 18. Plaintiff also claims that upon termination, Defendant failed to provide Plaintiff with accurate wage statements and failed to reimburse Plaintiff for necessary business-related expenses. *Id.* Plaintiff brings this action on behalf of himself and "[a]ll current and former hourly-paid and/or non-exempt employees who worked for Defendant[] in the State of California at any time during the period for four years prior to the date of the filing of this Complaint until final judgment." *Id.* ¶ 21.

[1] HVAC stands for "heating, ventilation, and air conditioning."

Plaintiff also proposes a sub-class of former employees, who include "[a]ll Class members whose employment with Defendant[] ended at any point in time during the period from four years prior to the date of the filing of this Complaint until final judgment." *Id.* ¶ 22.

On November 28, 2023, Plaintiff filed this action in Los Angeles County Superior Court against Ferguson and several Doe defendants, alleging the following claims: (1) failure to pay minimum wage; (2) failure to pay overtime; (3) meal break violations; (4) rest break violations; (5) failure to pay wages during employment; (6) failure to provide accurate wage statements; (7) failure to timely pay final wages; (8) failure to reimburse necessary business expenses; and (9) unfair and unlawful business practices. *See* ECF 1-2 (citing Cal. Lab. Code §§ 1194, 1197, 1197.1, 1198, 510, 22.67, 512, 226.7, 204, 210, 226(a), 201–03, 2800, 2802, 17200 *et seq.*).

On January 25, 2024, Ferguson filed an Answer. ECF 1-4. On January 26, 2024, Ferguson removed the action to federal court.[2] ECF 1. On April 8, 2024, Ferguson filed the instant Petition to Compel Individual Arbitration and Dismiss Class Claims. ECF 20. Defendant argues that on June 13, 2014, Ferguson mailed an arbitration agreement ("Arbitration Agreement" or "Agreement") to Plaintiff. ECF 20-1 at 9. Defendant further argues that the Agreement and related materials informed Plaintiff that "the Arbitration Agreement would apply to him if he (i) continued working at Ferguson past July 31, 2014, and (ii) did not timely (by July 31, 2014) reject—'opt-out' of—the arbitration program." *Id.* (quotations in original). On July 12, 2024, Plaintiff filed an Opposition, arguing that he never received the Arbitration Agreement or related materials, and therefore cannot be bound by the terms of the Agreement. ECF 26 at 5. On August 8, 2024, Defendant filed its Reply. ECF 27. On August 22, 2024, the Court held a hearing and took the Petition under submission. ECF 28. On October 30, 2024, and again on March 7, 2025, the Court granted the parties' stipulation to continue the pre-trial dates. ECF 30; ECF 31; ECF 38; ECF 39. The Final Pretrial Conference is set for October 19, 2026. ECF 39.

II. DISCUSSION

A. Existence of an Enforceable Arbitration Agreement

The Court begins by addressing Plaintiff's argument that the Arbitration Agreement is not valid because "Plaintiff never received, reviewed, signed, or otherwise agreed to be bound by an arbitration agreement." ECF 26 at 5. To determine "whether a valid contract to arbitrate exists,"

[2] Defendant identified the diversity of the parties and the Class Action Fairness Act ("CAFA") as the bases for removal to federal court. ECF 1. Accordingly, the Court's conclusion regarding the inapplicability of the Federal Arbitration Act ("FAA") does not impact the Court's jurisdiction over these claims.

courts apply "ordinary state law principles that govern contract formation." *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1093 (9th Cir. 2014) (citations omitted). "Under California law, mutual assent is a required element of contract formation." *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014). "Mutual assent may be manifested by written or spoken words, or by conduct." *Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850 (1999). As the party moving to compel arbitration, Defendant bears "the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence." *Norcia v. Samsung Telecomm. Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017) (citations omitted).

First, the Court considers Plaintiff's argument that a contract did not exist because Defendant failed to establish that Plaintiff received notice of the arbitration agreement. Next, the Court will consider Plaintiff's argument that a failure to affirmatively opt out of the arbitration agreement cannot constitute acceptance of the terms.

1. Receipt of the Arbitration Agreement

Plaintiff argues that he never received the Arbitration Agreement, and, therefore, he could not possibly have consented to be bound by its terms. ECF 26 at 13 (citing Madrigal Decl., ¶¶ 7–13). Defendant disagrees, arguing that Ferguson mailed the Agreement to Madrigal's P.O. Box (in addition to providing follow-up materials via mail and the internal workplace website), and that Madrigal's continued employment at Ferguson through July 31, 2014, is "sufficient manifestation of his intent to be bound by the Agreement." ECF 20-1 at 15.

Under the mailbox rule, there is an evidentiary presumption that correspondence is deemed received by the addressee when it is placed in a properly addressed envelope with correct postage and is deposited in the U.S. mail. *See* Cal. Evid. Code § 641; *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884). However, that presumption may be rebutted with "a specific factual denial of receipt of notice." *Nunley v. City of Los Angeles*, 52 F.3d 792, 793 (9th Cir. 1995); *see also Baghdasarian v. Macy's, Inc.*, No. CV2104153ABMAAX, 2021 WL, 2021 WL 12251599, at *4 (C.D. Cal. Oct. 28, 2021). Here, Plaintiff's declaration that he did not receive the Agreement in the mail constitutes a specific factual denial. *See* ECF 26-1 at ¶¶ 7–13. This declaration is enough to defeat the mailbox rule presumption. "The Court therefore resolves the issue of receipt by weighing the evidence in the record." *Baghdasarian*, 2021 WL 12251599, at *5.

In weighing the evidence in the record, the Court finds that Defendant provided sufficient evidence that Plaintiff received the Arbitration Agreement and opt-out forms by mail. Plaintiff's failure to acknowledge receipt cannot void the existence of the agreement. *See Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 245 (2012) ("[W]e decline to read additional unwritten procedural requirements, such as actual notice and meaningful reflection,

into the arbitration statute."); *Davis*, 755 F.3d at 1094 (affirming that an employee assented to a revised arbitration agreement after the employer "satisfied the minimal requirements under California law for providing employees with reasonable notice" by sending employees letters about the updated arbitration agreement). Defendant provided a sworn declaration stating that Ferguson mailed the arbitration agreement to employees in June 2014 and again in July 2014. ECF 20-2 at 2. In addition to mailing the materials twice, Ferguson tracked which materials were marked as undeliverable, and Plaintiff's materials were not among those failed deliveries which were returned to sender. *Id.* at 4. The declaration also states that Ferguson mailed the agreement to Plaintiff's P.O. Box in Baldwin Park, California, which is the same address Ferguson used for other important work-related documents (such as W-2 tax forms) and which Plaintiff admits he regularly checked through 2014. *Id.* at 2–3; ECF 27 at 7.

Plaintiff does not dispute the validity of the address that Defendant used, but rather argues that Defendant could have sent the agreements via certified mail or in another form that was not "untraceable U.S. Mail." ECF 27 at 22; ECF 26 at 13. However, as explained above, it is not for this Court to imagine alternative procedures that may have been superior or to "read additional unwritten procedural requirements" into arbitration agreements. *See Pinnacle*, 55 Cal. 4th at 245. Therefore, after weighing the evidence provided, the Court finds that Defendant has established that Plaintiff received the arbitration agreement by mail.

2. Consent by Failure to Opt-Out

Plaintiff further argues that he did not agree to the Agreement by failing to opt out, and he would have had to have taken some other, affirmative action to manifest his consent. ECF 26 at 15–16. "[A]cceptance of contract terms may be implied through action or inaction." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–95 (1991). Ordinarily, silence or inaction is not sufficient to communicate consent. *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir 2002). However, "[e]mployees generally have a responsibility to affirmatively opt out of an arbitration agreement if they do not wish to accept." *Thorne v. Comerica Bank*, No. CV-23-3178-MWF-RAO, 2023 WL 6194370, at *3 (C.D. Cal. May 25, 2023) (citations omitted); *see also Najd*, 294 F.3d at 1109. "Where an arbitration agreement does not require the employee to sign or acknowledge the agreement for it to be binding, courts have found assent where the employer provided inquiry or constructive notice." *Thorne*, 2023 WL 6194370, at *3 (collecting cases); *see also Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014) (arbitration is enforceable where the employer puts "a reasonably prudent [employee] on inquiry notice of the terms of the contract.").

Here, the Court finds Ferguson's mailings would have put a reasonably prudent employee on notice of the agreement. Ferguson sent the Agreement materials multiple times, flagged any undelivered mail, and alerted employees to expect the Agreement materials via the internal company website. ECF 20-2 at 2–4. In the Court's view, these efforts are sufficient to put Plaintiff on either inquiry notice or constructive notice. Accordingly, the Court finds that a valid arbitration agreement exists here.

B. Section 1 Transportation Exception to the FAA

After finding that the Arbitration Agreement complies with common law contract formation, the Court examines whether Plaintiff is subject to a statutory exemption to the Agreement pursuant to the Federal Arbitration Act ("FAA"). The FAA provides that arbitration agreements generally "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. However, nothing in the FAA "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. "[A] court should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration." *New Prime Inc. v. Oliveira*, 586 U.S. 105, 111 (2019). Plaintiff, as the party "resisting arbitration, bear[s] the burden of proving that this exemption applies." *Rogers v. Lyft, Inc.*, 452 F. Supp. 2d 904, 913 (N.D. Cal. 2020) (citing *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151 (9th Cir. 2008)).

To be considered a "transportation worker" for purposes of § 1 of the FAA, "any such worker must at least play a direct and 'necessary role in the free flow of goods' across borders." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001)). Put another way, transportation workers must be actively engaged in transportation of those goods across borders via the channels of foreign or interstate commerce. *Id.* at 463.

The parties dispute whether Plaintiff can be classified as a last-mile delivery driver who—while working entirely intrastate—nonetheless falls into the category of interstate transportation workers. A handful of Ninth Circuit cases inform the Court's analysis of this issue.

First, in *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), the Ninth Circuit held that some of Amazon's "last mile" delivery drivers qualified for § 1's transportation worker exception, even though those delivery drivers never crossed state lines. In reaching this determination, the Ninth Circuit considered the broader stream of interstate commerce that

Amazon engaged in while conducting its business operations[3] and found that the last mile delivery drivers were sufficiently connected to this interstate commerce such that the § 1 exception applied. *See id.* at 917–18.

Two years later, in *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022), the U.S. Supreme Court addressed the § 1 transportation workers exception. In *Saxon*, plaintiff was a ramp supervisor for Southwest whose "work frequently require[d] her to load and unload baggage, airmail, and commercial cargo on and off airplanes that travel across the country." *Id.* at 453. In interpreting the statutory language of the FAA, the Supreme Court reasoned that §1 would apply to "any class of workers directly involved in transporting goods across state lines or international borders . . . ." *Id.* at 457. The Supreme Court concluded that airline ramp supervisors were sufficiently directly involved in this type of interstate transportation to fall within § 1's exemption. *Id.* After the Supreme Court reached its holding in *Saxon*, it directed the Ninth Circuit to reexamine how that case affected the holding in *Rittmann*, because, as explained above, *Rittmann* relied at least in part on the interstate nature of Amazon's business, and in *Saxon*, the Supreme Court explained that the key inquiry was "the actual work that the members of the class, as a whole, typically carry out," and not what the employer "does generally." *Id.*

In *Carmona Mendoza v. Domino's Pizza, LLC*, the Ninth Circuit reaffirmed *Rittman*. 73 F.4th 1135 (9th Cir. 2023) ("*Carmona II*"), *cert. denied sub nom. Domino's Pizza, LLC v. Carmona*, 144 S. Ct. 1391 (2024). *Carmona* is a case with a complicated procedural history that bears repeating here. In the first *Carmona* appeal before the Ninth Circuit, that court held that a class of drivers who delivered pizza ingredients and other supplies from Domino's warehouses to its franchisees qualified for the §1 exemption. *Carmona v. Domino's Pizza, LLC*, 21 F.4th 627 (9th Cir. 2021) ("*Carmona I*"). In reaching the holding in *Carmona I*, the Ninth Circuit relied heavily on *Rittman*. *See generally, id.* Domino's appealed the outcome of *Carmona I* to the Supreme Court. After the holding in *Saxon* called into question *Rittmann's* status as good law, the Supreme Court vacated and remanded *Carmona I*, directing the Ninth Circuit to reconsider its holding in light of *Saxon*. *Domino's Pizza, LLC v. Carmona*, 143 S. Ct. 361 (2022). Upon reconsideration, the Ninth Circuit explained that *Saxon* was not inconsistent with *Rittmann*, because although *Rittmann* considered the broader scope of Amazon's business, the *Rittmann* Court nonetheless grounded its § 1 inquiry in "what the relevant class of workers actually did." *Carmona II*, 73 F.4th at 1137 (citing *Rittmann*, 971 F.3d at 915). The Ninth Circuit therefore affirmed the ruling it originally reached in *Carmona I*, holding that because the Domino's drivers, "like the Amazon package delivery drivers, transport[ed] interstate goods for the last leg of their

[3] Amazon is a global online marketplace platform responsible for delivering nationally and internationally produced products throughout the United States.

final destinations, they [were] engaged in interstate commerce under §1." *Id.* at 1138 (citing *Carmona I*, 21 F.4th at 630) (cleaned up).

Here, it is undisputed that Ferguson engaged in interstate commerce as a corporate entity. *See* ECF 20-2 at 12; ECF 26-2 at 8; ECF 26-2 at 11. However, as explained above, it is also well-established that Ferguson's ties to interstate commerce are not enough to automatically trigger the § 1 exemption. *See Saxon*, 596 U.S. at 455. Therefore, the Court instead addresses whether Plaintiff and the class members—delivery drivers who worked at Ferguson's Pomona Distribution Center and delivered goods[4] within the state of California—fall within a "class of workers engaged in foreign or interstate commerce." *Id.* In other words, the "central inquiry" before the Court is "what the relevant class of workers actually did," and whether that work is sufficiently tied to interstate commerce for § 1 to apply. *Carmona II*, 73 F.4th at 1137.

In its Reply, Defendant argues that Plaintiff's work is not sufficiently tied to interstate commerce to fall within the bounds of § 1. ECF 27 at 6–17. Specifically, Defendant argues that, regardless of where the goods Plaintiff delivered originated,[5] these goods have "come to rest" in the Pomona warehouse. *Id.* (estimating that, on average, the goods Plaintiff delivered had been in the warehouse for about 65 days). Defendant further argues that "coming to rest" in the warehouse for an extended period means that the goods are no longer part of a continuous stream of interstate commerce, and, thus, Plaintiff's connection to the stream of interstate commerce is also severed. *Id.*

The Court is not convinced by Defendant's argument. The Ninth Circuit directly addressed this issue in *Rittmann* and the *Carmona* cases. For example, in *Rittmann*, the Ninth Circuit specifically found that "Amazon packages do not 'come to rest,' at Amazon warehouses, and thus the interstate transactions do not conclude at those warehouses." 971 F.3d at 916. Similarly, in *Carmona II*, the Ninth Circuit explained:

> Nor does the pause in the journey of the goods at the warehouse alone remove them from the stream of interstate commerce. *See* [*Walling v. Jacksonville Paper Co.*,

[4] The Pomona Distribution Center mostly stored "general inventory" items, which are "fungible, commonly-used items" such as "plumbing supplies, appliances, HVAC systems, and other products." ECF 27 at 14.

[5] Plaintiff identifies many of the goods as having been manufactured outside the country, and Defendant does not meaningfully dispute that the goods at issue originated from outside of California. *See, e.g.*, Madrigal Decl. ¶ 5 ("I recall regularly seeing many of the plumbing supplies labeled 'Made in Thailand' and 'Made in China.'").

> 317 U.S. 564, 568 (1943)] ("The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey."); *id.* ("[I]f the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points."); *see also Fraga v. Premium Retail Servs., Inc.*, 61 F.4th 228, 241 (1st Cir. 2023) (holding that an employer's "use of its own employees to carry the materials for the last part of each interstate journey does not turn the journey into two unconnected trips"). Because the goods in this case were inevitably destined from the outset of the interstate journey for Domino's franchisees, it matters not that they briefly paused that journey at the Supply Center.

73 F.4th at 1138. Defendant is largely unable to rebut the presumption that this Court should apply the above analysis and reach the same outcome as the Ninth Circuit in *Rittmann* and *Carmona*. While Defendant does identify a circuit split,[6] Ninth Circuit precedent is binding on this Court—that another circuit treats this issue differently is immaterial to the resolution of this case. For the foregoing reasons, the Court finds that Plaintiff belonged to a class of workers engaged in interstate commerce and that the Arbitration Agreement therefore falls within the § 1 exception, meaning the FAA cannot compel enforcement.

C. Enforceability of Arbitration Agreement under California Law

Because the Court finds that the § 1 exemption applies, the Court next evaluates whether the Agreement is enforceable under California law. *See Breazeale v. Victim Servs., Inc.*, 198 F. Supp. 3d 1070, 1079 (N.D. Cal. 2016) ("When a contract with an arbitration provision falls beyond the reach of the FAA, courts look to state law to decide whether arbitration should be compelled nonetheless.") (citation omitted), *aff'd*, 878 F.3d 759 (9th Cir. 2017); *see also* ECF 20-2 (explaining that if the FAA does not apply, California law governs the Agreement).

The California Arbitration Act ("CAA") provides that arbitration agreements are "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." Cal. Code Civ. P. § 1281. "California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration. However, arbitration agreements that encompass *unwaivable* statutory rights must be subject to particular scrutiny. This is because these kinds of arbitration agreements may impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws." *Mejia v.*

[6] *See* ECF 27 at 8–9 (citing *Wallace v. GrubHub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020)).

RXO Last Mile, Inc., No. 22-CV-08976-SI, 2023 WL 5184153, at *4 (N.D. Cal. Aug. 10, 2023) (cleaned up).

In arguing against the enforcement of the Agreement, Plaintiff relies on *Gentry v. Superior Court*, 42 Cal. 4th 442, 457 (2007), *overruled on other grounds by AT&T v. Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Garrido Air Liquide Indus. U.S. LP*, 24 Cal. App. 4th 833, 845 (2015); *Muro v. Cornerstone Staffing Sols., Inc.*, 20 Cal. App. 5th 784, 793 (2018).[7] Under *Gentry*, a class arbitration waiver is unenforceable if the waiver "will likely lead to a less comprehensive enforcement of overtime laws" and class proceedings would be "a significantly more effective practical means of vindicating the rights of the affected employees." 42 Cal. 4th at 463. To determine whether a waiver is unenforceable under *Gentry*, courts consider: (1) "the modest size of the potential individual recovery"; (2) "the potential for retaliation against members of the class"; (3) "the fact that absent members of the class may be ill informed about their rights"; and (4) "other real world obstacles to the vindication of class members' right[s]." *Id.* The plaintiff is required to make "a factual showing under the four-factor test." *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 497, *as modified* (July 20, 2011). The Court has "broad discretion" in ruling on this issue. *Muro*, 20 Cal. App. 5th at 793.

The Court begins by analyzing Plaintiff's treatment of the *Gentry* factors. ***First***, Plaintiff argues that his potential for individual recovery, calculated at $32,915, is modest. ECF 26-2 at 4. The Court agrees. "Generally, individual awards in wage-and-hour cases tend to be modest because they usually involve workers at the lower end of the pay scale. Potential damages up to $37,000 have been found to satisfy a modest size of potential individual recovery under the *Gentry* rule." *Mejia*, 2023 WL 5184153, at *5 (citing *Gentry*, 42 Cal. 4th at 457; *Garrido*, 241 Cal. App. 4th at 846; *Betancourt v. Transportation Brokerage Specialists, Inc.*, 62 Cal. App. 5th 552, 557 (2021)) (cleaned up).

Defendant argues that Plaintiff's estimated individual potential recovery is artificially low because it does not include "(i) the value of injunctive relief; (ii) pre-judgment interest; and (iii) attorney fees and costs, all of which are sought in Madrigal's Prayer for Relief." ECF 27 at 18. The Court is unpersuaded by this argument. First, the "value of injunctive relief" is compliance with the California Labor Code, making this a "cost" Defendant is already obligated

[7] Note that, although federal and state courts have limited the applicability of *Gentry* by holding it is preempted under the FAA, *see, e.g., Concepcion*, 563 U.S. 352 (holding that California's public policy rule disfavoring the enforcement of class-action waivers in arbitration agreements is pre-empted by the FAA), here, these limitations do not apply, because the Court has already established that the FAA does not apply to Plaintiff and this class of workers.

to undertake. Second, while the Court acknowledges that pre-judgment interest may impact the ultimate recovery amount, if the Court is considering factors such as pre-judgment interest, then logically it follows that the Court should also consider external factors that would impact the ultimate recovery, such as Defendant's ability to lessen the recovery amount through affirmative defenses. *See, e.g.*, *Mejia*, 2023 WL 5184153, at *5 (rejecting defendants' argument that the individual recovery was likely bigger than plaintiff's estimation and positing that if the court were to consider additional factors, it should also consider factors like affirmative defenses). Third, while attorneys' fees and costs will undoubtedly impact the cost of the litigation, Defendant makes no showing that these costs would not also apply to arbitration proceedings, and, to the extent such an argument exists, this is the exact situation the *Gentry* court sought to avoid. *Gentry* anticipated that where workers are economically vulnerable and individual recovery amounts are low, workers may be dissuaded from bringing individual claims, in part because they may not be able to hire a lawyer willing to take on a case with such low recovery amounts, or, even if the worker finds a willing attorney, the cost of hiring that attorney may outweigh the benefits of recovery under the suit. Moreover, as the *Gentry* court points out, if plaintiffs lose the lawsuit, they face the same risk as defendants and may be forced to pay the opposing party's legal costs. *Gentry*, 42 Cal. 4th at 459 (explaining "employees and their attorneys must weigh the typically modest recovery, and the typically modest means of the employees bringing overtime lawsuits, with the risk of not recovering and being saddled with the substantial costs of paying their own attorneys.").

The Court therefore declines to attempt this type of "back-of-the-napkin" math and will instead utilize the estimation Plaintiff provides. Although Plaintiff has not provided information regarding the recovery of the average class member, the Court assumes that Plaintiff's position is "typical" of that of the rest of the class. *See Brown*, 197 Cal. App. 4th at 497; Fed. R. Civ. Proc. 23(a)(3). Accordingly, the Court determines that the first *Gentry* favor weighs in favor of invalidating the class action waiver.

Second, Plaintiff argues that members of the class are likely to experience retaliation for bringing individual claims. *See Gentry*, 42 Cal.4th at 460 (explaining "a current employee who individually sues his or her employer is at greater risk of retaliation."). In support of his argument, Plaintiff relies on his experience (while still employed at Ferguson) of being retaliated against for attempting to unionize as evidence that the employee class members would experience retaliation if they were to pursue individual claims. *See* ECF 26 at 11; ECF 26-1 at 3–4. Defendant responds that Plaintiff's alleged retaliation in response to the unionizing efforts amounted to "petty slights" and that Plaintiff "makes no claim that he would have feared for his job safety had he filed a lawsuit." ECF 27 at 19. Regardless of the severity of the retaliation, Plaintiff has nonetheless met his burden of making a factual showing that the potential for

retaliation exists.

As the *Gentry* court recognized, an employee's fear that his employer might retaliate against him for initiating a legal action is a common fear, even where such retaliation is prohibited by law. *See* 42 Cal.4th at 460–61 (explaining that "the nature of the economic dependency involved in the employment relationship is inherently inhibiting" and "the existence of an antiretaliation statute and an administrative complaint process [does not] undermine[] [plaintiff's] point that fear of retaliation will often deter employees from individually suing their employers.") (citations omitted). This reluctance to sue an employer is especially strong "for employees further down on the corporate hierarchy." *Id.* at 460. In light of this reality, "federal courts have widely recognized that fear of retaliation for individual suits against an employer is a justification for class certification in the arena of employment litigation, even when it was otherwise questionable that the numerosity requirements of [Federal Rule of Civil Procedure] 23 were satisfied." *Id.* (collecting cases). Given that the class members at issue here are low-wage workers who are relatively uninsulated from the potential economic shock of employer retaliation, the Court weighs the second factor in favor of invalidating the class action waiver.

Third, Plaintiff argues that he was unaware of many of his rights while employed by Ferguson, and, therefore, other members of the class may be similarly unaware. ECF 26 at 11; ECF 26-1 at 3–4. Defendant contends that Plaintiff's declaration that he was not aware of certain rights is untrue. ECF 27 at 19. Defendant argues Plaintiff acknowledged receiving Ferguson's California Meal and Rest Period Policy in 2013 and that Ferguson has informed all employees of their entitlement to meal premiums since 2014. *Id.* (citing Cooper Decl. ¶¶ 4–5, Exs. A and B). One explanation for the discrepancy between Plaintiff's and Defendant's declarations is the explanation that Defendant prefers: Plaintiff simply lied about his awareness of his legal rights. However, there is also a second possible explanation: even despite the information Ferguson provided, Plaintiff remained unaware as to certain aspects of his rights under the California Labor Code. The Court finds this second explanation more compelling, because not only does it assume that both parties have been truthful in their declarations (as is required by law), but also, it is consistent with *Gentry*, which acknowledged that "it may often be the case that the illegal employer conduct escapes the attention of employees." *Gentry*, 42 Cal.4th at 461. The *Gentry* Court explained that this unawareness of illegal employer behavior is especially likely where the employees are "immigrants with limited English language skills," but that "even English-speaking or better educated employees may not be aware of the nuances of overtime laws . . . ." *Id.* Accordingly, the Court weighs this factor in favor of invalidating the class action waiver.

Fourth, the Court must consider *Gentry's* last factor: whether there are "real world obstacles to the vindication of class members' right[s] . . . through individual arbitration" that

would make a class action "likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration." *Id.* at 463. In evaluating this factor, "[t]he kind of inquiry a trial court must make is similar to the one it already makes to determine whether class actions are appropriate." *Id.* Here, Plaintiff does not make an argument as to why the class action is likely to be significantly more effective or practical than compelling individual arbitration. At this point in the proceedings, the Court does not have enough information to evaluate whether a class action lawsuit may be more practical or appropriate than individual arbitration (for example, the Court does not have a sense of the size of the potential class). Therefore, the Court weighs this factor in favor of enforcing the class-action waiver.

In summary, the Court finds that the first, second, and third factors weigh in favor of Plaintiff, whereas the fourth factor weighs in favor of Defendant. Although it is a close question, based on the totality of the circumstances and information before the Court, the Court finds that the class-action waiver is unenforceable under *Gentry*. The factual allegations in this case align with the type of situation the California Supreme Court envisioned in *Gentry*; accordingly, enforcing the Arbitration Agreement in this context would be inappropriate. *See Gentry*, 42 Cal. 4th 443, 456–57 (explaining the "important public policy goal of protecting employees in a relatively weak bargaining position against the evil of overwork," the "unwaivable" nature of statutory employment rights, and the high likelihood that class action waivers in wage-and-hour cases would "frequently if not invariably" be considered unconscionable due to their exculpatory effect) (citations omitted). Accordingly, the Court finds that because the class action waiver is unenforceable under California law, all of Plaintiff's claims can be heard in a court of law.[8]

III. CONCLUSION

For the foregoing reasons, Defendant's Petition to Compel Individual Arbitration and Dismiss Class Claims is **DENIED**.

IT IS SO ORDERED.

- : -

Initials of Deputy Clerk gga

[8] Because the Court finds the Arbitration Agreement is unenforceable under *Gentry*, the Court does not reach Plaintiff's argument that a class action waiver may not be applied to certain claims as identified in California Labor Code § 229.