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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PAMELA MONTGOMERY, Plaintiff and Respondent, v. SOLOMON EDWARDS GROUP LLC, Defendant and Appellant.	B260421, B259810 (Los Angeles County Super. Ct. No. BC533568)

APPEAL from an order of the Superior Court of Los Angeles County, Jane L. Johnson, Judge. Reversed.

Littler Mendelson and Lena K. Sims for Defendant and Appellant.

Dychter Law Offices and Alexander I. Dychter; United Employees Law Group and Walter L. Haines for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Solomon Edwards Group LLC, appeals from a November 25, 2014 order denying its petition to compel arbitration under an employment agreement with plaintiff, Pamela Montgomery. We reverse the order.

II. BACKGROUND

A. The Parties

Defendant is a Delaware limited liability company with its corporate headquarters in Pennsylvania. It operates from seven major cities in the United States. It contracts with and provides services to clients across the United States. Defendant hired plaintiff as a temporary project consultant. Plaintiff, a resident of Colorado, worked on a project in Pasadena, California. In connection with her employment, on September 28, 2011, plaintiff entered into an "Employment Mediation and Arbitration Agreement" (the arbitration agreement) with defendant.

B. The Arbitration Agreement

The arbitration agreement provides in pertinent part: "[A]s a condition of your employment, and in an effort to provide for more expeditious resolution of all employment-related disputes that may arise between [defendant] and its employees (except those Claims set forth below), [defendant] has instituted an exclusive and mandatory mediation and arbitration procedure . . . for all employees. Under the [p]rocedure, disputes that may arise from your employment with [defendant] or the termination of your employment with [defendant] must (after appropriate attempts to resolve your dispute internally through [defendant's] management channels have failed)

be submitted for resolution by non-binding mediation and, if necessary, binding arbitration.

Paragraph 2 of the arbitration agreement sets forth the claims covered by the parties' understanding. "**Claims Covered by the Agreement**: [Defendant] and Employee will resolve, by mediation or, if necessary, by arbitration, all statutory, contractual, and/or common law claims or controversies that [defendant] may have against the Employee, or that Employee may have against [defendant] ('Claims'). Claims subject to mediation or, if necessary, arbitration shall include, inter alia: [¶] i. Claims for discrimination or harassment . . . ; [¶] ii. Claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance or case law not included in Section 2.i, and excluding those referenced in Section 3, below; [¶] iii. Claims for wrongful discharge or breach of any contract or covenant (express or implied); [¶] iv. Tort claims . . . ; and [¶] v. *Any dispute concerning the arbitrability of any such controversy or claim*." (Italics added.)

Certain issues are excluded from the agreement to arbitrate: "3. **Claims Not Covered by this Agreement**: This Agreement will not apply to claims by the Employee for workers' compensation or unemployment insurance, claims under the National Labor Relations Act (NLRA), as amended; claims based upon [defendant's] current (successor or future) employee benefits and/or welfare plans that contain an appeal procedure or other procedure for the resolution of disputes under the plan; or claims by [defendant] for injunctive and/or other equitable relief (remedies requiring a court's rapid injunctive power)."

The parties identified the sequence of settlement and mediation efforts that are to proceed prior to binding arbitration: "4. **Internal Efforts**: As a prerequisite for submitting an employment dispute to mediation and, if necessary, arbitration, both you and [defendant] agree to make good faith efforts at resolving any dispute internally on an informal basis through [defendant's] management channels appropriate to that particular dispute. Only when those internal efforts fail may an employment dispute be submitted to mediation and, if necessary, final and binding arbitration under the terms of the

[arbitration procedure]. [¶] 5. **Non-Binding Mediation**: If efforts at informal resolution fail, disputes arising under this Agreement must first be submitted for non-binding mediation before a neutral third party. Mediation is an informal process where the parties to a dispute meet in an attempt to reach a voluntary resolution, using the third party as a facilitator. Mediation shall be conducted and administered by the American Arbitration Association (AAA) under its Employment Mediation Rules, which are incorporated . . . by reference. [¶] 6. **Binding Arbitration**: If a covered dispute remains unresolved at the conclusion of the mediation process, either party may submit the dispute for resolution by final, binding, *confidential* arbitration . . . . The arbitration will be conducted under the Employment Dispute Resolution Rules of the AAA (Rules), with the additional proviso that the [arbitration] shall be conducted on a *confidential* basis. These Rules, [i]ncorporated by reference into this [p]rocedure, include, but are not limited to, the procedures for the joint selection of an impartial arbitrator and for the hearing of evidence before the arbitrator. The arbitrator shall have the authority to allow for appropriate discovery and exchange of information before a hearing, including, but not limited to, production of documents, information requests, depositions and subpoenas. *A copy of the complete AAA Employment Dispute Resolution Rules may be obtained from the Director of Human Resources. The employee agrees that any mediation or arbitration conducted under this Agreement shall take place at [defendant's] then headquarters office (presently located in Wayne, PA) unless an alternative location is agreed upon by [defendant]*. The arbitrator shall render a decision and award within 30 days after the close of the arbitration hearing or at any later time on which the parties may agree." (Italics added.)

Paragraph 7 of the arbitration agreement contains a claims notice and special statute of limitations: "**Required Notice of Claims and Statute of Limitations for all Claims**: Claims defined in Section 2 hereof shall be initiated by serving by overnight courier or mail . . . a written notice received by the other party within 300 calendar days of the date the complaining party first has knowledge of the event first giving rise to the Claim. *If the notice of a Claim is not received by the other party within the required 300*

calendar days, all rights and claims that the complaining party has or may have had against the other party shall be waived and void, even if there are federal or state statutes or case law which would have given the complaining party more time to pursue a claim. Time is of the essence and will be strictly enforced." (Italics added.)

Paragraphs 8 and 9 contain provisions concerning the arbitrator's award and fees and costs: "**Arbitrator's Award**: The Parties agree that the award of the Arbitrator shall be final and binding on both Parties, and shall be issued within 30 days after the close of the arbitration hearing or at a later time on which the Parties may agree. The award shall be in writing and signed and dated by the arbitrator and shall contain express findings of fact and the basis for the award. In reaching a decision, the arbitrator shall apply the governing substantive law applicable to the claims, causes of action and defenses asserted by the parties as applicable. The arbitrator shall have the power to award all remedies that could be awarded by a court or administrative agency in accordance with the governing and applicable substantive law . . . . Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The award may be vacated or modified only on the grounds specified in the U.S. Arbitration Act or other applicable law. [¶] 9. **Representation and Arbitrator Fees and Costs**: An attorney may represent each party in the arbitration. Each party shall be responsible for its own attorney's fees, if any. If, however, any party prevails on a Claim, the arbitrator may award reasonable attorneys' fees and costs to the prevailing party. If Employee initiates the arbitration, Employee shall deliver to [defendant's] then headquarters office (presently located in Wayne, PA) to the Director of Human Resources, with the written notice of arbitration, a check payable to the American Arbitration Association in an amount equal to Fifty percent (50%) of the then applicable AAA filing fee. [Defendant] shall pay the balance of the AAA filing fee and the arbitrator's fee, and shall pay all other fees, costs and expenses, if any, of the arbitrator and AAA, if any, for administering the arbitration." (Italics added.)

D. The Parties' Non-Binding Mediation Efforts

Between April and August 2013, the parties attempted but failed to negotiate the terms of a non-binding mediation. On April 26, 2013, plaintiff, through counsel, requested non-binding mediation. Plaintiff proposed that the mediation occur in San Diego, California. On May 10, 2013, defendant, through counsel, responded. Defendant asserted that under the arbitration agreement and the American Arbitration Association rules, arbitration was to be held at defendant's Wayne, Pennsylvania headquarters. As to the mediator, defendant suggested one of three mediators culled from an "online list of [American Arbitration Association] mediators with employment law expertise" in Eastern Pennsylvania. Also on May 10, 2013, plaintiff asked defendant, "[P]lease confirm that [defendant] will be paying for the cost of private mediation?" Three days later, defendant advised that under the American Arbitration Association rules, "[T]he cost of mediation is shared equally by [defendant] and [plaintiff]." Defendant further advised the parties were required to submit a deposit in advance to cover the costs and expenses of mediation.

In a letter dated July 25, 2013, plaintiff's counsel, Alexander Dychter, asserted the arbitration agreement was procedurally and substantively unconscionable in that: requiring her to travel to Wayne, Pennsylvania to vindicate her statutory rights under the California Labor Code was unreasonable and unenforceable; the agreement, insofar as it required mediation in Wayne, Pennsylvania, was designed to dissuade employees' from vindicating their rights; requiring plaintiff to employ a mediator from Eastern Pennsylvania to mediate a dispute relating to California law was "nonsensical and unenforceable"; plaintiff was "entitled to a 'neutral' mediator who is based in California and who specializes in California labor law"; and requiring plaintiff to share equally in the mediation costs was unreasonable and unenforceable. Plaintiff demanded mediation in Los Angeles within 60 days conducted by a Los Angeles based mediator with expertise in California wage and hour law and paid for by defendant.

Defendant, through its lawyer, Anthony J. Rao, responded by letter dated August 1, 2013. Mr. Rao argued Wayne, Pennsylvania was a logical and practical place for mediation to occur. Mr. Rao further asserted engaging a mediator with expertise in California law was unnecessary as, "California's eight hour overtime rule and minimal exemption differences from the [Federal Labor Standards Act] are easy to comprehend by any mediator and arbitrator (if necessary) who focuses on wage and hour law." Mr. Rao agreed plaintiff could attend her mediation (and arbitration if necessary) via live video-conference and to work with her to select a mutually satisfactory mediator. And as for costs: "[Defendant] agrees to pay the initial mediation filing fee over and above what [plaintiff] would have paid had she filed a state or federal litigation in Los Angeles. [Defendant] also will pay all other mediation fees and costs (not your attorney's fees and costs unless they are awarded)." Mr. Rao concluded, "This offer will expire on August 9, 2013 at 5:00 P.M. PST."

After plaintiff filed the present complaint, defendant's trial counsel, Sam Sani, offered to mediate or arbitrate plaintiff's individual (non-class) claims in San Diego, California. Defendant's letter states: "This letter is to confirm that pursuant to Section 6 of [the arbitration agreement], [defendant] hereby agrees to mediate and/or arbitrate [plaintiff's] individual/non-class claims . . . in San Diego, California. [¶] [Defendant] further requests that your office please advise if [plaintiff] prefers a different location so that [defendant] can consider this alternate location and respond accordingly."

D. Plaintiff's Complaint

On January 17, 2014, plaintiff filed a putative class action alleging three causes of action: failure to pay overtime wages in violation of Labor Code section 510; failure to pay overtime wages, to provide meal breaks and rest periods, and to pay all wages owed upon termination in violation of Business and Professions Code, section 17200 et seq.; and failure to pay all wages owed upon termination in violation of Labor Code sections 201 or 202.

E. Defendant's Motion to Compel Arbitration

On June 16, 2014, defendant sought to compel arbitration of plaintiff's claims and to stay the action pending arbitration. In support of its motion, defendant asserted: both the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and the California Arbitration Act (Code Civ. Proc., § 1281.2 et seq.) supported enforcement of the arbitration agreement; arbitrability was an issue to be determined by the arbitrator; plaintiff's claims fell within the arbitration agreement; and the trial court should compel individual rather than class arbitration. (Because the trial court declined to enforce the arbitration agreement, it did not consider whether the arbitration should proceed on a class basis.)

Plaintiff opposed the motion. Plaintiff argued the arbitration agreement was procedurally unconscionable in that it was an adhesion contract required as a condition of her employment. Further, she argued the agreement incorporated but did not attach American Arbitration Association rules. She further identified provisions which were substantively unconscionable: defendant had sole authority to choose the mediation or arbitration forum; plaintiff was entitled to a neutral mediator based in California and specializing in California labor law rather than a mediator based in Eastern Pennsylvania; defendant agreed to pay mediation costs only after receiving correspondence from plaintiff's counsel citing legal precedent; the arbitration agreement's multistep resolution process was prejudicial to plaintiff in that it gave defendant a "free peek" at her case; and paragraph 7 of the arbitration agreement required plaintiff to waive statutory rights. Finally, plaintiff argued severance was inappropriate as unconscionability permeated the agreement. On appeal, plaintiff asserts other provisions were substantively unconscionable which she did not raise in the trial court.

The trial court denied defendant's motion. The trial court ruled the agreement was procedurally unconscionable as it was presented on a take-it-or-leave-it basis. The court found the failure to attach the American Arbitration Association rules was, "[O]nly slightly, at best, another procedural issue." The trial court concluded the agreement was substantively unconscionable in that: it required plaintiff to arbitrate at a location of

defendant's choice without regard to the burden it would impose on her; it required plaintiff to pay money to initiate arbitration; it allowed defendant, through its multi-step process, to receive a "free peek" at plaintiff's case, giving it an advantage in any subsequent arbitration; and it attempted to shorten the statute of limitations on plaintiff's statutory claims in violation of public policy. With respect to severance, the trial court concluded, "[T]he arbitration agreement is permeated by unconscionability as there are multiple unconscionable provisions such that the court cannot sever those terms without, in effect, re-writing the entire agreement."

III. DISCUSSION

A. Standard of Review

The relevant facts are undisputed. Therefore, our review is de novo. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*); *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 683; *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1567.)

B. Unconscionability

1. Overview

Code of Civil Procedure section 1281 provides, "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." Enforcement of valid arbitration agreements is favored under both state and federal law. (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 31; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97 (*Armendariz*).) However, courts will not enforce arbitration provisions that are

unconscionable or contrary to public policy. (*Pinnacle, supra,* 55 Cal.4th at p. 247; *Armendariz, supra,* 24 Cal.4th at p. 114.) The burden is on the party opposing arbitration to prove unconscionability. (*Pinnacle, supra,* 55 Cal.4th at p. 236; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 572.)

Our Supreme Court has enunciated the following principles concerning unconscionability: "'[G]enerally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening' the [Federal Arbitration Act]. (*Doctor's Associates*[, *Inc. v. Casarotto* (1996)] 517 U.S. [681,] 687; accord, *Armendariz*[, *supra,*] 24 Cal.4th [at p.] 114.) Unconscionability consists of both procedural and substantive elements. The procedural element addressed the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. (See *Armendariz,* [*supra,* 24 Cal.4th] at p. 114; *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071 [procedural unconscionability 'generally takes the form of a contract of adhesion'].) Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. (*Armendariz,* [*supra,* 24 Cal.4th] at p. 114; *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1159.) A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."' (*24 Hour Fitness, Inc. v. Superior Court* [(1998)] 66 Cal.App.4th [1199,] 1213.) [¶] The party resisting arbitration bears the burden of proving unconscionability. (*Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972; *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group, supra,* 197 Cal.App.4th at p. 1158.) Both procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on '"a sliding scale."' (*Armendariz, supra,* 24 Cal.4th at p. 114.) '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' (*Ibid.*) [¶] As indicated, procedural

unconscionability requires oppression or surprise. '"Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form."' (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317.)" (*Pinnacle, supra,* 55 Cal.4th at pp. 246-247.) Pursuant to *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, ___ [131 S.Ct. 1740, 1747-1748], state-law unconscionability rules apply under both the Federal and the California Arbitration Acts so long as those rules do not interfere with fundamental attributes of arbitration. (Accord, *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1142-1146.)

2. The Delegation Clause

We must first consider whether, as defendant contends, the arbitration agreement's *enforceability* is an issue the parties designated for decision by the arbitrator rather than by a court. The rules are the same under both the Federal and the California Arbitration Acts. (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 239-241; *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 781, fn. 4.) Under both the Federal Arbitration Act and the California Arbitration Act, when the parties have *clearly and unmistakably* so provided, an arbitrator, rather than a court, may be empowered to determine whether the arbitration agreement is enforceable. (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68-70 & fn. 1; *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1560; *Tiri v. Lucky Chances, Inc., supra,* 226 Cal.App.4th at p. 242.) The Court of Appeal has explained: "The requirement that the language of the delegation clause be clear is straightforward. The law presumes that a delegation to an arbitrator of enforceability issues is ineffective absent clear and unmistakable evidence that the parties intended such a delegation. (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944-945 . . . ; *Ontiveros* [v. DHL Express (USA), Inc.], *supra,* 164 Cal.App.4th [494,] 503.) . . . [A] party seeking to enforce a delegation clause must show that it was clear and unmistakable, and silence or ambiguity will be deemed insufficient. ([*First*

Options of Chicago, Inc. v. Kaplan, supra, 514 U.S.] at pp. 944-945; see also *Rent-A-Center*[*, West, Inc. v. Jackson*]*, supra,* 561 U.S. at pp. 65, 70, fn. 1.)" (*Tiri v. Lucky Chances, Inc., supra,* 226 Cal.App.4th at p. 242.)

Defendant argues there was both express delegation and delegation through incorporation of the American Arbitration Association rules. Defendant has not demonstrated a clear and unmistakable express delegation of the enforceability determination to the arbitrator. As noted above, paragraph 2 of the present agreement lists the substantive claims to be resolved by arbitration. It then provides that the arbitrable issues include, "Any dispute concerning the arbitrability of any such controversy or claim." The reference to "any such controversy or claim," in context, can only mean any such *substantive* controversy or claim. Moreover, a claim's arbitrability and an arbitration agreement's enforceability are two different things. As the Court of Appeal explained in *Ajamian v. CantorCO2e, L.P., supra,* 203 Cal.App.4th at pages 786-787: "Language such as 'any disputes, differences or controversies' may well be adequate and necessary for the parties to express their intention to arbitrate all *substantive* claims, since the number and diversity of potential future substantive claims is so great as to defy a specific enumeration of each type. But the issue of who would decide the enforceability of the arbitration clause *itself* is a horse of a different color. It is a distinct issue that could and would be easily addressed—if the parties actually contemplated it at the time of contracting—by stating expressly that the arbitrator shall decide questions of the enforceability of the arbitration provision. Because such issues are normally decided by the court, parties who consider the matter and want the issues to be decided instead by the arbitrator would most likely spell out their unusual intention in the arbitration provision. The absence of such express language . . . therefore gives rise to the inference that the parties did *not* consider the matter. Indeed, because the issue is arcane and *not* likely contemplated by the parties, silence or ambiguity as to who would decide the enforceability of the arbitration provision suggests it was not a matter on which the parties mutually agreed and, therefore, the enforceability issue *cannot* be arbitrated . . . ." (Accord, Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial (The Rutter Group

2014) ¶ 9:407, p. 9(I)-178 (rev. # 1, 2014); compare, *Tiri v. Lucky Chances, Inc., supra,* 226 Cal.App.4th at p. 242 [“‘[T]he Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the . . . enforceability, . . . of this Agreement . . .,”].) There is no clear and unmistakable express delegation of the enforceability issue to the arbitrator in the present contract.

Defendant also has not shown the necessary clear and unmistakable intent was accomplished through incorporation of the American Arbitration Association’s employment dispute rules. Paragraph 6 of the applicable American Arbitration Association rules states, “The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or *validity* of the arbitration agreement.” (Italics added.) Read in relation to the contract’s delegation provision, the rule creates an ambiguity. The delegation provision is inconsistent with the rule. The arbitration agreement authorizes the arbitrator to determine the arbitrability of any substantive claim or controversy. It does not authorize the arbitrator to decide whether the arbitration contract itself is enforceable in the first instance. Under these circumstances, incorporating the American Arbitration Association rules by reference does not evidence a clear and unmistakable delegation of enforceability questions to the arbitrator. (See *Ajamian v. CantorCO2e, L.P., supra,* 203 Cal.App.4th at pp. 788-790; see also, *Tiri v. Lucky Chances, Inc., supra,* 226 Cal.App.4th at p. 242, fn. 5 .) Therefore, enforceability is a question for the court.

3. Procedural unconscionability

Plaintiff argues the arbitration agreement is procedurally unconscionable in two respects—it is a contract of adhesion and, the American Arbitration Association rules incorporated by reference were not attached. It is undisputed the mandatory arbitration agreement was imposed on plaintiff as a condition of her employment. The language of the agreement made clear there was no room for negotiation: “[A]s a condition of your employment . . . [defendant] has instituted an exclusive and mandatory . . . arbitration

procedure . . . . Under the Procedure, disputes that may arise from your employment with [defendant] or the termination of your employment with [defendant] must . . . be submitted for resolution by . . . binding arbitration." The agreement was, therefore, to some degree, procedurally unconscionable. (*Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 402; *Ajamian v. CantorCO2e, L.P., supra,* 203 Cal.App.4th at p. 796.) However, the compulsory nature of the agreement does not, without more, render the contract unenforceable. (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 84, fn. 4; *Sanchez v. Carmax Auto Superstores California, LLC, supra,* 224 Cal.App.4th at p. 402; *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1127.) Moreover, this was a stand-alone agreement. No provisions were hidden in lengthy text. There was no evidence plaintiff did not freely sign the agreement. There was no surprise. (*Pinnacle, supra,* 55 Cal.4th at p. 247 & fn. 12; *Lane v. Francis Capital Management LLC, supra,* 224 Cal.App.4th at pp. 689-690; *Sanchez v. Carmax Auto Superstores California, LLC, supra,* 224 Cal.App.4th at p. 403.)

Paragraph 6 of the arbitration agreement states in part, "The arbitration will be conducted under the Employment Dispute Resolution Rules of the [American Arbitration Association] . . . ." As noted above, plaintiff asserts unconscionability in that the referenced American Arbitration Association rules were not attached to the arbitration agreement. We hold, consistent with decisional authority, that the failure to attach the applicable rules added slightly at most to the procedural unconsionability. (*Carmona v. Lincoln Millennium Car Wash, Inc., supra,* 226 Cal.App.4th at p. 84 ["Failure to provide the applicable arbitration rules is another factor that supports procedural unconscionability"]; *Lane v. Francis Capital Management LLC, supra,* 224 Cal.App.4th at p. 690 ["We agree that the failure to attach the arbitration rules could be a factor in support of a finding of procedural unconscionability, but disagree that the failure, by itself, is sufficient to sustain a finding of procedural unconscionability"]; *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1470-1472 [failure to attach American Arbitration Association rules insufficient standing alone to find procedural

unconscionability]; *Bigler v. Harker School* (2013) 213 Cal.App.4th 727, 737 [minor significance]; *Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 485 ["The absence of the AAA (American Arbitration Association) arbitration rules adds *a bit* to the procedural unconscionability" (Italics added)].) Notably, the present agreement expressly made the applicable rules available to plaintiff. The arbitration agreement states, "A copy of the complete [American Arbitration Association] Employment Dispute Resolution Rules may be obtained from the Director of Human Resources." This mitigates against plaintiff's procedural unconscionability theory. (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 180.)

Plaintiff further notes the applicable rules are titled, "Employment Mediation Rules," *not*, as stated in the arbitration agreement, "Employment Dispute Resolution Rules." (The rules were formerly titled, "National Rules for the Resolution of Employment Disputes.") One Court of Appeal has held, "If . . . the [American Arbitration Association] does not publish rules under the title to which the arbitration agreement refers, the discrepancy would add to the oppressive nature of the agreement." (*Zullo v. Superior Court*, *supra*, 197 Cal.App.4th at p. 486, fn. 3.) But plaintiff presents no evidence: she was confused by any misdescription of the applicable rules; she was unable to obtain a copy of the applicable rules or that she was prevented from doing so; or she was surprised or oppressed by application of those rules to arbitration under her employment agreement. (Compare, *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1405 [unattached rules precluded consumer from obtaining damages]; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 721 [unattached rules trumped discovery provision in arbitration agreement].)

Based on plaintiff's evidence, we conclude the degree of procedural unconscionability is low. The arbitration agreement must be enforced unless the degree of substantive unconscionability is high. (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 704; *Ajamian v. CantorCO2e, L.P., supra,* 203 Cal.App.4th at p. 796; *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 982.) As discussed below, we conclude the degree of substantive unconscionability is low.

4. Substantive Unconscionability

a. The forum selection clause

As noted above, section 6 of the arbitration agreement states in part, "The employee agrees that any . . . arbitration conducted under this Agreement shall take place at [defendant's] then headquarters office (presently located in Wayne, PA) unless an alternative location is agreed upon by [defendant]." Plaintiff, a Colorado resident, argues the clause is unconscionable because it requires her to arbitrate her claim in Pennsylvania, a distant forum, thereby discouraging her from bringing legitimate claims against defendant. The Court of Appeal has held, "A forum selection clause that discourages legitimate claims by imposing unreasonable geographical barriers is unenforceable under well-settled California law." (*Aral v. EarthLink, Inc.* (2005) 134 Cal.App.4th 544, 549 [clause requiring consumer to travel 2,000 miles to recover small sum was unreasonable]; see *Alan v. Superior Court* (2003) 111 Cal.App.4th 217, 230 [a court should set aside a forum selection clause that is unreasonable or unjust].) As Division Four of the Court of Appeal for this appellate district has explained, "If it is clear that 'trial in the contractual forum will be so gravely difficult and inconvenient that [the employee] will for all practical purposes be deprived of his [or her] day in court,' it would be 'unfair, unjust, [and] unreasonable' to enforce the forum selection provision. (*The Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 18.)" (*Aral v. EarthLink, Inc., supra,* 134 Cal.App.4th at p. 561.) But a mandatory forum selection clause in an employment agreement will be upheld so long as it is not unfair or unreasonable. (*Animal Film, LLC v. D.E.J. Productions, Inc.* (2011) 193 Cal.App.4th 466, 471; *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1294; *Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 358.) And, as the Courts of Appeal have held: "'"Mere inconvenience or additional expense is not the test of unreasonableness . . . "' of a mandatory forum selection clause. [Citation.]' (*Berg* [*v. MTC Electronics* Technologies Co.], *supra,* 61 Cal.App.4th [349] at pp. 358, 359 . . . .)" (*Olinick v. BMG*

Entertainment, supra, 138 Cal.App.4th at p. 1294, fn. omitted.) Further, a forum selection clause is reasonable if it has a logical connection with at least one of the parties or their transaction. (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 12; *CQL Original Products, Inc. v. National Hockey League Players' Assn.* (1995) 39 Cal.App.4th 1347, 1354.) Moreover, the burden is on the party opposing arbitration to show that a forum selection clause is unreasonable based on the additional expense and inconvenience of litigation far from home. (*Aral v. Earthlink, Inc.*, *supra,* 134 Cal.App.4th at p. 561; *Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 198; but see *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 161 [burden reversed when underlying claim based on unwaivable statutory rights including Labor Code provisions establishing overtime pay, meal and rest breaks].)

The forum selection clause in the present arbitration agreement has a logical connection to defendant. It is a corporate entity that operates in multiple states and employs individuals in locations across the county. The corporate home is a logical forum for arbitration. Plaintiff has not shown that requiring her to arbitrate in Wayne, Pennsylvania will discourage or prevent her from pursuing her claims. In a July 14, 2014 declaration filed in opposition to defendant's motion to compel arbitration, plaintiff asserted: "I was willing to travel to California for a mediation related to my dispute with [defendant] because my work was performed in California. Also, I had family and friends in California, so I could have stayed at someone's home in California in order to save on costs related to lodging." This was not sufficient evidence the burden of traveling to Pennsylvania would discourage or prevent plaintiff from pursuing her claims.

Further, there is some indication the parties may agree on an alternative location. Subsequent to filing its motion to compel arbitration, on July 17, 2014, defendant offered to arbitrate plaintiff's individual claims in San Diego, California. Defendant's counsel advised: "This letter is to confirm that pursuant to Section 6 of [defendant's] Employment Mediation and Arbitration Agreement, [defendant] hereby agrees to mediate and/or arbitrate [plaintiff's] individual/non-class claims . . . in San Diego, California. [¶] [Defendant] further requests that your office please advise if [plaintiff] prefers a different

location so that [defendant] can consider this alternate location and respond accordingly." Going forward, the trial court has jurisdiction to resolve any dispute that arises over the location of the arbitration. (See *Olinick v. BMG Entertainment, supra,*138 Cal.App.4th at p. 1294; *Alan v. Superior Court, supra,* 111 Cal.App.4th at p. 230.)

b. Costs

Plaintiff asserts unconscionability with respect to *mediation* costs. However, because defendant's motion is to compel *arbitration* and not to compel non-binding *mediation,* we need not consider the terms of the mediation agreement.

c. Multi-step dispute resolution

The agreement is not substantively unconscionable in requiring plaintiff to exhaust more informal attempts to resolve an employment dispute before moving to binding arbitration. As Division Seven of the Court of Appeal for this appellate district held in *Serpa v. California Surety Investigations, Inc., supra,* 215 Cal.App.4th at page 710: "[A] requirement that internal grievance procedures be exhausted before proceeding to arbitration is both reasonable and laudable in an agreement containing a mutual obligation to arbitrate. It plainly does not 'shock the conscience' so as to vitiate the arbitration agreement." (Compare, *Carmona v. Lincoln Millennium Car Wash, Inc., supra,* 226 Cal.App.4th at p. 89 [*unilateral* "free peek" provision contributed to substantive unconscionability].)

d. Shortened statute of limitations

Paragraph 7 of the arbitration agreement mutually restricts the time for bringing all claims: "**Required Notice of Claims and Statute of Limitations for all Claims**: Claims defined in Section 2 hereof shall be initiated by serving by overnight courier or

mail . . . a written notice received by the other party within 300 calendar days of the date the complaining party first has knowledge of the event first giving rise to the Claim. *If the notice of a Claim is not received by the other party within the required 300 calendar days, all rights and claims that the complaining party has or may have had against the other party shall be waived and void, even if there are federal or state statutes or case law which would have given the complaining party more time to pursue a claim.* Time is of the essence and will be strictly enforced." (Italics added.) The applicable statutes of limitations are significantly longer. The statute of limitations for a claim under Labor Code section 510 is three years. (*Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 404; see *Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, 1148 .) The statute of limitations for plaintiff's Business and Professions Code section 17200 unfair competition claim is four years. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178-179; see *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1130 ["UCL limitations period applies even to claims based on violation of statutes bearing shorter limitations periods"]; *Blanks v. Shaw* (2009) 171 Cal.App.4th 336, 364 [same].) An action alleging violations of Labor Code sections 201 or 202 must be brought within three years. (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1395 Plaintiff argues, "[A]ttempts to limit statutory claims are improper." Defendant does not dispute this point. Defendant argues, instead, that the issue is moot because plaintiff's notice was timely. We conclude the shortened notice period in the agreement is one factor adding to substantive unconscionability of the contract as of the time the parties entered into it. (*Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1147 [California wage and hour claims]; *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1283; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 117-118.)

e. Additional unconscionable provisions

Plaintiff argues the agreement is substantively unconscionable in several additional respects: inadequate discovery; excluded claims favor defendant; she is

deprived of her right to attorney fees; and the agreement in multiple respects does not satisfy the *Armendariz* requirements. These issues were not raised in the trial court. Traditional forfeiture jurisprudence applies to appellate review in the arbitration context. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 681; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 30-31; *Tutti Mangia Italian Grill, Inc. v. American Textile Maintenance Co.* (2011) 197 Cal.App.4th 733, 740; *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 19, fn. 12.) Plaintiff forfeited her additional claims.

E. Severance

The trial court concluded the unconscionable provisions could not be severed without, in effect, rewriting the arbitration agreement. We review that decision for an abuse of discretion. (*Armendariz, supra,* 24 Cal.4th at p. 122; *Carmona v. Lincoln Millennium Car Wash, Inc., supra,* 226 Cal.App.4th at p. 83; *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 821.) As our colleagues in Division Eight recently explained: "A trial court has the discretion to refuse to enforce an agreement as a whole if it is permeated by unconscionability. (*Armendariz, supra,* 24 Cal.4th at p. 122.) 'The overarching inquiry is whether "'the interests of justice . . . would be furthered'" by severance.' (*Id.* at p. 124.) If the central purpose of a contractual provision, such as an arbitration agreement, is tainted with illegality, then the provision as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contractual provision, and can be severed or restricted from the rest, then severance is appropriate. (*Ibid.*) [¶] When an arbitration agreement contains multiple unconscionable provisions, '[s]uch multiple defects indicate a systemic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage.' (*Armendariz, supra,* 24 Cal.4th at p. 124.) Under such circumstances, a trial court does not abuse its discretion in determining the arbitration agreement is permeated by an unlawful purpose." (*Carmona v. Lincoln Millennium Car Wash, Inc., supra,* 226 Cal.App.4th at p. 90.)

As discussed above, the present arbitration agreement is not permeated by unconscionability. The notice of claims provision in paragraph 7 is collateral to the main purpose of the arbitration agreement. Therefore, the trial court should have severed paragraph 7 and otherwise enforced the agreement.

IV. DISPOSITION

The order denying defendant's petition to compel arbitration is reversed. Upon remittitur issuance, the trial court is to enter an order severing paragraph 7 of the arbitration contract. Defendant, Solomon Edwards Group LLC, is to recover its costs on appeal from plaintiff, Pamela Montgomery.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

KRIEGLER, J.

KIRSCHNER, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.