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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

JAMES MASSIE, et al., Plaintiffs and Respondents, v. RALPHS GROCERY COMPANY, et al., Defendants and Appellants.	B224196 (Los Angeles County Super. Ct. Nos. BC321144 and BC321704)

APPEAL from orders of the Superior Court of Los Angeles County, Ann Jones, Judge. Affirmed.

Reid Smith, Linda S. Husa and Steven B. Katz; Littler Mendelson, Henry D. Lederman and Lisa C. Chagala for Defendants and Appellants.

Law Offices of Ian Herzog and Ian Herzog; Daniels, Fine, Israel, Schonbuch & Lebovits, Scott A. Brooks and Craig S. Momita; Law Offices of Stephen Glick and Stephen Glick for Plaintiffs and Respondents.

INTRODUCTION

In a prior opinion, we addressed Ralphs Grocery Co.'s appeals from orders denying its petitions to compel arbitration of two class action lawsuits filed by its employees, alleging Labor Code and Unfair Competition Law violations. Ralphs had unsuccessfully sought arbitration of these disputes in accordance with provisions in various agreements that subject such claims to individual binding arbitration and prohibit proceedings on a class or representative basis, and we affirmed the trial court's orders denying Ralphs' petitions. (*Massie v. Ralphs Grocery Co.*, *McLeod v. Ralphs Grocery*, B187844, B187854, May 14, 2007 [nonpub. opn.].) Thereafter, our Supreme Court granted Ralphs' petitions for review and remanded the matters with directions to vacate our prior decision and to reconsider the cause in light of *Gentry v. Superior Court* (2007) 42 Cal.4th 443. (S153059.) We in turn remanded the matter to the trial court for the required factual showing.

After permitting the parties to conduct discovery on the *Gentry* factors and considering supplemental briefing and argument on these issues, the trial court again denied Ralphs' motion to enforce its class action waiver and compel individual arbitration, finding "Just as in *Gentry*, the class arbitration waivers found in this case jeopardize the rights of its employees by prohibiting the most practical and most likely, only, effective means of challenging defendants' overtime practices."

Ralphs appeals. Because we conclude the agreement Ralphs seeks to enforce is procedurally and substantively unconscionable and unenforceable as a result, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

In our prior opinion, we summarized the proceedings to date as follows:

"***Massie v. Ralphs Grocery Company*** (Super. Ct. Los Angeles County, 2004, No. BC321144)**:** On September 7, 2004, James Massie, Eddy Korkiat Prachasaisoradej, Teresa Lee, Jose Mendez and Jaime Rosales, **'**individually and on behalf of all others similarly situated, and on behalf of the California general public,' filed a complaint against Ralphs Grocery Company and Food-4-Less Holdings, Inc. (hereinafter

collectively "Ralphs") alleging causes of action for underpayment of overtime in violation of Labor Code section 510, violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and for penalties under Labor Code sections 203 and 558.

"***McLeod v. Ralphs Grocery Company*** (Super. Ct. Los Angeles County, 2004, No. BC321704): Ten days later, Donald McLeod, Benjamin Mock and Michael Miner, 'individually and on behalf of all others similarly situated, and on behalf of the California general public,' filed a complaint against Ralphs alleging causes of action for nonpayment of overtime compensation and violation of the Unfair Competition Law.

In November, the trial court ordered these two cases as well as *Swanson v. Ralphs Grocery Co*., (Super. Ct. Los Angeles County, 2002, No. BC284875), and *Prachasaisoradej v. Ralphs Grocery Co.* (Super. Ct. Los Angeles County, 2001, No. BC254143) related, with the *Prachasaisorade*j case designated the lead case.[]

"In April 2005, the McLeod plaintiffs filed a first amended complaint adding plaintiff Bruce Pack. In August, they filed a second amended complaint adding plaintiff Peter Wang as well as a third cause of action for unlawful nonpayment of overtime in violation of the Labor Code and unfair business practices under the Unfair Competition Law.

"In September 2005, Ralphs filed motions to compel arbitration and stay proceedings in both the Massie and McLeod actions.

"There are three arbitration policies at issue: the 2001, 2003 and 2004 policies.[1] The 2001 arbitration policy was set forth in a four-page, single-spaced document, entitled 'Ralphs Grocery Company Dispute Resolution Program Mediation & Binding Arbitration Policy.' At paragraph 4, this arbitration policy states: 'Arbitration . . . is the sole and exclusive remedy for any dispute(s) arising out of or related to the employer/employee

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1 The parties apparently dispute whether *more* than one of these policies applies to certain plaintiffs (both the 2003 and 2004 policies state that the current policy "supersedes and replaces each prior version of the Company's Mediation & Binding Arbitration Policy"), but it is undisputed that at least one of these policies applies to each of the ten named plaintiffs.

relationship. . . . This includes, for example, disputes arising from alleged *unfair competition, unfair business practices, . . . unpaid wages or failure to pay overtime or other compensation or the computation thereof. . . .* This Policy covers, for example, *any claims arising under . . . the California Labor Code [or] the California Business [and] Professions Code . . . .*' (Italics added.)

"Paragraph 8 of the policy contains the following class action waiver provision: '[U]nless controlling legal authority requires otherwise, there will be no right or authority for any dispute to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving disputes brought in a representative capacity on behalf of the general public, of other Ralphs employees (or any of them), or of other persons similarly situated. The individual claim of any Employee bound by this Policy is subject to this Policy. Any action brought against Ralphs (or any of them) by any other person (whether an Employee bound by this Policy or not) in a representative capacity on behalf of or for the benefit of any Employee bound by this Policy will be designated as a "Representative Action." To the fullest extent permitted by law, any individual claim by an Employee for a remedy pursuant to or under the authority of a Representative Action is subject to this Policy. Thus, even though some of the Federal Rules of Civil Procedure apply as set forth above, **there shall be no judge or jury trials, and there shall be no class actions or Representative Actions permitted**, unless controlling legal authority requires otherwise.' (Original emphasis.)

"According to Ralphs, McLeod, Mock, Pack and Rosales agreed to the terms of the 2001 arbitration policy by signing an acknowledgement. (As to Miner and Wang, Ralphs presented declarations indicating that copies of the policy were delivered to Miner and 'Chang P Wang' in September 2001, and they continued to work for Ralphs thereafter.)

"The 2003 arbitration provision was incorporated by reference into a six-page, single-spaced document entitled '2003 Semi-Annual Bonus Plan.'[] Headings within the document included 'Concepts Used in Determining the Bonus You May Be Eligible to

Earn Under the Bonus Plan,' 'How to Calculate the Bonus You May Be Eligible To Earn Under the Bonus Plan,' 'Eligibility to Earn a Bonus Under the Bonus Plan,' and 'Other Terms and Conditions.' At paragraph 3 under this last heading, the bonus plan provides: 'All participants in this Bonus Plan are covered and bound by the most recent version of the Ralphs Grocery Company Dispute Resolution Program ("DRP") Mediation & Binding Arbitration Policy (the "Policy")—as implemented, modified, amended, restated, or revoked—for all "Covered Disputes" as defined in the Policy, regardless of whether they relate to or arise out of this Bonus Plan or any predecessor or successor plan(s). Any Bonus Plan participant who is not familiar with or does not have a copy of the most recent version of the Policy can obtain a copy from their Store Director, the Company's Personnel Department, or the Company's Human Resources Department.'

"Paragraphs 6 and 7 at page 5 (regarding 'Eligibility to Earn a Bonus under the Bonus Plan') of the 2003 Bonus Plan stated: '**The Store Member must not have chosen to opt-out of participating in the Bonus Plan.** As set forth below, Bonus Plan eligible Members who do not agree with the terms and conditions of this Bonus Plan must affirmatively opt-out of participating in the Bonus Plan.

"'[¶] **The Store Member must not challenge, or have challenged, the legality, validity, or enforceability of this Bonus Plan or any predecessor or successor plan(s) on behalf of the Store Member himself or herself, in any type of representative capacity on behalf of any other current or former employees of the Company, or as a participant in any type of representative action making any such challenge(s)**. . . .' (Original emphasis.)

"The 'Other Terms and Conditions' section of the 2003 Bonus Plan also contained the following provisions: '[¶] This Bonus Plan, and all predecessor and successor plans, have been or will be voluntarily drafted or implemented by the Company with the intention that they comply with all applicable laws and regulations. The Company did not and does not intend to draft or implement, or incur the expense of defending, any such plans which anyone challenges or are held as not being in any way legal, valid, or

enforceable as drafted or implemented. If this Bonus Plan, or any predecessor or successor plan(s), as drafted or implemented, is challenged as unlawful, invalid, unconscionable, or otherwise unenforceable in whole or in part, or held to be such by any court or arbitrator of competent jurisdiction, by or through any type of individual or representative action or proceeding brought or participated in by any Bonus Plan participant on his or her own behalf or on behalf of any current or former employee(s) of the Company, then such plans will be deemed to be terminated from their inception as to any such Bonus Plan participants and they must return to the Company any payments received thereunder.

"'[¶] The Company reserves the exclusive right to amend, modify, or terminate this Bonus Plan at any time and for any reason in its sole and absolute discretion.

"'[¶] Any Store Member covered by this Bonus Plan who does not agree to all of the terms and conditions contained herein must affirmatively opt-out of participating in this Bonus Plan by giving notice to the Company of their opting-out of participating in this Bonus Plan. Such notice must be given to the Company in writing no later than **September 26, 2003**, and must be delivered by that date to Ralphs Grocery Company's registered agent for service of process in the state in which the Store Member works for the Company. The written notice must identify the Store Member by name and their social security or employee identification number, contain an affirmative statement that the Store Member is opting-out of participating in this Bonus Plan, and be signed and dated by the Store Member. Any Store Member who fails to give the Company such notice in the manner prescribed herein, or who accepts any bonus distribution under this Bonus Plan after giving such notice, will be deemed to be covered by the terms and conditions of this Bonus Plan and a participant thereof.' (Original emphasis.)

"Although it apparently was not provided with the 2003 Bonus Plan, the 'most recent' (2003) version of the arbitration policy defined 'Covered Disputes' to include the same types of disputes subject to the 2001 policy (among others) and also contained a

class action waiver provision similar to the one set forth within the 2001 arbitration policy.[2]

"According to Ralphs, Massie, Prachasaisoradej, Lee, Mendez, Rosales, McLeod and Wang agreed to the 2003 arbitration policy because they all accepted payments under the 2003 bonus plan and failed to opt out of this plan.

"The 2004 Bonus Plan was substantially similar to the 2003 plan before this court in the *Swanson* case except that the 2004 plan states that the calculations 'are adjusted based on the principles in *Ralphs v. Superior Court,* 112 Cal.App.4th 1090 (2003).' Further, instead of incorporating the 'most recent version' of the arbitration policy by reference, the 2004 Bonus Plan attached the 2004 arbitration policy to the plan (making the plan eleven pages). The 2004 arbitration policy contained a substantially similar definition of 'covered disputes' and a substantially identical class action waiver provision as those found in the 2001 and 2003 policies, but also added a number of new provisions. For example, the following language was added: 'The submission of an application for employment, acceptance of employment or continuation of employment with the Company by an Employee is deemed the Employee's acceptance of this Arbitration

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[2] "'[T]here is no right or authority for any Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Ralphs employees (or any of them), or of other persons similarly situated. The individual Covered Disputes of any Employee bound by this Policy are subject to this Policy. Any action or proceeding brought against Ralphs (or any of them) by any person (whether an Employee bound by this Policy or not) or entity in a representative capacity on behalf of or for the benefit of (in whole or in part) any Employee bound by this Policy is designated as a 'Representative Action' in this Policy. To the fullest extent permitted by law, any individual Covered Disputes of or by an Employee for a remedy pursuant to or under the authority of a Representative Action are governed by and subject to this Policy. Thus, even though some of the Federal Rules of Civil Procedure apply as set forth above, **there are no judge or jury trials and there are no class actions or Representative Actions permitted under this Policy.**' (Original emphasis.)"

Policy. No signature by an Employee or the Company is required for this Arbitration Policy to apply to Covered Disputes.'[3]

"In addition, a new paragraph was added to the 2004 Bonus Plan, stating as follows: '[¶] **Acceptance of any payment under this Bonus Plan by any participant constitutes a waiver, release, relinquishment and discharge of any and all claims the participant has, had or may have against Ralphs Grocery Company (and/or its predecessor, successor, parent, subsidiary and/or affiliated entities) arising out of or related to any and all previous bonus plans (and the payments made thereunder) and/or any actual or claimed misclassification as a salaried employee rather than as an hourly employee, as previously, now or hereafter made or asserted by such participant, regardless of whether such claims were or are made or asserted by or for such participant individually, collectively, putatively, on a representative basis, or otherwise, including without limitation in connection with the following**

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[3] "Further revisions to the 2004 arbitration policy also included the following: 'If the parties do not mutually agree on the selection and appointment of a Qualified Arbitrator, the following selection method will be used to select and appoint a Qualified Arbitrator: (1) Each party to the arbitration proceeding will propose a list of three Qualified Arbitrators that they want appointed to hear and decide the Covered Dispute(s); and (2) The parties will alternate in striking one name from any other party's list of proposed Qualified Arbitrators, *with the first strike to be made by a party who has not demanded arbitration pursuant to this Arbitration Policy*, followed by a continuing rotation of alternating adverse parties until there is only one proposed Qualified Arbitrator that has not been stricken, who will be deemed to be the parties' selected and appointed Qualified Arbitrator to hear and decide the Covered Dispute(s) that are the subject of the arbitration proceedings.' (Italics added.)

"Another new provision specified: 'Except and only to the extent it may be required by applicable law, the parties and the Qualified Arbitrator shall maintain the existence, content and outcome of any arbitration proceedings held pursuant to this Arbitration Policy in the strictest confidence and shall not disclose the same without the prior written consent of all the parties.'

"Other provisions purported to shorten the applicable statutes of limitation and shift arbitration costs to the extent Ralphs could contractually do so."

litigation: *Eddy Korkiat Prachasaisoradej vs. Ralphs Grocery Company*, Los Angeles County Superior Court Case No. BC254143 (commenced July 13, 2001), California Court of Appeal (Second Appellate District) Case No. B165498 (commenced March 3, 2003); *David Swanson vs. Ralphs Grocery Company*, Los Angeles County Superior Court Case No. BC284875 (commenced November 7, 2002), California Court of Appeal (Second Appellate District) Case No. B168257 (commenced June 30, 2003); and *James Massie, Eddie Korkiat Prachasaisoradej, Teresa Lee, Jose Mendez and Jaime Rosales vs. Ralphs Grocery Company*, Los Angeles County Superior Court Case No. BC321144 (commenced September 7, 2004).' (Original emphasis.)

"According to Ralphs, Prachasaisoradej, Mendez, Rosales and Wang agreed to the 2004 arbitration policy by accepting payments under the 2004 bonus plan and by failing to opt out of this plan.

"The Massie and McLeod plaintiffs filed opposition to Ralphs' motions to compel arbitration, claiming the arbitration agreements were unconscionable and therefore unenforceable on multiple grounds, including the impermissible inclusion of the class action waivers.

"The trial court heard oral argument, took the matter under submission and issued a six-page ruling denying the motions to compel arbitration, finding the class action waivers unconscionable and therefore unenforceable under *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 162-163 (*Discover Bank*) and *Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court* (2005) 133 Cal.App.4th 396, 410-411 (*Mailbox Center*). Because Ralphs indicated it was unwilling to pursue arbitration in the absence of the class action waivers, the trial court denied Ralphs' motions without prejudice." (*McLeod v. Ralphs Grocery Co.* (May 14, 2007, B187844/B187854) [nonpub. opn.] at pp. 2-8, all emphasis in original.) We affirmed the trial court's orders. (*Id.* at p.17.)

A few months later, however, our Supreme Court granted review, holding the cases pending resolution of *Gentry v. Superior Court.* (*McLeod v. Ralphs Grocery*

Company, supra, review granted Aug. 8, 2007, S153059.) Then, on November 28, 2007, our Supreme Court reversed and remanded the matter with directions to reconsider in light of the decision in *Gentry v. Superior Court* (2007) 42 Cal.4th 443.

The *Gentry* court stated: "We cannot say categorically that all class arbitration waivers in overtime cases are unenforceable. . . . Nonetheless, when it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the[se] factors . . . : the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration." (*Gentry, supra,* 42 Cal.4th at pp. 462-463.) Because *Gentry*'s application to the factual record in this case should be performed by the trial court in the first instance, we remanded the matter to the trial court to reconsider this case in light of *Gentry*. (See *id.* at p. 472 ["we remand the matter to the Court of Appeal with directions to remand to the trial court to determine whether the class arbitration waiver is void"].)[4]

On remand, the trial court permitted the parties to conduct discovery on the *Gentry* factors, received further briefing and heard argument on the issues. In its March 8, 2010 Statement of Decision, this time pursuant to *Gentry, supra,* 42 Cal.4th 443, the trial court again found the class relief waiver provision in the arbitration agreements unenforceable.[5] More particularly, the trial court determined as follows:

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[4] We noted at that time that some of the trial court's original findings already tracked some of the factors ultimately specified in *Gentry.*

[5] The trial court noted that counsel for Ralphs again confirmed that Ralphs had no interest in pursuing arbitration if conducted on a class-wide basis, seeking only to compel individual arbitration for each plaintiff and did not consent to class or consolidated arbitrations. "Thus, although generally when an arbitration agreement contains a single

"A. Anticipated Recoveries in these Cases Are Modest

"The first question is whether there are financial incentive[s] sufficient to insure individual challenges to the defendants' overtime policies in the event that the class arbitration waiver were to be enforced.

"Considering the first factor set forth in *Gentry*, plaintiffs have met their burden of showing that the amount of the typical recovery that might be expected given the plaintiffs' theories of liability is modest and fails to provide a sufficient financial incentive for the plaintiffs to pursue these cases individually. [(Cf. *Franco v. Athens Disposal Company, Inc.* (2009) 171 Cal.App.4th 1277, 1288] ('in determining the validity of a class arbitration waiver, the trial court must consider the plaintiff's theories of liability and the amount of the typical individual recovery').[)]

"The individual claims encompassed within these two actions are too small to warrant the extensive litigation that would be required to vindicate these rights. For example, plaintiff McLeod, as manager of operations, averaged 10 to 15 hours of overtime per week at an hourly rate of approximately $28.75. Assuming an overtime rate of $43.15 and 12 hours of overtime per week for a 52[-]week year (assuming no vacations or leave) his total damages would equal only $26,952 per year. This amount barely meets the threshold for unlimited jurisdiction cases. For plaintiff Wang, his hourly rate is $34.99, for an overtime rate of $52.49. Working during the Southern California Retail Grocers Strike, his estimated damages for that period would be approximately $19,156. Claims in these amounts are so modest that it would clearly be uneconomic to pursue them individually, particularly when compared to the exceptional time and expense that would be incurred in litigating them to a successful conclusion.

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term in violation of public policy, that term will be severed and the rest of the arbitration agreement enforced, that is not the desire of the moving party in this case. [(Compare *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075.)]"

"Defendants counter the obvious fact that these cases involve relatively small amounts of individual damages by aggregating the representative plaintiffs' claims over a four-year statutory period. Thus, plaintiff McLeod's claim would increase to more than $80,000 and the other plaintiffs would have claims ranging from $10,000 to $75,000. See Defendants' Supplemental MPA ISO Motion to Compel Arbitration and Stay Proceedings at 6. That exercise, however, is wholly unavailing. Adjusting for risk, no individual would file a claim necessitating the complex discovery undertaken in an overtime case such as these in the hope of obtaining $30,000. In fact, in *Gentry* the court found that an individual recovery of $37,000 provided insufficient incentive to obviate the need for class action. *Gentry,* 42 Cal.4th at 458.

"The issue is not whether absolute recovery of the representative plaintiffs meets a particular threshold; the issue is whether the relatively small recoveries if the case were to be restricted to an employee-by-employee adjudication render it uneconomic to ensure vigorous private enforcement of the statutory scheme. In this case, none of the representative plaintiffs—or the other similarly situated parties they seek to represent—have sufficient individual damages to justify the risk and expense of pursuing the complex inquiry into the defendants' overtime pay practices.[6]

"B. Risk of Retaliation Would Deter Individual Actions

"The second factor identified in *Gentry* requires a consideration of whether an individual employee would be deterred from filing an individual action to enforce his or her statutory rights to overtime pay were this court to enforce the class arbitration

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6 "The costs of wage and hour litigation (excluding attorney time, which may be separately compensable under the statutory scheme) are quite high. Proof of a misclassification, for example, often requires expert testimony, including statistical samplings or surveys, and a job analysis. This expert discovery is quite expensive. See Seligman Dec'l at ¶ 14, Bergen Dec'l at 10. Many depositions may be required and employees in individual cases may be required to document hours worked and tasks performed. Id. These records are not routinely maintained by employees—who have no idea regarding the requirements imposed by the Labor Code on their employer. Dec'l of Eric A. Grover at ¶ 8."

provision at issue in this case. The question is greater than whether the representative plaintiffs, in fact, may suffer an adverse employment consequence due to their decision to sue as individuals. Rather, the inquiry focuses on all of the persons who would be eligible to participate indirectly through representative plaintiffs and whether those persons would be likely to eschew enforcement of their statutory rights because of fear of termination or loss of promotional opportunity.

"Plaintiffs have provided ample and credible evidence that employers, such as defendants, may retaliate against persons who seek to enforce the protections of the Labor Code. Peter Wang's amended interrogatory responses provide persuasive proof that defendants' store managers were fearful of retaliation from their employer. 'If an employee did not do what they were told, there was a real and substantial risk of facing negative employment consequences, including being written up, transferred or even terminated.' 'My employment was at will.' 'I definitely felt that I would be retaliated against if I complained or sued Ralphs while I was employed there. It was a very autocratic company.' As observed by one experienced attorney who works in the area of wage and hour litigation, individuals who are current employees express fear that were they to file individual suits, that decision would undermine their ability to continue with their employment.[7]

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[7] "Defendants' objection to this testimony is overruled. The relevant inquiry is whether individuals are fearful; not the truth of the likelihood of retaliation. This evidence is admissible for a non-hearsay purpose, i.e., that state of mind of potential plaintiffs. If employees believe that they will suffer adverse consequences by filing an individual lawsuit, they will not do so. Without viable plaintiffs, the private enforcement mechanism intended by the Legislature to secure the benefits of the statutory protections afforded laborers in California will be jeopardized. See Dec'l of Eric A. Grover at ¶¶ 5-6. The court's ruling as to defendants' remaining evidentiary objections to other aspects of the Grover, Seligman, Borgen and Locker declarations are set forth in separate orders."

"Defendants' argument that the five plaintiffs who are no longer employed by Ralphs cannot have a valid fear of adverse consequences from coming forward is without merit.[8] While an ex-employee may no longer fear direct retaliation from a former employer, these plaintiffs have a valid and actual fear that subsequent potential employers may discover that an applicant has been involved in a lawsuit and refuse to extend an offer for that reason. See Grover Dec'l at ¶ 8. That information is readily accessible through public searches of court records or may be asked about on a job application or in an employment interview. Id.

"C. Plaintiffs and Others Similarly Situated Were Ill-Informed of their Rights Under the Overtime Laws.

"In cases such as this one—involving the alleged misclassification of workers on a company-wide basis—it is beyond cavil that most individual employees have a limited understand of the legal requirements that apply to their employer's actions. See Dec'l of Seligman at ¶ 10. And, in this case, the representative plaintiffs were never informed of their legal rights with regard to the law and regulations involving overtime pay. For example, plaintiff Peter Wang was never informed nor instructed regarding the difference between exempt and non-exempt work and Ralphs made no effort to ensure that he spent his time primarily engaged in exempt work. In fact, during the 2003-2004 grocery store labor dispute, Wang 'was expected and required to perform any task in the store, including work that was not managerial and which was routinely performed by hourly

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[8] "Defendants misread *Gentry* as finding that a potential for retaliation exists only for current employees. Rather, the Court suggested that current employees may fac[e] a greater risk of retaliation directly from their employer; not that ex-employees face no potentially adverse consequences. Further, defendants' argument that because Ralphs never retaliated against these ten representative plaintiffs, its current employees cannot be reasonably presumed to have a genuine fear of retaliation is specious and contrary to the evidence adduced by plaintiffs in this case. The standard for 'fear of retaliation' does not require proof of actual retaliation against the named plaintiffs. Rather, the issue is whether, for current employees the prospect of challenging an employer by filing a lawsuit is sufficiently intimidating to deter private enforcement by way of individual actions. The evidence adduced by plaintiffs in this case show[s] that clearly it does."

employees.'[9]

"Moreover, defendants' argument that Massie, Prachasaisoradej, Mendez and Rosales, by accepting payments under the Ralphs' 2004 Bonus Plans, can no longer claim that they were uninformed of their rights under the labor laws is unsupported by law or fact. As is apparent from a reading of the waivers contained in the 2004 Bonus Plan, Ralphs intended to insulate itself from its statutory obligations, not inform its employees of their rights under the law. See *Vu v. Superior Court,* Second District No. B213988 (November 17, 2009) at 11 (Ralphs' arbitration agreement and dispute resolution policy was substantially [sic, substantively] unconscionable as it purported to 'insulate Ralphs from all employee class actions and class arbitrations'). Nor did any of the plaintiffs believe that they could 'opt out' of these provisions. As established by Peter Wang, when he was presented with the 2004 Bonus Plan, he 'felt pressured and coerced into signing in order to receive my wages which I had already earned.'

"Employees, such as the plaintiffs in this case, who are never informed of their rights, or who surrender known rights due to coercion or the substantive unfairness of the defendants' dispute resolution system are unlikely to enter into private litigation to enforce the statutory wage scheme. In such instances, as here, a representative action (whether by litigation or arbitration) is the avenue by which the defendants' alleged violations are likely to be challenged. A waiver of the plaintiffs' rights to seek class arbitration, such as the one at issue here, operates to exonerate defendants of their obligations under the law. As such, it is impermissible.

"D. Real World Obstacles to Individual Vindication of Rights through Individual Arbitration

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[9] "Defendants' contention that persons who speak English fluently are necessarily informed of their rights under the Labor Code is flatly absurd. None of the cases cited in defendants' brief supports the contention that only workers with limited English language skills can meet this *Gentry* factor."

"In enumerating this final category, the majority in *Gentry* directed trial courts to engage in a fact-specific inquiry based on the unique circumstances presented in wage and overtime cases in order to determine whether a class arbitration waiver is void. In this case, plaintiffs have met their burden of demonstrating that there are a number of impediments to their abilities to secure a vindication of their rights by way of individualized actions. First, none of the plaintiffs have the financial resources to pay for an attorney to file this action on their behalf. Second, attorneys who typically represent employees in overtime cases are unwilling to accept these cases on a contingent basis without being able to plead them as class actions. Third, the arbitration provisions at issue (were the matter to be arbitrated individually) are substantively unconscionable. Ralphs included a limitation of all claims to a one[-]year statute of limitation, rather than the statutory term. This provision (if enforceable) dramatically reduces the recovery available to individuals who elect to arbitrate a dispute [of] their individual claim with their employer. Offsetting that small recovery with the expense of such a complex action ensures that individual arbitrations of defendants' overtime practices will not occur. Under those same arbitration policies, defendants deprived employees of their rights to proceed as private attorneys general. In addition, Ralphs inserted terms that guaranteed Ralphs the right to select the [arbitrator] and to terminate or modify the terms of the plan in its sole and absolute discretion. And, Ralphs [also] issued these policies as part of a bonus plan, without sufficient time for the employees to make an informed decision whether they wished to exercise their right to 'opt-out' of the accompanying bonus plan. The obvious one-sidedness of Ralphs' dispute resolution mechanism creates yet another impediment to an individual employee seeking to vindicate his or her statutory rights to receive overtime pay through the arbitral process.

"E. Federal Preemption Does Not Preclude Invalidating Ralphs' Class Arbitration Waiver

"Defendants' contention that any effort to apply *Gentry* to invalidate Ralphs' class arbitration waiver would be preempted by federal law is without merit. As clearly stated

by the [California] Supreme Court, '[w]e [do not] accept Circuit City's argument that a rule invalidating class arbitration waivers discriminates against arbitration clauses in violation of the Federal Arbitration Act.' 42 Cal.4th at 465. Rather, by striking down the waiver and allowing employees to proceed with class arbitration, this court's ruling is consistent with the 'liberal policy favoring arbitration agreements.' As noted in *Gentry*, '[w]e . . . continue to reject Circuit City's suggestion that class actions are incompatible with arbitration and that compelling class arbitrations in the appropriate case violates the FAA.' Id.

"F. Conclusion

"Just as in *Gentry*, the class arbitration waivers found in this case jeopardize the rights of its employees by prohibiting the most practical and most likely, only, effective means of challenging defendants' overtime practices.

"For the reasons set forth above, defendants' motion to enforce its class action waiver and to, thereby, compel individual arbitration is denied. . . ."[10]

Ralphs appeals.[11]

DISCUSSION

"'Whether an arbitration provision is unconscionable is ultimately a question of law.'" (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1511, citing *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1567.) "'We are not bound by the trial

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10 The trial court rejected Ralphs' objections to the court's tentative statement of intended decision and adopted the tentative statement as its final statement of decision.

11 Ralphs filed its notice of appeal under the case number for the Massie action only (BC 321144). However, the notice indicated that Ralphs appealed from the "[o]rder denying a petition to compel arbitration under Code of Civil Procedure section 1294(a)" entered on "March 8, 2010." The referenced order identified "CASE NO. BC321144 [the Massie action] related case BC321704 [the McLeod action]." (Similarly, the court's statement of intended decision had identified "CASE NO. BC321144 R[elated]/T[o] CASE NO. BC321704." The text of the court's order specifically identified both actions.

court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale.'" (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433, citation omitted.) Generally speaking, "an appealed judgment or order *correct on any theory* will be *affirmed*, even though the trial court's reasoning may have been erroneous." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) [¶] 8:214, p. 8-147, original italics, citing *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.) "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*Davey v. Southern Pacific Co., supra,* 116 Cal. at p. 329.)

"'To justify a reversal, it is incumbent upon the appellant to show an erroneous ruling, and not merely bad reasoning or mistaken views of the law.'" [Citations.] In other words, it is judicial action, and not judicial reasoning or argument, which is the subject of review; and, if the former be correct, we are not concerned with the faults of the latter." (*Davey v. Southern Pacific Co., supra,* 116 Cal. at pp. 329-330.)

Just five days after Ralphs filed its opening brief, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740] (*Concepcion*). By a five-to-four majority, the *Concepcion* court held that the California Supreme Court's rule in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 [30 Cal. Rptr. 3d 76, 113 P.3d 1100] (*Discover Bank*)—that class action waivers in consumer arbitration agreements may be unenforceable or unconscionable—is preempted by the FAA. "[W]hen a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration," a court must determine whether the state law rule "stand[s] as an obstacle to the accomplishment of the FAA's objectives"--primarily to "ensure that

private arbitration agreements are enforced according to their terms." (*Concepcion, supra,* 131 S.Ct. at p. 1748.) "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Ibid.*)

According to Ralphs, *Concepcion* now conclusively establishes that *Gentry v. Superior Court, supra,* 42 Cal.4th 443 is preempted by the Federal Arbitration Act.

In this appeal, however, we need not decide whether *Gentry, supra,* 42 Cal.4th 443 survives *Concepcion, supra,* 563 U.S. ___ [131 S.Ct. 1740] or whether the class action waiver, standing alone, is unenforceable; from the outset, the plaintiffs in this case have argued the arbitration agreements at issue are both procedurally and substantively unconscionable for multiple deficiencies beyond the class action waiver.[12] We agree.[13]

"*Concepcion* did not overthrow the common law contract defense of unconscionability whenever an arbitration clause is involved. Rather, the Court reaffirmed that the savings clause preserves generally applicable contract defenses such as unconscionability, so long as those doctrines are not 'applied in a fashion that disfavors arbitration.'" (*Kilgore v. KeyBank, N.A.* (2012) 2012 U.S. App. LEXIS 4736, citing *Concepcion, supra*, 131 S. Ct. at 1747.) "[A] court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that

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12 We note that in *Sanchez v. Valencia Holding Company* (2011) 201 Cal.App.4th 74, Division One determined that "*Concepcion, supra,* 563 U.S. __ [131 S.Ct. 1740], does not preclude the application of the unconscionability doctrine to determine whether an arbitration provision is unenforceable," and our Supreme Court has granted review in this case. (*Sanchez v. Valencia Holding Company, supra,* 201 Cal.App.4th 74, review granted Mar. 21, 2012, S199119.)

13 In an unpublished decision in *Vu v. Superior Court* (Nov. 17, 2009, B213988) [nonpub. opn.], we addressed a substantially similar iteration of Ralphs arbitration policy and found it to be procedurally and substantively unconscionable and unenforceable as a result. (See also *Chavarria v. Ralphs Grocery Company* (2011) 2011 U.S. Dist. LEXIS 104694.)

enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" (*Concepcion, supra,* 131 S.Ct. at p. 1747.)

"[C]ourts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), and enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)." (*Concepcion, supra,* 131 S.Ct. at pp. 1745-1746.) "The final phrase of [title 9, United States Code, section] 2 . . . permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract." (*Id.* at p. 1746.) "Under California law, courts may refuse to enforce any contract found 'to have been unconscionable at the time it was made,' or may 'limit the application of any unconscionable clause.' Cal. Civ. Code Ann. § 1670.5(a) (West 1985). A finding of unconscionability requires 'a "procedural" and a "substantive" element, the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results.'" (*Ibid.*) "Unconscionability has generally been recognized to include (1) an absence of meaningful choice on the part of one of the parties and (2) contract terms which are unreasonably favorable to the other party." (*Chavarria v. Ralphs Grocery Company* (2011) 2011 U.S. Dist. LEXIS 104694, p. 11, citing *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1526-1527.)

Procedural Unconscionability

Leaving to one side the evidence the plaintiffs presented that they were pressured to sign the arbitration agreements and were required to accept the arbitration terms in order to receive bonuses for which they had already worked, the agreements themselves establish the agreements were presented on a "take it or leave it" basis. The 2001 Policy states that the arbitration agreement is "a term of all Employees' employment." According to the 2003 Policy, it is a "term of all Employees' employment (or application

for employment)." The 2004 Policy specifies that it "applies to all Employees' employment," that "continuation of employment with the Company by an Employee is deemed the Employee's acceptance of this Arbitration Policy" and that it applies to employees whose employment has terminated. To the extent Ralphs claims some employees had the opportunity to "opt out" of the arbitration policy (within a 14-day window without any specification of to whom such a request was to be directed and forfeiting any bonus), such an option was illusory since continued employment purportedly constituted acceptance of arbitration—no signature is even required. Even an employee who attempted to opt out of the arbitration policy and even lost a bonus as a result would find the arbitration policy still applied—an added element of surprise. (See also *Chavarria v. Ralphs Grocery Company, supra,* 2011 U.S. Dist. LEXIS 104694.)

Substantive Unconscionability

For the reasons identified in *Chavarria v. Ralphs Grocery Company, supra,* 2011 U.S. Dist. LEXIS 104694 (as well as *Vu v. Superior Court, supra,* B213988), we find Ralphs arbitration policy to be substantively unconscionable as well. Substantive unconscionability "turns not only on a 'one-sided result,' but also on an absence of 'justification' for it." (*Ellis v. McKinnon Broadcasting Co.* (1993) 18 Cal.App.4th 1796, 1806, citations omitted.) Here, in addition to Ralphs' preclusion of all representative, class and private attorney general actions (see *Brown v. Ralphs Grocery Company* (2011) 197 Cal.App.4th 489) (and notwithstanding the trial court's factual findings under *Gentry*), in the same agreement it touts as fair and for the benefit of everyone involved, the Ralphs arbitration policy mandates confidentiality as to the "existence, content and outcome" of any proceeding (see *Davis v. O'Melveny & Meyers* (2007) 485 F.3d 1066, 1079, overruled on another ground in *Kilgore v. KeyBank, supra,* 2012 U.S. App. LEXIS 4736 [similar confidentiality provision "too broad," "contrary to public policy," and therefore substantively unconscionable under California law]); prohibits arbitration before providers maintaining their own procedural safeguards in conflict with the

limitations Ralphs seeks to impose (see *Martinez v. Master Protection Corp*. (2004) 118 Cal.App.4th 107 [American Arbitration Association refused to conduct employment arbitration pursuant to agreement containing similar deficiencies]); attempts to shorten the limitations period (and thus limit available damages) and impose arbitration costs and fees on employees (see *id*. at p. 116); and provides Ralphs may modify the agreement so long as it does so in writing or otherwise allows itself to do pursuant to its own policy (see *Ingle v. Circuit City Stores, Inc*. (9th Cir. 2003) 328 F.3d 1165, 1173, 1179; *Circuit City Stores, Inc. v. Mantor* (9th Cir. 2003) 335 F.3d 1101, 1107), among other one-sided provisions. (See also *Chavarria v. Ralphs Grocery Company, supra,* 2011 U.S. Dist. LEXIS 104694 at p. 16 [the method Ralphs devised for the selection of an arbitrator amounts to a "sham"; if the parties do not mutually agree on an arbitrator, the end result is that the "last arbitrator standing" will always be one of three arbitrators proposed by Ralphs].)

In light of the numerous deficiencies in Ralphs' arbitration policy, severance of an offending provision is no cure in this case; we find the policy is permeated with unconscionability and unenforceable as a result. (Civ. Code, § 1670.5, subd. (a).)

As the court in *Chavarria v. Ralphs Grocery Company, supra,* 2011 U.S. Dist. LEXIS 104694 stated, "Ralphs' arbitration policy lacks any semblance of fairness and eviscerates the right to seek civil redress, rendering it a right that exists in name only. To condone such a policy would be a disservice to the legitimate practice of arbitration and a stain on the credibility of our system of justice." As we said in finding Ralphs' arbitration policy unenforceable in *Vu v. Superior Court,* "This is not a close case."

DISPOSITION

The orders are affirmed. The plaintiffs are entitled to their costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**