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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

ARSEN HOVANESYAN, Plaintiff and Respondent, v. GLENDALE INTERNAL MEDICINE & CARDIOLOGY MEDICAL GROUP, INC., et al., Defendants and Appellants.	B277855 (Los Angeles County Super. Ct. No. BC624258)

APPEAL from an order of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

Sheppard, Mullin, Richter & Hampton, Ryan D. McCortney and Jason M. Guyser for Defendants and Appellants.

Solomon, Saltsman & Jamieson, Ralph Barat Saltsman, Stephen Warren Solomon, Ryan M. Kroll and Melissa H. Gelbart for Plaintiff and Respondent.

In this employment case, defendants Glendale Internal Medicine & Cardiology Medical Group, Inc., and several employees (together Glendale Internal) appeal the trial court's order denying their motion to compel plaintiff cardiologist Arsen Hovansyan to arbitrate his breach of contract, statutory, and tort claims pursuant to a clause in his employment contract. The trial court found plaintiff's tort claims were not covered by the arbitration agreement. For the contract and statutory claims, it concluded the Federal Arbitration Act (9 U.S.C. § 1 et al.) (FAA) did not apply, and even if it did, the agreement to arbitrate was unconscionable.

We conclude the trial court correctly held the arbitration agreement was unconscionable. Because that issue is dispositive, we need not address the court's other holdings and affirm.

BACKGROUND

Plaintiff is a licensed physician who began working for Glendale Internal as a cardiologist on March 28, 2011. He signed a written nine-page employment agreement that contained the following arbitration clause in the same size font as the rest of the agreement but split between pages seven and eight:

"Arbitration. Except as provided below, the parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement (referred to collectively hereafter as the 'Dispute'), that are not resolved by their mutual agreement shall be resolved by final and binding arbitration as the exclusive remedy. Either party may commence the arbitration process by filing a written demand for arbitration with JAMS and sending a copy to the other party. The arbitration shall be conducted by one arbitrator selected from a list of arbitrators provided by JAMS, or its successor, in Los Angeles County, California. If the parties are unable to agree upon an arbitrator from the list provided, the

parties shall alternate in striking names of arbitrators from the list until one is left who shall be the arbitrator. The parties will cooperate in scheduling the arbitration proceedings. The arbitration will be conducted in accordance with the JAMS Comprehensive Arbitration Rules and Procedures in effect at the time arbitration is initiated. The arbitrator is authorized to award any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court. The arbitrator shall have the authority to order such discovery as the arbitrator considers necessary to a full and fair exploration of the Dispute, consistent with the expedited nature of arbitration. Proceedings to enforce, confirm, modify, set aside or vacate an award or decision rendered by the arbitrator will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec. 1 et[] seq. or applicable state law. Nothing in this Section shall prohibit or limit the parties from seeking provisional remedies under California Code of Civil Procedure (CCP) section 1281.8, including, but not limited to, injunctive relief from a court of competent jurisdiction. The parties hereby agree that should any arbitration occur between the parties with respect to a Dispute or should any party seek a provisional remedy under CCP section 1281.8, the prevailing party shall be entitled to recover from the losing party all of its/his/hers [*sic*] reasonable attorneys' fees and costs and arbitrator's fees incurred in connection therewith, provided that the award of such fees and costs to the prevailing party would not be contrary to applicable law. Should either party initiate litigation in a court in violation of this paragraph, the party who successfully compels arbitration shall be entitled to recover its/his/hers [*sic*] attorney's fees and costs incurred in compelling arbitration from the

party who violated this paragraph, and a court may require the payment of such attorney's fees and costs as part of its order compelling arbitration."

Plaintiff was terminated on March 15, 2016. He filed a complaint thereafter alleging nine causes of action: (1) retaliation (Health & Saf. Code, § 1278.5); (2) wrongful termination in violation of public policy; (3) breach of the employment agreement; (4) waiting time penalties (Lab. Code, § 203); (5) breach of the implied covenant of good faith and fair dealing; (6) defamation; (7) violation of Civil Code section 43; (8) intentional interference with prospective economic relations; and (9) negligent interference with prospective economic relations. The first five claims were based on allegations plaintiff was wrongfully terminated when he complained about unsafe patient care and negligent medical practices. The latter four claims (collectively the "tort claims") were based on allegations that defendants made a host of false statements about plaintiff after his employment ended.

Glendale Internal moved to compel arbitration of all plaintiff's claims pursuant to his employment agreement. It argued the FAA applied because Glendale Internal engaged in interstate commerce, and the clause was neither procedurally nor substantively unconscionable. Plaintiff opposed the motion on a variety of grounds. He argued (1) the arbitration clause did not apply to the tort claims, which arose after his employment ended; (2) the FAA did not apply because the agreement did not affect interstate commerce; and (3) the clause was both procedurally and substantively unconscionable. As to unconscionability, he argued the clause was procedurally unconscionable because it was a contract of adhesion and he was not given the applicable JAMS rules, which were unknown at the time. He contended the clause

was substantively unconscionable because it failed to ensure he would not pay arbitration expenses; it failed to provide for a neutral arbitrator; it contained a one-sided attorney fee provision in Glendale Internal's favor; and the JAMS rules regarding admissibility of evidence and cross-examination were unconscionable.

In support of his opposition, plaintiff declared he was told he "needed to sign this document in order to work for Glendale Internal." When he asked if he could discuss modifying any terms, he was told "[t]o either sign it as is or we'll move on to the next applicant." He was also told there were several other applicants interested in the job and that he should take or leave the agreement as it was because it was the only contract he would be offered. He also stated nobody explained the arbitration provision to him and he was not given any JAMS rules. In any case, he could not have reviewed the applicable rules prior to signing the agreement because the rules that Glendale Internal contended applied became effective July 1, 2014, three years after he signed the agreement.

In reply, Glendale Internal submitted several e-mails that allegedly showed plaintiff had bargaining power and negotiated some terms of the agreement. In the first e-mail, dated January 24, 2011, Glendale Internal office manager Kym Bennett wrote: "Just in case you [can't] find the Verdugo Hills Staff Application from a while back, here is one. Dr. Dalinger and Dr. Aleman are very interested in you joining the group. Do you still have the contract I sent you a while back?" In a January 25, 2011 response, plaintiff said: "Yes I do have a copy. I am interested in the group as well and think now would be a good time to start discussions as colleagues of mine are starting to get offers, and there are over 5-7 openings for general cardiologists in the city, which was unheard of

in years past. [¶] I have enjoyed getting to know [certain doctors], as well as yourself and the office staff. And I know that my interest in imaging will be productive for the group. Plus, I would have fun working with the groups patient population." Bennett responded the next day, January 26, 2011, stating, "Was there something that you want added to the employment agreement that we sent previously? [¶] I asked Dr. Aleman about the overhead for the 2nd year and he wanted to know what you wanted it to be." She then discussed details regarding overhead cost allocation.

In a later e-mail dated February 3, 2011, Bennett wrote, "I am assuming you have found another job offer since you have not gotten back to me about the employment contract." Plaintiff responded on February 9, 2011, "I have thoroughly read and made small changes to the contract you sent me in [*sic*] August 10 and can email it back to you whenever you'd like."

A month later on March 10, 2011, Bennett e-mailed plaintiff about insurance details. The same day plaintiff sent the contract to Bennett, noting among other things that he made "very little changes. The hardest part for me was conceding on the interventional call, but Dr. Aleman gave me his word that efforts would be made not to have me do interventional call, and I trust him, and I like and respect the group highly, such that I can live with it. [¶] Regarding the tail coverage, the second draft you sent me completely omitted it, so I added it back in without changing any of the verbage [*sic*], which again leaves me responsible for tail coverage. Again, I have no intentions of leaving the group, but the numbers I got from Don were astronomical. He said though, there are ways around it, such as if the group highers [*sic*] someone else to replace the leaving party, then the policy would simply continue. [¶] The other problem is that Don thought I would be non-invasive.

But I intend to be invasive (diagnostic cath, pa cath, central lines, etc), but non-interventional. So he will be giving you two different quotes. [¶] Finally, I took out the portion about receipts for the relocation. It would be in all of our best interest to have me live close to Adventist, and its [*sic*] only a modest fee."

In response, Bennett wrote in relevant part, "I will get you a signed copy of the contract for your records next week. I need to review the contract again and see what happened to the last draft I sent you. My draft still has the tail coverage clause in it. I must have hit a block of delete keyes [*sic*] and did not save it to my copy."

After a hearing, the trial court denied the motion, finding the tort claims were not subject to arbitration and suggesting the FAA did not apply to the remaining claims. Even if the FAA did apply, the court held the agreement was unconscionable under state and federal law. Citing plaintiff's declaration, the court found "some procedural unconscionability" because the agreement was presented on a take-it-or-leave-it basis and Glendale Internal did not attach the JAMS rules.

The court found three provisions were substantively unconscionable. First, the provision granting attorney fees to the party who successfully compels arbitration only benefitted Glendale Internal. The court reasoned, "This court is well-aware that it is only the plaintiff/employee who files the complaint in court, and it is the defendant/employer who moves to compel arbitration. Thus, under the terms of this section, a defendant who is successful in compelling arbitration will get its attorney's fees paid. However, if the plaintiff is successful in opposing arbitration, there is no corresponding provision to allow plaintiff to have his attorney's fees paid."

Second, the court was concerned the provision entitling the prevailing party to recover arbitration costs at the end of arbitration would improperly allow the arbitrator to order plaintiff to pay arbitration costs and fees.

Finally, the court found the arbitrator selection process did not ensure a neutral arbitrator. It explained: "The agreement provides that the arbitrator is to be selected from a list of arbitrators provided by JAMS, and if the parties are unable to agree upon an arbitrator from the list, the parties will alternate in striking the names of arbitrators from the list until one is left. This is not sufficient to provide for a neutral arbitrator because there is no indication that the list will only consist of neutral persons and there appears to be no provision that plaintiff will have the right to reject the last remaining person from the list if that person (and all others) are not neutral. For instance, if the list contained 20 names who were pro-defendant and 10 names that were pro-plaintiff, the procedure in effect would guarantee that the arbitrat[or] selected would be pro-defendant."

The court concluded that, "[w]hile any one of these three reasons might not be enough, in and of itself, to find that the arbitration agreement is unconscionable," the three provisions together made the arbitration clause substantively unconscionable.

Glendale Internal timely appealed the order. (Code Civ. Proc., § 1294, subd. (a); *Buckhorn v. St. Jude Heritage Medical Group* (2004) 121 Cal.App.4th 1401, 1406.)

DISCUSSION

Glendale Internal challenges every aspect of the trial court's decision. We will assume for the sake of our decision that the FAA applies and plaintiff's tort claims fall within the agreement to arbitrate because we conclude the trial court properly found the

agreement unconscionable and unenforceable, which is dispositive.[1] (See *Bigler v. Harker School* (2013) 213 Cal.App.4th 727, 735 (*Bigler*).)

1. Legal Standards

Both federal and California law embrace a liberal policy favoring arbitration. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97-98 (*Armendariz*); *Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 284 (*Magno*); see *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 (*Concepcion*).) Hence, "arbitration agreements are valid, irrevocable, and enforceable except on grounds that exist for revocation of contracts more generally," such as unconscionability. (*Magno, supra*, at p. 284; see *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 (*Pinnacle*); see *Concepcion, supra*, at pp. 339.) As the party asserting unconscionability, plaintiff bears the burden to demonstrate the agreement was unenforceable. (*Magno, supra,* at p. 284.)

Both procedural and substantive unconscionability must be present to refuse to enforce an arbitration agreement. (*Magno, supra,* 1 Cal.App.5th at pp. 284-285.) "The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the

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[1] For the first time on appeal, plaintiff argues the parties never actually agreed to arbitration because the agreement did not identify the applicable JAMS rules, citing *Flores v. Nature's Best Distribution, LLC* (2016) 7 Cal.App.5th 1. We need not address this contention because even if he did agree to arbitrate his claims, we find the agreement unconscionable.

fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." (*Pinnacle, supra,* 55 Cal.4th at p. 246.) These elements need not be present in equal measure; instead, they exist on a sliding scale, so " ' " '[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.' " ' [Citation.] 'The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement.' " (*Magno, supra*, at p. 285.)

We review the trial court's resolution of disputed facts for substantial evidence and decide de novo whether the facts, as so found, constitute unconscionability. (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 795 (*Ajamian*).)

2. Procedural Unconscionability

As noted, procedural unconscionability involves oppression or surprise in the formation of the contract. Oppression exists when " ' "a contract involves lack of negotiation and meaningful choice," ' " and surprise exists " ' "where the allegedly unconscionable provision is hidden within a prolix printed form." ' " (*Pinnacle, supra,* 55 Cal.4th at p. 247.) " '[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. . . . Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum. [Citation.] Ordinary contracts of adhesion, although they are indispensible facts of modern life that are generally enforced [citation], contain a degree of procedural unconscionability even without any notable surprises, and "bear within them the clear danger of oppression and overreaching." ' " (*Baltazar v. Forever 21,*

Inc. (2016) 62 Cal.4th 1237, 1244 (*Baltazar*).) In the context of employment agreements, we must be " 'particularly attuned' " to this danger, where " 'economic pressure exerted by employers on all but the most sought-after employees may be particularly acute.' " (*Ibid.*)

Substantial evidence supported the trial court's finding of "some" procedural unconscionability. The court credited plaintiff's declaration that when he asked if he could discuss modifying any terms in the agreement, he was told he needed to sign it as is to work for Glendale Internal; otherwise, Glendale Internal would "move on to the next applicant." He was also told there were several other applicants interested in the job and he should take or leave the agreement as it was because it was the only contract he would be offered.

Glendale Internal cites the e-mails between plaintiff and Bennett to argue plaintiff had at least seven months to review the agreement, he had bargaining power, and he actually negotiated a few terms. It also claims the trial court abused its discretion in relying on plaintiff's declaration because his version of the facts were irreconcilable with those e-mails.[2]

The e-mails are not incompatible with plaintiff's claim he was required to sign the agreement without negotiation because none of them indicate plaintiff could *actually* negotiate the substantive terms. In his March 10, 2011 e-mail discussing a few terms, he

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[2] Plaintiff objected to these e-mails in the trial court because Glendale Internal submitted them for the first time in reply to its motion to compel arbitration. The court's order is silent on the objection, but even if the court had overruled the objection and considered this evidence, the court implicitly rejected the evidence when it found the agreement procedurally unconscionable.

noted that he made "very little changes" to the contract and explained his understanding of terms already in there. He said with regard to one term, the "hardest part for me was conceding" it. While he did remove a portion about "receipts for the relocation," he apparently thought that was a minor point and was in both parties' best interests.

Likewise, the seven months plaintiff apparently had the contract did not suggest he had bargaining power or could negotiate. Bennett's January 24, 2011 e-mail strongly suggested the parties did not discuss the contract during the first five months he had it because she asked him, "Do you still have the contract I sent you a while back?" The parties also did not appear to discuss it much after that, given Bennett wrote in her February 3, 2011, "I am assuming you have found another job offer since you have not gotten back to me about the employment contract."

While plaintiff—a cardiologist—might have been more sophisticated than lower-level employees, the trial court was entitled to rely on his declaration to find the contract was offered on a take-it-or-leave-it basis, which showed some degree of procedural unconscionability. (*Ajamian, supra,* 203 Cal.App.4th at p. 796 ["The finding that the arbitration provision was part of a nonnegotiated employment agreement establishes, by itself, some degree of procedural unconscionability."].)

The court also relied on the fact that plaintiff was not given a copy of the applicable JAMS rules or told where he could obtain a copy. This is not surprising given the arbitration clause called for applying the JAMS rules in effect at the time of the arbitration. Neither party had any way to know exactly what rules would be in effect at that undefined point in the future.

" '[N]umerous cases have held that the failure to provide a copy of the arbitration rules to which the employee would be bound supported a finding of procedural unconscionability.' " (*Baltazar, supra,* 62 Cal.4th at p. 1246; see also *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 244-245 (*Carbajal*) [citing cases].) In *Baltazar,* our high court clarified the failure to attach the applicable rules contributes to procedural unconscionability only when the plaintiff also challenges some element of those rules as substantively unconscionable. (*Baltazar, supra,* at p. 1246.) As we will discuss, plaintiff has challenged JAMS Comprehensive Arbitration Rules & Procedures, rule 31 regarding arbitration costs as substantively unconscionable.[3]

Clearly identifying and attaching the applicable rules is important to avoid "surprise to the party opposing arbitration." (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 690 (*Lane*).) Failing to do so " 'contributes to oppression because the employee "is forced to go to another source to find out the full import of what he or she is about to sign—and must go to that effort *prior* to signing." ' [Citation.] The level of oppression is increased when . . . the employer not only fails to provide a copy of the governing rules, but also fails to clearly identify which rules will govern so the employee could locate and review them." (*Carbajal, supra*, 245 Cal.App.4th at p. 245.)

In this case, we are not faced with the risk of surprise from failing to attach *existing* rules or clearly designating which *existing* rules would apply. (See *Carbajal, supra*, 245 Cal.App.4th at pp. 242-243.) Instead, the arbitration provision called for applying

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3 All further references to the JAMS rules are to the JAMS Comprehensive Arbitration Rules & Procedures effective July 1, 2014, unless otherwise indicated.

JAMS rules that *did not yet exist*, so plaintiff could not have sought them out and reviewed them. If failing to attach or clearly designate existing rules demonstrates some measure of procedural unconscionability, then surely selecting nonexistent rules does as well. (Cf. *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407 [oppression existed because it was "unclear whether an arbitration would be conducted under the Better Business Bureau rules as of the time of contracting, or at the time of arbitration," which could create a preliminary legal battle over the applicable rules].)

Glendale Internal cites *Bigler* to argue "[i]t is not uncommon for arbitration agreements to specify that the applicable rules will be the particular set of rules in effect at the time arbitration is initiated." While true the arbitration clause in *Bigler* subjected any arbitration to the American Arbitration Association (AAA) rules " 'then in effect' " (*Bigler, supra*, 213 Cal.App.4th at p. 732), the court did not analyze the significance of that fact other than to say in a single sentence that "the absence of the AAA rules is of minor significance to our analysis" (*id.* at p. 737). Thus, to the extent *Bigler* affects our analysis at all, it actually supports our conclusion that the designation of rules that do not exist contributes to procedural unconscionability.

Glendale Internal also cites *Lane* to argue the failure to attach the applicable rules is not procedurally unconscionable because plaintiff was sophisticated and, quoting *Lane*, "does not appear to lack the means or capacity to locate and retrieve a copy of the referenced rules." (*Lane, supra,* 224 Cal.App.4th at pp. 691-692.) The problem with this statement should be obvious: Even if plaintiff were highly sophisticated, he was not prescient, so he had no way to know what rules would apply when he signed the agreement.

Finally, at oral argument, Glendale Internal cited JAMS rule 4, "Conflict with Law," which provides: "If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected." We discuss this Rule in more detail below as it relates to substantive unconscionability, but it does not affect our conclusion that designating future JAMS rules constituted unfair surprise. Inconsistencies between any particular rule and applicable law is not the issue. The key point is that plaintiff could not have sought out and reviewed *any* applicable rules because they did not yet exist, and JAMS rule 4 does not change that fact.

3. Substantive Unconscionability

Substantive unconscionability refers to " ' "terms that are 'unreasonably favorable to the more powerful party.' " ' [Citation.] 'The substantive component of unconscionability looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner.' " (*Magno, supra,* 1 Cal.App.5th at p. 288.) The trial court found three aspects of the arbitration agreement together rendered the agreement substantively unconscionable: (1) it improperly imposed arbitration costs on plaintiff; (2) it failed to provide for a neutral arbitrator; and (3) it contained a one-sided attorney fees provision. We agree on points one and three.[4]

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[4] Plaintiff briefly points to other JAMS rules that he claims contribute to unconscionability, such as rules allowing the arbitrator to stray from the rules of evidence (JAMS rule 22(d)) and to rely on affidavits not subject to cross-examination (JAMS rule 22(e)). This argument is not well-developed and we need not

a. Arbitration Costs

Under California law, when subjecting an employee's statutory and public policy claims to arbitration, an employer must pay all costs unique to arbitration. (See *Armendariz, supra,* 24 Cal.4th at p. 113; see also *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076; *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 279-280 (*O'Hare*).) Glendale Internal argues this rule applies only to unwaivable statutory and public policy claims "carefully tethered to fundamental policies delineated in constitutional or statutory provisions" (*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 506), and only three of plaintiff's nine claims fall into that category—his retaliation, wrongful termination, and Labor Code section 203 claims. The implication appears to be that the rule from *Armendariz* preventing the employee from paying costs does not apply to this type of "mixed" case.

Glendale Internal has cited no case refusing to apply *Armendariz* to a case involving both unwaivable statutory/public policy claims and common law claims. We believe *Armendariz* must apply for the simple reason Glendale Internal cannot have it both ways—it cannot demand arbitration of *all* plaintiff's claims and avoid the *Armendariz* requirements simply because only some of those claims assert unwaivable rights. It would directly undercut the primary goal in *Armendariz* to "ensure that employees bringing [nonwaivable] claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially

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address it because the other grounds discussed *post* supported the trial court's decision.

imposed on an employee by the employer." (*Armendariz, supra*, 24 Cal.4th at p. 111.)

Turning to the agreement here, it imposes costs on plaintiff in contravention of *Armendariz*. It provides that after arbitration, "the prevailing party shall be entitled to recover from the losing party all of its/his/hers [*sic*] reasonable attorneys' fees and costs and arbitrator's fees incurred in connection therewith, provided that the award of such fees and costs to the prevailing party would not be contrary to applicable law." While bilateral, this clause would obviously require plaintiff to pay the costs of arbitration if he loses, creating a "sense of risk and uncertainty among employees that could discourage the arbitration of meritorious claims." (*Armendariz, supra*, 24 Cal.4th at p. 111.)

Glendale Internal points out the costs provision allows the arbitrator to award costs so long as doing so "would not be contrary to applicable law." Glendale Internal argues, "It is up to the arbitrator to determine whether applicable law would permit the recovery of such costs and fees depending on the party seeking the costs and fees and the claims at issue." But *Armendariz* made clear it is *not* up to the arbitrator to decide whether to impose costs on an employee who brings unwaivable claims. To include a clause raising the specter of allocating costs to the employee at the end of arbitration fosters the uncertainty and deterrence condemned by *Armendariz*.

The agreement also does not address who pays costs prior to or during arbitration. In *Armendariz*, the court interpreted an arbitration agreement silent on cost allocation as requiring the employer to pay all expenses, which solved the issue of unconscionability on that point. (*Armendariz, supra,* 24 Cal.4th at p. 113.) Here, though, the agreement incorporated the JAMS rules

in effect at the time of arbitration. Effective July 1, 2014, JAMS rule 31 requires each party to pay "its *pro rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation of fees and expenses." Those fees must be paid "from time to time during the course of the proceedings and prior to the Hearing." If a party fails to pay those fees, the arbitrator could suspend the case or preclude the party from offering evidence of any affirmative claim. The section also makes the parties jointly and severally liable for the fees.

By its plain terms, JAMS rule 31 not only requires plaintiff to pay a share of arbitration costs, but it places plaintiff's entire right to recovery at risk if he is unable to do so. It also creates the risk he would be responsible for Glendale Internal's share of costs if it did not pay. This rule violates *Armendariz*. (See *O'Hare, supra,* 107 Cal.App.4th at pp. 279-280 [contract silent on allocating costs but incorporating arbitration rule allocating costs to employee contravened *Armendariz*]; but see *Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1276, & fn. 5 [implying employer obligation to pay arbitration costs for nonwaivable statutory claims despite arbitration rules to the contrary].)

Glendale Internal points out JAMS rule 31 provides for cost sharing "unless the Parties agree on a different allocation of fees and expenses." According to Glendale Internal, the parties did just that when they agreed to allow the arbitrator to apportion costs to the prevailing party after the arbitration. But these are two entirely separate provisions—the JAMS rule governs who pays costs *during* the arbitration, whereas the agreement allows the arbitrator to award costs at the *end* of arbitration. And both

provisions still impose the costs on plaintiff, either during or after the arbitration, in violation of *Armendariz*.

Glendale Internal also directs us to JAMS rule 4, which calls for following the applicable law over any conflicting JAMS rules, as we discussed above. The argument goes: if we conclude *Armendariz* applies to preclude plaintiff from paying arbitration costs, JAMS rule 4 would preclude plaintiff from paying any costs under JAMS rule 31. Courts have rejected similar arguments from employers attempting to nullify the unconscionable effect of invalid provisions. (See *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1147 (*Samaniego*) [rejecting employer's argument that invalid attorney fees provision can be ignored because it was illegal and unenforceable]; *O'Hare, supra,* 107 Cal.App.4th at pp. 280-281 [rejecting employer's post hoc offer to pay arbitration costs despite invalid arbitration rule allocating costs to employee " 'unless the law provides otherwise' "].) Also, that Glendale Internal expected plaintiff to anticipate these twists and turns in a set of rules that may not have existed at the time he signed the agreement simply underscores the unfairness of the agreement.

b. Selection of Arbitrator

Beyond the costs provision, the trial court was concerned the arbitrator selection process does not necessarily ensure a neutral arbitrator. The agreement provides the arbitrator would come from a list provided by JAMS; if the parties cannot agree on the arbitrator, they will alternate striking names from the list until one name is left. The trial court believed this arrangement could result in a pro-defendant arbitrator and plaintiff would be unable to strike that person at the end of the process.

We see this provision as less problematic. The agreement provides both parties the opportunity to participate in the selection process based on a list of names from JAMS. As Glendale Internal points out, there are multiple safeguards to ensure the arbitrator is neutral. For instance, JAMS rule 15(b) allows JAMS to "replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice." JAMS rule 15(h) requires the parties to "disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives." Of course, we have no evidence these rules were in effect at the time the parties signed the agreement. Even so, statutory provisions require arbitrators to make disclosures to the parties, allow the parties to disqualify arbitrators on that basis, and require arbitration companies to make certain disclosures to the public. (Code Civ. Proc., §§ 1281.9, 1281.91, 1281.96.) Given these safeguards, the arbitrator selection provision shows little substantive unconscionability in the agreement.

c. Attorney Fees for Successful Motion to Compel

Like the trial court, we are troubled by the provision allowing for an award of attorney fees if one of the parties initiates a claim in court "in violation of this paragraph" and is compelled to arbitrate. The trial court was concerned this provision was not bilateral because "in reality it can only adhere to the benefit of the defendant. This court is well-aware that it is only the plaintiff/employee who files the complaint in court, and it is the defendant/employer who moves to compel arbitration. Thus, under the terms of this section, a defendant is successful in compelling

arbitration will get its attorney's fees paid. However, if the plaintiff is successful in opposing arbitration, there is no corresponding provision to allow plaintiff to have his attorney's fees paid."

The court's analysis does not account for Civil Code section 1717. That provision states in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).)

If Civil Code section 1717 makes this clause technically reciprocal—a point we do not decide—the practical effect of this clause still tilts strongly against plaintiff because it will deter him from challenging the enforceability of the arbitration clause. Absent a clear delegation of authority—which we do not have here—enforceability of the arbitration clause is a question for the court. (*Ajamian, supra,* 203 Cal.App.4th at p. 781.) But if plaintiff files a claim in court challenging the agreement and loses, he will have "initiate[d] litigation in a court in violation of" the arbitration paragraph, rendering him responsible for Glendale Internal's attorney fees. Even if he has a strong claim of unconscionability, he might not pursue it if there is even a small chance he could owe a substantial sum to Glendale Internal before arbitration begins. Glendale Internal points again to JAMS rule 4, but Glendale Internal cites no JAMS rules this attorney fees provision purports to modify. Indeed, this provision is triggered before the case is even ordered to arbitration.

4. Sliding Scale

Having identified "some" procedural unconscionability and two substantively unconscionable provisions, we must place the parties' agreement on the "sliding scale" of unconscionability. We do this to determine whether " 'the totality of the agreement's substantive terms as well as the circumstances of its formation' " created an " 'unreasonably one-sided' " bargain. (*Carbajal, supra*, 245 Cal.App.4th at p. 242.) Again, " '[t]he ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement.' " (*Magno, supra,* 1 Cal.App.5th at p. 285.)

In this case, the trial court was presented with this scenario: Glendale Internal imposed a contract on plaintiff with a nonnegotiable arbitration provision and told him he must either accept the contract as-is or look for employment elsewhere. The agreement imposed a postarbitration cost provision that violated *Armendariz* and identified governing arbitration rules that did not yet exist. The rules that became effective included a cost rule that also violated *Armendariz*. Then the agreement included an attorney fees clause that would deter plaintiff from challenging the enforceability of the provision in court. Like the trial court, we think this arbitration provision was sufficiently oppressive and unfair that it cannot be enforced.

5. Severance of Unconscionable Terms

A trial court has discretion to sever unconscionable aspects of an arbitration agreement if the interests of justice are furthered by severance and the agreement is not permeated by unconscionability. (*Magno, supra,* 1 Cal.App.5th at p. 292.) Glendale Internal did not argue for severance in the trial court, the trial court did not address the issue, and Glendale Internal did not

raise the issue in its opening brief on appeal. We find the issue forfeited. (*Samaniego, supra*, 205 Cal.App.4th at p. 1149.) In any case, severance would be inappropriate because multiple provisions are substantively unconscionable. (*Ibid.* [" 'An arbitration agreement can be considered permeated by unconscionability if it "contains more than one unlawful provision . . . . Such multiple defects indicate a systematic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage." ' "].)

DISPOSITION

The order is affirmed. Plaintiff is entitled to costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.