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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

VICTOR ALBARRAN et al., Plaintiffs and Respondents. v. MIDWEST ROOFING CO., INC., et al., Defendants and Appellants,	B284151 (Los Angeles County Super. Ct. No. BC644284)

APPEAL from an order of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. Reversed with directions.

Hill, Farrer & Burrill, James A. Bowles, Richard A. Zuniga, and Elissa L. Gysi for Defendants and Appellants.

The Myers Law Group, David P. Myers, Justin M. Crane, and Ann Hendrix for Plaintiffs and Respondents.

INTRODUCTION

Defendants Midwest Roofing Co., Inc. (Midwest) and Darren Norman Tangen (Tangen) appeal from the trial court's denial of their petition and motion[1] to compel Victor Albarran and Raul Gutierrez (plaintiffs) to arbitrate their wage and hour and related claims and stay proceedings in the trial court. The trial court found that the arbitration agreement was unconscionable because it lacked mutuality for two reasons: It was not signed by Midwest and required only employees to arbitrate their claims.

Defendants assert that the trial court erred on both counts because cases have interpreted similar language in an arbitration clause to be mutual and have enforced arbitration agreements even if not signed by both parties. Defendants further fault the trial court for considering plaintiffs' opposing papers because they were untimely under Code of Civil Procedure[2] section 1290.6. Finally, they contend that the arbitration agreement was not procedurally unconscionable: It was not a contract of adhesion and case law does not require attaching the incorporated rules of the arbitration provider.[3]

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[1] The trial court order reflects a ruling on the petition but not the motion. Drawing all reasonable inferences in favor of the trial court's ruling (see *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 715 (*Atkins*)), we infer that the trial court also denied the motion.

[2] Undesignated statutory citations are to the Code of Civil Procedure.

[3] The trial court did not address procedural unconscionability in its order. Because an arbitration clause is enforceable in the absence of either procedural or substantive

We agree the trial court erred in interpreting the arbitration agreement, which, under the applicable case law, did not lack mutuality. We also agree that the absence of Midwest and Tangen's signatures did not render the agreement unenforceable. Because defendants filed a petition and a motion to compel arbitration, section 1005 provided the applicable deadline for responding to those documents, and plaintiffs' opposing papers were timely under that deadline. In any event, given defendants' duplicate filings to enforce the arbitration agreement, the trial court did not err in exercising its discretion to consider plaintiffs' opposing papers.

We reverse the trial court's denial of defendants' petition and motion to compel arbitration with two caveats. First, certain cost-shifting provisions in the incorporated provider rules are unconscionable, and accordingly, we order the trial court to sever those provisions from the arbitration agreement. Second, because plaintiffs' claim under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.) is brought in the state's name, the arbitration agreement does not apply to the PAGA claim. Accordingly, the trial court should stay proceedings on plaintiffs' PAGA claim pending arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed a complaint against defendants asserting eight wage and hour causes of action, as well as PAGA and unfair competition causes of action based on the alleged wage and hour violations. Plaintiffs alleged they were hourly, nonexempt

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unconscionability, and we conclude the agreement here was not substantively unconscionable, we do not address the parties' respective arguments regarding procedural unconscionability.

employees of Midwest. Plaintiffs further alleged Tangen was Midwest's managing agent and responsible managing officer.

It is undisputed that at or near the commencement of their employment, plaintiffs each signed two arbitration agreements.[4] It is also undisputed that the agreements provided no place for defendants' signatures, and defendants never signed the agreements.

The first arbitration agreement was contained in a two-page document entitled "California Employee Leasing Enrollment Report [¶] Worksite Employee Acknowledgement." The parties refer to this document as the "employee leasing agreement," as do we. It states in relevant part, "I agree that any dispute between me and [Workforce Business Services of CA, LLC] WBS or Client Company will be resolved by binding arbitration[, t]he details of which are set forth in a separate agreement." The text on the first page does not identify the "Client Company." It also refers to the "Client Company" 's obligation to pay wages. The second page identifies the "Client Company Name" as Midwest.

The second agreement, which we refer to as the arbitration agreement, recites: "The undersigned ('You[']' or [']Your') her[e]by consents to voluntarily agree to submit any disputes with Midwest Roofing Co., Inc. ('Company') to final and binding arbitration. You agree that any and all controversies, claims, or disputes arising out of, relating to or concerning any

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[4] The parties' counsel failed to redact plaintiffs' social security numbers on the copies of the agreements contained in the record. Disclosing social security numbers violates California Rules of Court, rule 1.201(a). We have requested the Clerk of the Court to redact this information from the appellate record.

interpretation, construction, performance or breach of the Employee Leasing agreement by and between you and Company . . . (the 'Agreement') [s]hall be subject to binding arbitration to be held in accordance with the then-current rules of American Arbitration Association (AAA) for the resolution of any and all types of disputes (the 'Rules'). You further consent that any arbitration will be administered by the AAA and that the arbitrat[or] shall be selected in a manner consistent with the Rules. To initiate the arbitrat[ion] process, the aggrieved party must file and serve upon the responding party a written claim in accordance with the Rules. You also agree that the arbitrator shall have the power to award any remedies, including preliminary relief, injunctive relief, attorney's fees and costs and all other remedies available under the applicable law. The decision of the arbitrator shall be final, conclusive, and binding on the parties of arbitration. Judgment may be entered on the arbitrator's decision in any court having jurisdiction. This is the complete agreement of the parties on the subject of [*sic*] arbitration provision contained in any pension or benefit plan. You acknowledge and agree that You are executing this Agreement voluntarily and without any duress or undue influence by Company or anyone else." (Italics omitted.)

Defendants then filed a petition to compel arbitration and stay the action. The same day, they filed a motion to compel arbitration and to stay the action pending arbitration. Plaintiffs filed a combined opposition to the petition and motion, and an additional, separate response to the petition. Defendants filed a

reply and evidentiary objections[5] five court days preceding the hearing.

In their opposing papers in the trial court, plaintiffs essentially made three arguments. First, no agreement existed because neither Midwest nor WBS signed the employee leasing agreement, and no one from Midwest signed the arbitration agreement. We observe plaintiffs did not argue that Tangen could not enforce the arbitration agreement because he did not sign it. Second, the agreement was substantively unconscionable because it lacked mutuality in that it required plaintiffs to arbitrate their claims against defendants, but it did not require defendants to arbitrate their claims against plaintiffs. Finally, citing *County of Solano v. Lionsgate Corp.* (2005) 126 Cal.App.4th 741 and *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), they asserted that because their PAGA claim was brought on behalf of the state, it was not subject to arbitration.

Defendants retorted that the trial court should ignore plaintiffs' opposing papers because they were untimely under section 1290.6, and Midwest's nonsignatory status did not defeat contract formation. They further argued the agreement was not substantively unconscionable because its language of agreement was, or should be construed as, mutual. Finally, they asserted that the trial court should compel arbitration of the PAGA claim because the arbitration agreement did not require plaintiffs to waive PAGA claims and PAGA claims are not exempt from arbitration under the Federal Arbitration Act (FAA) (9 U.S.C. § 1

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[5] The record does not reflect the trial court ruled on these objections. The parties do not raise the objections on appeal; therefore, nor do we.

et seq.) In the alternative, they contended the trial court should stay the PAGA claim pending arbitration of plaintiffs' wage and hour claims.

The trial court's proceedings on defendants' motion and petition were not reported. In a terse minute order, the trial court referenced an "announced" tentative ruling and denied the petition. The trial court subsequently signed an order denying defendants' petition and motion for the following reasons: "[T]he arbitration agreement [is unconscionable because it] is not signed by Midwest . . . and . . . does not contain language wherein Midwest . . . agrees to arbitrate disputes that Plaintiffs have with Midwest . . . . " Defendants timely appealed.

STANDARD OF REVIEW

"The denial of a motion to compel arbitration is an appealable order." (*Hernandez v. Ross Stores, Inc.* (2016) 7 Cal.App.5th 171, 176 (*Hernandez*).) "We review the trial court's interpretation of an arbitration agreement de novo where no conflicting extrinsic evidence exists." (*Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, 785 (*Garcia*).) " 'We will uphold the trial court's resolution of disputed facts if supported by substantial evidence.' " (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 683.) "In assessing whether the court erred by declining to sever unconscionable provisions and to enforce the remainder of the arbitration agreement, we apply an abuse-of-discretion standard." (*Juarez v. Wash Depot Holdings, Inc.* (2018) 24 Cal.App.5th 1197, 1202 (*Juarez*).)

DISCUSSION

A. The Trial Court Properly Considered Plaintiffs' Opposition Papers Because They Were Timely Under The Relevant Statutory Deadline, The Trial Court Had Discretion To Consider Them In Light Of Defendants' Duplicative Moving Papers, And Defendants Would Not Be Prejudiced Thereby

Defendants argue that the trial court should have deemed the allegations in their petition admitted and precluded plaintiffs from invoking their denials or affirmative defenses because plaintiffs' opposing papers were untimely under section 1290.6. Section 1290.6 generally provides a 10-day response deadline.[6] They further argue the trial court erred by even considering plaintiffs' untimely response. We disagree because defendants rely on the wrong statute: Section 1005 supplied the applicable deadline, which plaintiffs' opposing papers met. Even under section 1290.6, in the absence of prejudice, the trial court had discretion to consider untimely papers and did not abuse that discretion in doing so here.

"The allegations of a petition are deemed to be admitted by a respondent duly served therewith unless a response is duly served and filed." (§ 1290.) "A response shall be served and filed within 10 days after service of the petition . . . . The time provided in this section for serving and filing a response[, however,] may be extended by an agreement in writing between

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[6] The trial court did not expressly make findings or rule on this issue. We infer that the trial court exercised its discretion to consider plaintiffs' papers. (See *Atkins*, *supra*, 8 Cal.App.5th at p. 715.)

the parties to the court proceeding or, for good cause, by order of the court." (§ 1290.6.)

Moreover, "[c]ourts have long acknowledged that the trial court may consider untimely filed and served response papers, when no prejudice to the petitioner is shown, without an order extending the 10-day time period of section 1290.6." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 847 (*Ruiz*).) The circumstances surrounding an untimely opposition to a petition or motion to compel arbitration should be viewed under "the strong policy of the law favoring the disposition of cases on the merits . . . ." (*Juarez*, *supra*, 24 Cal.App.5th at p. 1202.)

Ruiz held that the trial court properly considered otherwise untimely opposition papers to a petition to compel arbitration. The trial court treated the petition as a motion for filing deadline purposes because the petitioner-defendant filed its reply papers five days preceding the hearing, "implicitly rel[ying] on section 1005, subdivision (b) as authority for filing its reply papers . . . ." (*Ruiz*, *supra*, 232 Cal.App.4th at pp. 847-848; see § 1005, subd. (b) ["All papers opposing a motion . . . shall be filed . . . and . . . served on each party at least nine court days, and all reply papers at least five court days before the hearing."].) *Ruiz* also reasoned that the California Arbitration Act (CAA) (§ 1280 et seq.) does not contemplate reply papers. (*Ruiz*, *supra*, at pp. 847-848.) The respondent-plaintiff filed and served his response nine court days preceding the hearing, which was timely under section 1005. The *Ruiz* court further stated, "the reply papers avoided any prejudice to [the petitioner-defendant] due to [the respondent-plaintiff]'s late-filed and served response papers." (*Id.* at p. 848.) Finally, *Ruiz* concluded that opposing

counsel's mistake in treating the petition as a motion was good cause to consider the otherwise untimely response. (*Id.* at p. 847.)

Similarly here, defendants filed and served their reply papers on June 14, 2017, exactly five court days preceding the June 21, 2017 hearing, which was timely under section 1005, subdivision (b).[7] Defendants did not and do not articulate any prejudice. Nor is any prejudice evident from the record. Defendants' reply papers were timely filed, addressed plaintiffs' opposition on the merits, and were accompanied by written evidentiary objections.

The same day defendants filed their petition, they filed and served a document referring to the noticed proceeding as a motion. Indeed, defendants state that they "filed both a Petition and a Motion." Both documents recited the same hearing date and referred to the same parties and arbitration agreements. Plaintiffs characterize the dual filings as "cloud[ing] the procedure." We agree that the dual filings could have reasonably created confusion as to the deadline for responding to these duplicate filings, and as such, plaintiffs demonstrated good cause for an extension of time under section 1290.6.

Defendants contend plaintiffs knew that the petition and motion each required a timely response because plaintiffs filed a separate response to the petition. Defendants ignore that they filed the documents simultaneously, referring to the same hearing date, parties, and arbitration agreement. Similar to the

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[7] On our own motion, we take judicial notice that June 17 and 18, 2017 were weekend days. (Evid. Code, § 452, subd. (h).) Section 1005, subdivision (b) requires reply papers to be filed five court days before the hearing date.

calendaring error in *Ruiz*, these factors could have led a reasonable attorney to be confused about the type of proceeding the petitioning (or moving) party intended and the concomitant response deadline.

Additionally, the petition and motion were properly treated collectively as a motion. Although a litigant seeking to compel arbitration may proceed by motion or petition, "[t]he term 'petition[ ]' . . . has been construed, in practice, to include the term 'motion' when, as here, an action is already pending." (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349; see Younger on California Motions § 9:10 (2d ed. 2017) ["when a party has already commenced a lawsuit in a dispute subject to an arbitration agreement, . . . a motion is . . . the proper procedure" and "[f]or practical purposes a petition is a motion."].)

In sum, whether seen through the lens of section 1290.6 or 1005, plaintiffs timely filed their opposition and response papers, they did not waive their denials or affirmative defenses, defendants have not demonstrated any prejudice, and the trial court properly exercised its discretion to consider plaintiffs' opposing papers.

B. The Agreement Is Not Unenforceable For Unconscionability Because Substantive Unconscionability Is Absent, And The Presence Of Both Procedural And Substantive Unconscionability Is Required To Render An Arbitration Agreement Unenforceable For Unconscionability

Plaintiffs argue that the agreement was substantively unconscionable for lacking mutuality because it required arbitration only of their claims and not defendants' claims. Plaintiffs attempt to support their argument by citing the

agreement's "you agree" language and assert that the absence of Midwest's signature indicates a mere unilateral obligation.

An unconscionable arbitration agreement is unenforceable. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243.) " ' "[U]nconscionability has both 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." ' " (*Id.* at p. 1243.) To be unenforceable, an arbitration agreement must be both procedurally and substantively unconscionable. (*Ibid.*) " 'The party resisting arbitration bears the burden of proving unconscionability.' " (*Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1561.)

We also observe that CAA and FAA "are driven by a strong public policy of enforcing arbitration agreements." (*Weiler v. Marcus & Millichap Real Estate Investment Services, Inc.* (2018) 22 Cal.App.5th 970, 979.)

1. The agreement is mutual because its broad language requires both parties to arbitrate

"An arbitration agreement is substantively unconscionable if it requires the employee but not the employer to arbitrate claims." (*McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 100 (*McManus*).) "Absent some indicia in the agreement that arbitration is limited to the employee's claims against the employer, the use of the 'I agree' language in an arbitration clause that expressly covers 'all disputes' creates a mutual agreement to arbitrate all claims arising out of the applicant's employment." (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1466 (*Roman*); accord, *Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 252-253

(*Nguyen*); *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 182 (*Serafin*).)

"Even if the language in the . . . arbitration provision were somehow ambiguous on this point, given the public policy favoring arbitration [citation] . . . , we would necessarily construe the arbitration agreement as imposing a valid, mutual obligation to arbitrate." (*Roman*, *supra*, 172 Cal.App.4th at p. 1473.)

In *Nguyen*, *supra*, 4 Cal.App.5th 232, in asserting that the arbitration agreement lacked mutuality, the plaintiff referred to the agreement's sentences beginning with " 'I' ": " 'I hereby agree to submit to binding arbitration' "; " 'I further agree . . . that all disputes . . . which might arise out of or related to my employment with the company . . . will be submitted to binding arbitration' "; " 'I agree that such arbitration shall be conducted under the rules of the [AAA].' " (*Id.* at p. 251.) The *Nguyen* court wrote, "By agreeing that 'all disputes and claims arising out of or relating to the submission of [the] application' and 'all disputes that cannot be resolved by informal internal resolution which might arise out of or relate to my employment with the company,' plaintiff was doing no more than acknowledging that all disputes between him and defendant would be resolved through binding arbitration. . . . In short, there was a mutual obligation to arbitrate any and all employment-related issues." (*Id.* at pp. 252-253.)

Similarly, the agreement here refers to "any disputes" and "any and all controversies, claims, or disputes arising out of, relating to or concerning any interpretation, construction, performance or breach of the Employee Leasing agreement by and between you and the Company. . . . " This language created

a mutual obligation to arbitrate the claims described in the arbitration agreement.

Plaintiffs' primary argument is virtually identical to the argument rejected by *Nguyen*. Plaintiffs highlight the arbitration and leasing agreements' "you agree" language: "[t]he undersigned ('You[']' or [']Your') her[e]by consents"; "You agree that any and all controversies, claims, or disputes"; "You further consent that any arbitration will be administered"; "You also agree that the arbitrator shall"; "You acknowledge and agree that You are executing this Agreement"; "I agree that any dispute between me and WBS or Client Company." Plaintiffs identify no contractual language indicating that the obligation to arbitrate is limited to plaintiffs' claims against defendants. Therefore, the "you agree" language does not render the agreement unilateral.

Plaintiffs cite seven cases they claim support their positon. Plaintiffs' cases are unavailing.

Higgins v. Superior Court (2006) 140 Cal.App.4th 1238 turned on "the television defendants' unilateral reservation of the right to seek injunctive relief without identifying the corresponding business necessities for reserving that right . . . . " (*Roman*, *supra*, 172 Cal.App.4th at p. 1473.) The agreement in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*) " ' "explicitly limited the scope of the arbitration agreement to wrongful termination claims and therefore implicitly excluded the employer's claims against the employee . . . ." ' " (*Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 403-404.) The agreement in *Fitz v. NCR Corp*. (2004) 118 Cal.App.4th 702, 725 exempted disputes over noncompete agreements and intellectual property rights from arbitration, and the court observed that "it

is far more often the case that employers, not employees, will file such claims."

The agreement in *Pinedo v. Premium Tobacco Stores, Inc.* (2000) 85 Cal.App.4th 774, 781 was "inherently one-sided [because] it addresse[d] only claims involving terms of employment described as claims based on 'changes in position, conditions of employment or pay, or the end of employment[,]' . . . claims which would normally be brought by the employee against the employer." The agreement in *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1528 exempted "[a]ny action initiated by the Company seeking specific performance or injunctive or other equitable relief" from arbitration. In contrast, the arbitration agreement here expressly gives the arbitrator power to award injunctive "and all other remedies available under the applicable law." The arbitration policy in *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1326 (*Kinney*) exempted the employer from the requirement to "initiate the arbitration process in regard to any dispute" and the prerequisite internal dispute review procedure, and exempted the employer's "action against an employee for breach of any restrictive covenant, wrongful disclosure of confidential information, or any other actions which may constitute a breach of contract, a breach of [the employer]'s Code of Conduct, a breach of a common law duty, or a breach or violation of either civil or criminal law" from arbitration. No such unilateral reservation of rights or limitations on types of claims subject to arbitration are in the arbitration agreement here.

Finally, plaintiffs cite *24 Hour Fitness, Inc. v. Superior Court* (*24 Hour Fitness*) (1998) 66 Cal.App.4th 1199 for the

proposition that all parties to an arbitration agreement must be named in the agreement's language of agreement, as in, "you and Nautilus agree that you both will submit [any dispute] exclusively to final and binding arbitration." (*Id*. at p. 1205.) *24 Hour Fitness* found that the parties entered into an enforceable arbitration agreement but did not address this language in its analysis. (*Id.* at p. 1215.) Regardless, such language is unnecessary to establish mutuality. As discussed above, mutuality exists when an agreement requires all parties to arbitrate all types of disputes as indicated by language such as "any and all disputes"; language of agreement concerning only one party, such as "I agree," does not destroy mutuality. (*Roman*, *supra*, 172 Cal.App.4th at p. 1466; *Nguyen*, *supra*, 4 Cal.App.5th at pp. 251-253.)

Plaintiffs argue that Civil Code section 1654 requires that the arbitration agreement be construed against defendants. This section states that where a contract's language is uncertain, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

Plaintiffs describe the following provision in the arbitration agreement as ambiguous and contradictory: "This is the complete agreement of the parties on the subject of [*sic*] arbitration provision contained in any pension or benefit plan." (Italics omitted.) Plaintiffs ultimately characterize this provision as an integration clause: "This statement . . . merely confirms that this is the 'complete agreement.' " We fail to see this provision's relevance to the issue of mutuality. Additionally, we do not agree with plaintiffs' premise: The arbitration language here is not uncertain because its "any disputes" language is

facially neutral and under the case law, has been uniformly interpreted as creating a mutual agreement to arbitrate.

Plaintiffs further assert that the language " 'the aggrieved party must file and serve upon the responding party a written claim' " "is merely a descriptive term for the employee" and could not refer to defendants. Given that we construe the "any disputes" language to indicate a mutual obligation to arbitrate under the case law and public policy, either plaintiffs or defendants could be "the aggrieved party." The language merely directs the party asserting the claim to file and serve it on the other party. It does not exempt defendants from the claim initiation requirements, in contrast to *Kinney*, *supra*, 70 Cal.App.4th at p. 1326.

Finally, plaintiffs refer to the employee leasing agreement as extrinsic evidence "as to what [the arbitration agreement] may mean . . . . " Plaintiffs advance this argument under the assumption that the arbitration agreement is facially unilateral. As discussed above, the arbitration agreement is mutual by its own terms and under the applicable case law. We do not need to look to the employee leasing agreement any further to make this determination.

2. The absence of Midwest's signature is not relevant to substantive unconscionability

Plaintiffs place great reliance on the absence of Midwest's signature from the arbitration agreement (and to a lesser extent, the employee leasing agreement) as indicating the arbitration agreement's lack of mutuality. Specifically, they assert that "the lack of mutuality is further illustrated by the failure of Midwest to sign the agreement." (Capitalization omitted.) In support, plaintiffs state the general rule that the existence of an

arbitration agreement is a prerequisite to compelling arbitration. They then quote *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413: "[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence."

Mutuality in this context refers to whether, by an arbitration agreement's terms, all parties to the agreement are equally obligated to arbitrate their claims. (See *McManus*, *supra*, 109 Cal.App.4th at p. 100.) Plaintiffs do not explain how, or cite authority supporting their contention that the absence of a party's signature can establish that an arbitration agreement's terms are not mutual.

Plaintiffs argue that *Serafin*, *supra*, 235 Cal.App.4th 165 does not support a finding of mutuality because there, the nonsignatory employer demonstrated its assent to the arbitration agreement by initiating arbitration of its own claims, but here, in contrast, Midwest did not initiate arbitration or bring any claims of its own. Plaintiffs' argument actually addresses contract formation involving nonsignatories, which we discuss below and resolve on a theory unaffected by *Serafin*. Regarding mutuality, *Serafin* supports our conclusion that the arbitration agreement's terms were mutual. *Serafin* concluded that the arbitration agreement there was mutual because of its broad language referring to " 'any and all' " disputes. (*Id.* at p. 182.) Similarly

here, the arbitration agreement refers to "any disputes" and "any and all controversies, claims, or disputes."

3. Midwest and Tangen's signatures are unnecessary to establish the existence of an arbitration agreement as plaintiffs are equitably estopped from avoiding the arbitration clause because their claims are "intimately founded in and intertwined with" the employee leasing agreement's obligations, and Tangen was allegedly Midwest's agent

In their appellate briefing, plaintiffs do not contest that an arbitration agreement existed, although they did in the trial court. Generally, "[i]ssues not raised in an appellant's [or respondent's] brief are deemed waived or abandoned." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 (*Reyes*) [declined to extend to demurrer by *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1244].) Even if they preserved this argument on appeal, it would not be well-founded.

"[T]he writing memorializing an arbitration agreement need not be signed by both parties in order to be upheld as a binding arbitration agreement." (*Serafin*, *supra*, 235 Cal.App.4th at p. 176.) "[I]t is not the presence or absence of a *signature* which is dispositive; it is the presence or absence of evidence of an *agreement* to arbitrate which matters." (*Banner Entertainment, Inc. v. Superior Court* (*Alchemy Filmworks, Inc.*) (1998) 62 Cal.App.4th 348, 361; see *Nguyen*, *supra*, 4 Cal.App.5th at pp. 252-253 ["No separate signature was required by defendant, as it was the company that set

binding arbitration of all disputes as a condition of plaintiff's employment."].)

"Under [the equitable estoppel] doctrine, 'a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are "intimately founded in and intertwined" with the underlying contract obligations.' [Citations.] 'This requirement comports with, and indeed derives from, the very purposes of the doctrine: to prevent a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to arbitrate with the nonsignatory under another clause of that same agreement.' [Citation.] [¶] The doctrine focuses on the 'nature of the claims asserted by the plaintiff against the nonsignatory defendant.' [Citation.] 'Claims that rely upon, make reference to, or are intertwined with claims under the subject contract are arbitrable.' " (*Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 20.)

Here, the first page of the employee leasing agreement contains an arbitration clause that incorporates the arbitration agreement by reference: "I agree that any dispute between me and WBS or Client Company will be resolved by binding arbitration[, t]he details of which are set forth in a separate agreement." It also states that "Client Company" would "establish[ ] pay rates" and pay the wages given the language, "If WBS does not receive payment from my Client Company . . . . " The second page of the employee leasing agreement identifies Midwest under "Client Company Name."

There is no dispute plaintiffs were Midwest's employees under the leasing agreement, Midwest had an obligation to pay plaintiffs' wages under the leasing agreement, and the leasing

agreement incorporated the arbitration agreement by reference. Because the leasing agreement refers to wages, and plaintiffs' claims against Midwest are based on a failure to pay such wages, plaintiffs' claims are "intimately founded in and intertwined" with the leasing agreement's obligations. Therefore, Midwest may enforce the incorporated arbitration agreement despite being a nonsignatory.

Regarding Tangen, as previously noted, he too did not sign any arbitration agreement. As an agent of Midwest, he may, nonetheless, enforce that agreement. " 'Enforcement is permitted where the nonsignatory is the agent for a party to the arbitration agreement . . . . ' " (*Jenks v. DLA Piper Rudnick Gray Cary US LLP* (2015) 243 Cal.App.4th 1, 8.) "The [agency] exception applies, and a defendant may enforce the arbitration agreement, 'when a plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement . . . . ' [Citation.] Here, the operative complaint alleged Real Time and Pexco were acting as agents of one another and every cause of action alleged identical claims against 'All Defendants' without any distinction." (*Garcia*, *supra*, 11 Cal.App.5th at p. 788.)

Plaintiffs allege that Tangen was Midwest's managing agent and assert all causes of action against both Midwest and Tangen. These facts, along with our conclusion that Midwest was a party to the arbitration agreement, compel the conclusion that Tangen may enforce the agreement under the agency exception.

4. Two AAA cost-shifting rules are substantively unconscionable but may be severed because the arbitration agreement and AAA rules are not permeated with unconscionability

Plaintiffs argue that two AAA rules create a risk that they could be charged costs unique to the arbitral forum, rendering the arbitration agreement unconscionable. They did not raise this issue in the trial court. Nevertheless, a litigant may raise for the first time on appeal a pure question of law on undisputed facts. (*Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 335-336.)

We note at the outset plaintiffs marshal this argument under procedural unconscionability. Plaintiffs' contention actually relates to substantive unconscionability. (See *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1144-1145 [substantively unconscionable to require consumer to give up right to utilize judicial system while imposing prohibitively high arbitral forum fees].)

The first rule plaintiffs challenge is unnumbered. It falls under the section entitled "Costs of Arbitration (including AAA Administrative Fees)" and the subsection "For Disputes Arising Out of Employer Plans." It appears on page 33 of the AAA arbitration rules for employment cases amended and effective November 1, 2009, which defendants submitted as part of the record. We refer to this rule as the first rule.

It states in relevant part, "Arbitrator compensation, expenses as defined in section (iv) below, and administrative fees are not subject to reallocation by the arbitrator(s) except upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous." It further states that arbitrator compensation is not included in the

administrative fees. Arbitrator compensation is addressed further in Rule 44, which states that arbitrators charge a rate consistent with their stated rate. Section (iv) concerns hearing room rental fees and states that these fees are not included in the hearing fees, which are defined under section (ii), and that the employer will bear the room rental fee. Administrative fees are addressed in Rule 43, which authorizes AAA to charge filing and other administrative fees.

The second rule plaintiffs challenge is section (iv) also under the subheading "For Disputes Arising Out of Employer Plans." It states that a fee is payable "by a party causing a postponement of any hearing scheduled . . . . " The amount of the fee depends on whether the hearing were scheduled before a single arbitrator or multi-arbitrator panel. We refer to this rule as the second rule. We refer to the first rule and second rule collectively as the two rules.

Mercuro v. Superior Court (2002) 96 Cal.App.4th 167, 181-182 involved a substantively unconscionable fee-shifting provision where the employee "could wind up paying the entire cost of the arbitration, including the arbitrator's fee, should he lose." The two rules here could result in a similar outcome: Plaintiffs could be liable for expenses unique to the arbitral forum like arbitrator compensation, room rental fees, and postponement fees.

We agree that these fee- and cost-shifting rules are substantively unconscionable. Defendants' rebuttal is unpersuasive. They cite *Green Tree Financial Corp.-Alab. v. Randolph* (2000) 531 U.S. 79 for the proposition that speculative cost-shifting does not support substantive unconscionability. Our Supreme Court, however, has declined to

apply *Green Tree* in a similar context, explaining, "we do not believe that the FAA requires state courts to adopt precisely the same means as federal courts to ensure that the vindication of public rights will not be stymied by burdensome arbitration costs. We continue to believe that *Armendariz* represents the soundest approach to the problem of arbitration costs in the context of mandatory employment arbitration. We therefore conclude that on remand the court compelling arbitration should require the employer to pay in this case 'all types of costs that are unique to arbitration.' " (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1085 (*Little*); see *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1577.)

Defendants argue that the first rule is equivalent to the trial court's authority under section 128.5 and *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97 (*Williams*) to order an employee to pay the employer's attorney fees and costs when the employee brought claims in bad faith. (§ 128.5, subd. (a); *Williams*, *supra*, 61 Cal.4th at p. 115 [prevailing defendant may be awarded fees and costs if plaintiff's action objectively without foundation when brought, or plaintiff continued to litigate after it clearly became so].) Thus, defendants equate the bad-faith standard in the first rule to the bad-faith standard in section 128.5 and *Williams*.

Whether an employee has brought, or continues to pursue, a claim in bad faith, however, is not the relevant inquiry for whether an arbitration rule is substantively unconscionable. Rather, the relevant inquiry is whether the costs that are being shifted under the rules are unique to arbitration. Here, they are: The first rule shifts arbitration forum costs.

Concerning the second rule, defendants assert that, in court, plaintiffs could be responsible for the cost of rescheduling a hearing. Defendants provide no explanation, evidence, or authority, and do not identify any analogous trial court fee imposed for rescheduling a hearing.

Finally, defendants assert that *Armendariz* merely prohibits an employee from bearing unique arbitral forum costs as a condition of access to the arbitral forum and that the two rules at issue here do not violate this requirement because they would apply only during the arbitration process, after access to the forum had been granted, and after the arbitrator found that plaintiffs' claims were frivolous or after a hearing were scheduled and postponed. In support, defendants cite the following passage in *Armendariz*: "[A]n arbitration agreement is lawful if it ' . . . does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.' " (*Armendariz*, *supra*, 24 Cal.4th at p. 102, quoting *Cole v. Burns Intern. Security Services* (D.C. Cir. 1997) 105 F.3d 1465, 1482.) Defendants' reliance on this passage is misplaced because *Armendariz* was merely quoting a federal appellate court's formulation of minimum requirements for lawful mandatory employment arbitration agreements as part of its broader discussion of the law surrounding the enforceability of mandatory employment arbitration agreements. *Armendariz* has been interpreted to require the employer to pay all costs unique to arbitration without limitation. (*Little*, *supra*, 29 Cal.4th at p. 1085.)

Although the two rules are substantively unconscionable, they can be severed from the arbitration agreement because the arbitration agreement is not permeated with

unconscionability. (Civ. Code, § 1670.5, subd. (a); see *McManus*, *supra*, 109 Cal.App.4th at p. 102 [single unconscionable cost provision did not on its own render arbitration agreement permeated with unconscionability and was therefore severable.])

Plaintiffs argue that severance is unavailable because of the lack of mutuality. As discussed above, the agreement is mutual. Additionally, plaintiffs do not argue that the two rules, specifically, may not be severed.

C. The PAGA Claim Is Not Subject To Arbitration Under The Parties' Private Arbitration Agreement Because The State Is The Real Party In Interest, And It Is Appropriately Stayed Pending Arbitration

In the trial court, defendants expressly sought to arbitrate plaintiffs' PAGA claim: "[T]he parties already agreed on a single forum for resolving the PAGA claim and other claims—they agreed on arbitration." They also argued that PAGA claims are not inherently exempt from arbitration and the FAA would preempt any such exemption. Alternatively, defendants argued below that the PAGA claim should be stayed. In opposition, plaintiffs contended their PAGA claim was not subject to arbitration because "[t]he state is not bound by Plaintiffs' alleged pre-dispute agreement to arbitrate."

In their appellate briefing, defendants assert that "the entire action" should be compelled to arbitration, but neither they nor plaintiffs specifically address the PAGA claim's arbitrability. We consider the issue abandoned on appeal, but nevertheless exercise our discretion to resolve it for judicial economy. (See *Reyes*, *supra*, 65 Cal.App.4th at p. 466, fn. 6.)

"Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee

arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the [Labor and Workforce Development] Agency or aggrieved employees—that the employer has violated the Labor Code." (*Iskanian*, *supra*, 59 Cal.4th at pp. 386-387; accord, *Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651, 657 ["PAGA claims are not subject to private arbitration agreements"]; *Hernandez*, *supra*, 7 Cal.App.5th at p. 178 [under *Iskanian*, employee's PAGA claim could not be compelled to arbitration under employer's arbitration policy because the PAGA claim was not a dispute between employee and employer]; *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 448-449 [PAGA claim could not be compelled to arbitration under the parties' predispute arbitration agreement because the state was the real party in interest and not bound by the parties' agreement].)

"[A] PAGA claim is appropriately stayed and determined after the individual disputes are resolved in arbitration." (*Hernandez*, *supra*, 7 Cal.App.5th at p. 176.)

This reasoning applies here. Plaintiffs' PAGA claim may not be compelled to arbitration under the parties' private arbitration agreement because the state is the real party in interest and not subject to the agreement. Accordingly, plaintiffs' PAGA claim must be stayed pending the arbitration.

DISPOSITION

The order is reversed and remanded with instructions to enter a new order (1) granting the petition and motion except as to the PAGA cause of action, (2) staying the PAGA cause of action pending arbitration, and (3) severing the two AAA cost-shifting rules. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.