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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

MARIA DEL ROSARIO MARTINEZ, Plaintiff and Respondent, v. READY PAC PRODUCE, INC., Defendant and Appellant.	B279225 Los Angeles County Super. Ct. No. BC621332

APPEAL from an order of the Superior Court of Los Angeles County, Richard L. Fruin, Judge. Reversed and remanded with directions.

Constangy, Brooks, Smith & Prophete, Kenneth D. Sulzer, Steven B. Katz and Angela L. Rapko for Defendant and Appellant.

Bibiyan Law Group and David D. Bibiyan for Plaintiff and Respondent.

INTRODUCTION

California and federal law favor arbitration as an efficient, cost-effective alternative to litigation. An employer and employee may voluntarily agree to arbitrate their legal disputes, but as with other contracts, courts will not enforce agreements that violate public policy. While plaintiff and respondent Maria del Rosario Martinez (Martinez) worked for Ready Pac Produce, Inc. (Ready Pac), defendant and appellant, Martinez signed an agreement requiring the parties to arbitrate most types of legal claims arising out of the employment relationship. After Martinez filed a wrongful employment termination suit against Ready Pac, the company sought to compel arbitration under the arbitration agreement. But the trial court denied Ready Pac's petition because it found the agreement was unenforceable. Specifically, the court concluded the arbitration agreement was unconscionable because it included a provision waiving the right to participate in any representative action, including a class action suit pending at the time Martinez signed the arbitration agreement. Ready Pac appeals from the trial court's order denying its petition to compel arbitration. We disagree with the trial court's conclusion that the waiver of the right to participate in a pending class action is unconscionable and instead conclude the arbitration agreement should be enforced. Accordingly, we reverse and remand to the trial court with directions to enter an order granting Ready Pac's motion to compel arbitration.

FACTS AND PROCEDURAL BACKGROUND

Martinez began working for Ready Pac as a factory worker in approximately November 1996. Ready Pac terminated her employment in June 2015. Although Ready Pac told Martinez it

was terminating her employment due to a pallet labeling error, Martinez believed her termination related to her age—54 at the time of her employment termination. In May 2016, Martinez filed the present suit in which she asserts five claims relating to her employment termination (age discrimination, harassment, failure to prevent discrimination and harassment, and wrongful employment termination, all under Government Code section 12900 et seq., and wrongful termination in violation of public policy), four wage-and-hour claims (failure to provide meal breaks and rest breaks, failure to pay wages to a terminated employee, and failure to comply with itemized wage statements, all in violation of the Labor Code), and an unfair competition claim (Bus. & Prof. Code § 17200 et seq.).

In July 2016, Ready Pac contacted Martinez's counsel to advise that Martinez signed an arbitration agreement in 2011 (the 2011 agreement) in which she agreed to arbitrate all employment-related disputes with Ready Pac. The 2011 agreement includes the following general provision:

"It is hereby mutually agreed between the Company and Associate that any and all disputes between them, including, but not limited to, disputes arising out of or relating to Associate's employment or the termination of Associate's employment, will be subject to resolution only through final and binding arbitration in accordance with the then applicable American Arbitration Association ("AAA") Employment Arbitration Rules and Mediation Procedures ("AAA Rules"), as modified by applicable law and the terms of this Agreement. …"

In addition, the agreement states the employee waives the right to participate in any representative action (representative action waiver):

"The claims covered by this Agreement include any and all controversies, claims, or disputes with the Company arising out of, relating to, or resulting from the Associate's employment with the Company or the termination of the Associate's employment with the Company, including any breach of this Agreement (unless provisional or injunctive relief is sought), whether such claims are based in tort, contract, statute (including, but not limited to, any claims brought for unpaid expenses, wages, unpaid compensation, penalties for missed meal or rest breaks, wrongful termination, unfair competition, discrimination, harassment, or unlawful retaliation [under any state or federal law], … equitable law, or otherwise, with the exception of claims arising under the National Labor Relations Act …, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development Department claims, or any other claim excluded from mandatory arbitration by state or federal law."

Notwithstanding this provision, Martinez declined to stipulate to arbitration "on contractual grounds." Ready Pac then moved to compel arbitration of the dispute under the 2011 agreement.

Martinez opposed the motion. Martinez asserted in her declaration she did not recall signing the 2011 agreement but did not deny the agreement bore her signature. Martinez also recalled she refused to sign a different arbitration agreement in 2015, shortly before Ready Pac terminated her employment. As pertinent here, Martinez argued primarily that the 2011

arbitration agreement is both procedurally and substantively unconscionable and therefore unenforceable. Specifically, she contended her continued employment at Ready Pac was conditioned on her signing the 2011 agreement and the agreement is riddled with provisions favorable to Ready Pac, to her detriment. The court held several hearings on the matter and requested some additional materials and briefing from the parties. In connection with supplemental briefing, Martinez also asserted the 2011 agreement was unconscionable because it not only required her to submit any future employment-related claims to arbitration but also precluded her from participating in a then-pending class action against Ready Pac. The 2011 agreement included the following provision (the pending class action waiver):

"This Agreement and the provision for mandatory arbitration also apply to the current litigation titled *Ana L. Guzman and others vs. Ready Pac Produce, Inc.*, a case presented before the [Superior] Court of Los Angeles No. BC404172 [(*Guzman* class action)], an alleged class-action suit before the [Superior] Court of Los Angeles by non-exempt employees seeking money for unpaid wages, overtime payments, food payments, rest payments, penalties for wage statements, penalties for waiting periods, unfair competition and other compensation claims for damages, restitution and penalties." (Underscoring omitted, italics added.)

The trial court denied Ready Pac's motion, finding the 2011 agreement was both procedurally and substantively unconscionable, as Martinez urged. The court found Ready Pac submitted the 2011 agreement to Martinez, an at-will employee, and implied signing the agreement was a condition of her

continued employment. Further, the court said the 2011 agreement "is substantively unconscionable because it requires the employee to give up any rights she had as a putative class member in a class action brought against her employer in federal court. There is no valid reason for an employer to require an employee to give up rights she may have in a pending legal action as a condition of her continued employment." The court denied Ready Pac's request to sever the provision relating to the pending class action without specifying a reason.

Ready Pac timely appeals.

DISCUSSION

Ready Pac contends the court erred in finding the 2011 arbitration agreement both procedurally and substantively unconscionable and therefore unenforceable. Alternatively, Ready Pac urges if any provision of the 2011 agreement is unenforceable, it should be severed from the agreement and the remaining provisions enforced.

1. Standard of Review

" 'On appeal from the denial of a motion to compel arbitration, "we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law." ' [Citation.] Thus, unconscionability is a question of law we review de novo. [Citation.] To the extent the trial court's determination on the issue turned on the resolution of contested facts, we would review the court's factual determinations for substantial evidence." (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 82 (*Carmona*); *Baxter v. Genworth North America Corp.* (2017) 16 Cal.App.5th 713, 722 (*Baxter*).) In

assessing whether the trial court erred in declining to sever any unconscionable provisions and enforce the remainder of the arbitration agreement, we will not reverse the trial court's severance decision unless an abuse of discretion is shown. (See *Carmona,* at p. 83.)

2. The trial court erred in denying Ready Pac's petition to compel arbitration.

2.1. Although parties may contract to arbitrate their legal disputes, a court will not enforce an arbitration agreement that is unconscionable or contrary to public policy.

Under section 2 of the Federal Arbitration Act (9 U.S.C. § 2 (FAA)),[1] an agreement to arbitrate is " 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' " This section reflects a liberal federal policy favoring arbitration, but the "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. [Citations.]" (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 (*Concepcion*).) In other words, despite the strong policy favoring arbitration, courts may invalidate or limit agreements to arbitrate that are unconscionable or contrary to public policy. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*), abrogated in part by *Concepcion,* at p. 333; and see *Sanchez v. Valencia*

[1] The parties agree the FAA applies in this case.

Holding Co., LLC (2015) 61 Cal.4th 899, 910–911 (*Sanchez*); *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1142; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 (*Pinnacle*).)

Unconscionability " ' "refers to ' "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." ' [Citation.] As that formulation implicitly recognizes, the doctrine of unconscionability 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." ' " (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243 (*Baltazar*).) But " '[n]ot all one-sided contract provisions are unconscionable; hence the various intensifiers in our formulations: "*overly* harsh," "*unduly* oppressive," "*unreasonably* favorable." [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.' [Citation.]" (*Id.* at p. 1245.)

Both procedural and substantive unconscionability must be present for a court to refuse to enforce an agreement to arbitrate, although they need not be present in the same degree. (*Baltazar*, *supra*, 62 Cal.4th at p. 1243.) " 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the 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." (*Armendariz,*

supra, 24 Cal.4th at p. 114; *Baltazar,* at pp. 1243–1244.) Because unconscionability is a contract defense, the party asserting the defense—here, Martinez—bears the burden of proof. (*Sanchez, supra*, 61 Cal.4th at p. 911.)

2.2. The 2011 arbitration agreement is procedurally unconscionable.

The court concluded the 2011 arbitration agreement is procedurally unconscionable because it is a contract of adhesion. We agree.

"[P]rocedural unconscionability requires oppression or surprise. ' "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." ' " (*Pinnacle, supra,* 55 Cal.4th at p. 247; *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 689 (*Lane*).) "Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. [Citation.] 'The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' " (*Armendariz*, *supra*, 24 Cal.4th at p. 113.)

Courts routinely conclude that nonnegotiated employment agreements are procedurally unconscionable. (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 796 ["The finding that the arbitration provision was part of a nonnegotiated employment agreement establishes, by itself, some degree of procedural unconscionability"].) But here, there is no evidence concerning the circumstances under which Martinez signed the agreement or whether she was told she was explicitly required to

sign the agreement as a condition of her continued employment. Martinez stated she could not recall signing the agreement. Ready Pac submitted a declaration by Timothy Clark, its Senior Vice President and Chief Human Resources Officer, who stated none of Ready Pac's employees, including Martinez, were required to sign the 2011 agreement. Further, he stated that many employees had not signed the 2011 agreement but none had suffered any adverse employment action as a result. But Clark gave no detail concerning the procedure Ready Pac used to obtain employee signatures on the 2011 agreement either in general or specifically relating to Martinez.

We are well aware, however, of the reality of most employment relationships and the inherent imbalance of power between individual employees and large corporate employers—a reality our Supreme Court has repeatedly recognized: " '[I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.' " (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071, quoting *Armendariz, supra*, 24 Cal.4th at p. 115.) The analysis applies with equal force where an employer requires an employee to sign an arbitration agreement as a condition of continued employment. (*Baxter, supra*, 16 Cal.App.5th at p. 723 [finding " 'high degree of oppressiveness' " where employee could quit job of over five years or accept employer's new arbitration terms]; *Fitz* v. *NCR Corp.* (2004) 118 Cal.App.4th 702, 722 (*Fitz*) ["Few employees are in a position to forfeit a job and the benefits they have accrued … solely to avoid

the arbitration terms that are forced upon them by their employer"].)

In the absence of any specific evidence regarding Ready Pac's representations to Martinez at the time she signed the 2011 agreement, we are left with the plain language of the 2011 agreement, which specifically states the agreement is a condition of the employment relationship. The form agreement plainly states the employee—in this case, Martinez—was required to sign it in order to continue working at Ready Pac. Specifically, the 2011 agreement opens with the following statement: "As a condition of the employment relationship between Ready Pac Produce, Inc., including its affiliated companies, parent, subsidiaries, owners, directors, officers, managers, employees or agents (collectively, the "Company"), and Maria del Rosario Martinez (the "Associate") and in consideration of Associate's employment or continued employment with the Company, the parties agree to the following[.]" (Underscoring omitted.) And at the end of the agreement, in bold face all caps, the 2011 agreement states: "BY SIGNING BELOW AND ACCEPTING EMPLOYMENT OR CONTINUING EMPLOYMENT WITH THE COMPANY, THE ASSOCIATE INTENTIONALLY AND VOLUNTARILY WAIVES HIS OR HER LEGAL RIGHTS TO CLASS, COLLECTIVE AND REPRESENTATIVE ACTION … ."

Given similar language, our courts of appeal have concluded that employer arbitration agreements were procedurally unconscionable. (See, e.g., *Baxter, supra*, 16 Cal.App.5th at pp. 723–724 [arbitration agreement held procedurally unconscionable where employer presented arbitration agreement on a take-it-or-leave-it basis and agreement was required as a condition of continued employment];

Fitz, *supra*,118 Cal.App.4th at p. 722 [same].) And we have no difficulty drawing that conclusion here. But as we have said, " '[A] finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided.' " (*Baltazar, supra,* 62 Cal.4th at p. 1244.)

2.3. The arbitration policy is not substantively unconscionable.

Ready Pac contends the court erred in finding the pending class action waiver to be substantively unconscionable. We agree.

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience." ' " (*Pinnacle, supra*, 55 Cal.4th at p. 246; *Lane*, *supra*, 224 Cal.App.4th at p. 692.) In addition, " '[a]rbitration agreements in the employer-employee context must provide for: (1) neutral arbitrators, (2) more than minimal discovery, (3) a written award, (4) all types of relief that would otherwise be available in court, and (5) no additional costs for the employee beyond what the employee would incur if he or she were bringing the claim in court.' " (*Armendariz*, *supra*, 24 Cal.4th at p. 102; *Baxter, supra,* 16 Cal.App.5th at p. 722.) To be enforceable, an arbitration agreement that applies to the resolution of an employee's public rights must not only be conscionable but must also satisfy the five *Armendariz* requirements. (*Baxter,* at p. 722.)

It is well settled that class action waivers in arbitration agreements are generally enforceable. (See *Concepcion, supra*, 563 U.S. at p. 344 [applying the FAA to invalidate California rule prohibiting class action waivers in consumer contracts of adhesion]; *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 362–366 (*Iskanian*) [recognizing validity of class action waivers under the FAA in employment contracts].) Thus, the general representative action waiver contained in the 2011 agreement is enforceable. But Martinez argued, and the court ultimately found, the more specific pending class action waiver was substantively unconscionable because, in the court's words, the agreement "requires the employee to give up any rights she had as a putative class member in a class action brought against her employer in federal court. There is no valid reason for an employer to require an employee to give up rights she may have in a pending legal action as a condition of her continued employment." It is worth noting, however, that although the pending class action waiver precluded Martinez from joining the *Guzman* class action, it did not prevent her from *arbitrating* any claim she might have had against her employer which was the subject of the *Guzman* class action.[2]

Both Martinez and the court found it significant that the *Guzman* class action was underway—not merely a possibility at some future point in time—when Martinez signed the 2011

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[2] It appears the court may have misunderstood the impact of the pending class action waiver and assumed it would have prevented Martinez from pursuing any remedy against Ready Pac for misconduct addressed in the *Guzman* class action. The pending class action waiver limited Martinez's procedural rights, not her substantive rights.

agreement. But neither explained why that distinction is significant and it is not readily apparent.

In *Concepcion*, the United States Supreme Court concluded California's prior rule prohibiting class action waivers was inconsistent with the goals of arbitration and therefore preempted by the FAA. The California Supreme Court summarized *Concepcion*'s reasoning as follows: "According to *Concepcion*, classwide arbitration 'sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.' [Citation.] Class arbitration also 'greatly increases risks to defendants' and 'is poorly suited to the higher stakes of class litigation' because of the lack of judicial review, 'thus rendering arbitration unattractive' to defendants. [Citation.]" (*Iskanian, supra*, 59 Cal.4th at p. 362.) These observations about the advantages and efficacy of arbitration of individual disputes—as compared to representative actions—are true irrespective of whether a representative action is pending, contemplated, or entirely nonexistent at the time an arbitration agreement is signed. In all cases, the class action procedure eviscerates the benefits an arbitral forum provides. With that principle, as well as the strong state and federal policies in favor of arbitration, in mind, we conclude the court erred in finding the pending class action waiver to be substantively unconscionable.

We are unpersuaded by Martinez's arguments to the contrary. In defense of the court's unconscionability finding, Martinez asserts "essentially every authority uncovered in a search by Ms. Martinez's counsel showed that every jurisdiction was in agreement that requiring an employee to opt out of a *pending* class action for continued employment *is* not just unfair,

but unlawful." But the cases cited have nothing to do with the issue before us. Instead, the cases cited by Martinez all relate to a federal district court's authority under the Federal Rules of Civil Procedure to restrict coercive communications between a defendant in a class action suit and actual or potential class members during the pendency of the litigation—a matter utterly irrelevant here. (See *Camp v. Alexander* (N.D.Cal. 2014) 300 F.R.D. 617; *Guifu Li v. A Perfect Day Franchise, Inc.* (N.D.Cal. 2010) 270 F.R.D. 509; *Belt v. Emcare, Inc.* (E.D.Tex. 2003) 299 F.Supp.2d 664; *Abdallah v. Coca-Cola Co.* (N.D.Ga. 1999) 186 F.R.D. 672; *Hampton Hardware, Inc. v. Cotter & Co., Inc.* (N.D. Tex. 1994) 156 F.R.D. 630.)[3] The only other cited case, *Jennings v. Walgreen Co.* (S.D.Fla. 2011) 805 F.Supp.2d 1345, is similarly inapposite because it concludes an employee's participation in a class action against an employer constitutes evidence the employee engaged in protected activity which may form the basis of a claim for workplace retaliation under Title VII.

Martinez advances a number of other arguments designed to thwart Ready Pac's appeal on more technical grounds. She argues that Ready Pac did not adequately articulate below that a class action waiver affects only procedural rights and therefore should not be allowed to do so now, that Ready Pac is estopped from arguing the pending class action waiver is not substantively unconscionable because it purportedly conceded the point below,

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[3] At oral argument, Martinez's counsel cited *O'Connor v. Uber Technologies, Inc.* (N.D.Cal., Dec. 6, 2013, No. C-13-3826 EMC) 2013 WL 6407583. As with the other federal cases cited, *O'Connor* relates to the district court's authority to restrict communications between a defendant and putative class members. And like the other cases cited on this subject, it is irrelevant to the case before us.

that Ready Pac forfeited its argument that the pending class action waiver is "insufficiently unconscionable to render the entire agreement unconscionable" by purportedly failing to raise that issue below, and that we should disregard some of the nuances of Ready Pac's arguments because they are inadequately reflected in the argument section heading.

Although vigorous and creative advocacy is admirable, it is off the mark here. As we have said, our obligation in this appeal is to determine independently, and as a matter of law, whether the 2011 arbitration agreement is enforceable. The perceived defects in Ready Pac's briefing highlighted by Martinez are of no consequence to our decision in that regard.

In sum, the court erred in finding the pending class action waiver was substantively unconscionable and on that basis concluding the 2011 arbitration agreement was unenforceable.

DISPOSITION

The order denying Ready Pac's motion to compel arbitration is reversed. On remand, the court should vacate its prior order and enter a new order granting Ready Pac's motion and submitting the matter to arbitration. Ready Pac shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.