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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

ROSITA CRUZ SERDENIA, Plaintiff and Respondent, v. GRANADA HILLS CONVALESCENT HOSPITAL, INC., Defendant and Appellant.	B243074 (Los Angeles County Super. Ct. No. BC482769)

APPEAL from an order of the Superior Court of Los Angeles County. Abraham Khan, Judge. Affirmed.

David M. Browne for Defendant and Appellant.

Law Offices of Choi & Associates and Edward W. Choi for Plaintiff and Respondent.

Granada Hills Convalescent Hospital, Inc. (appellant) appeals from an order denying its motion to compel arbitration. Respondent Rosita Cruz Serdenia (respondent) sued appellant for Labor Code violations and unfair business practices. Appellant filed a motion to compel arbitration based on a written arbitration agreement that respondent signed as part of her contract of employment. Appellant contends that the denial of the motion to compel arbitration was improper, and that none of the arguments respondent advanced in the trial court had any merit. We affirm.

BACKGROUND

On April 12, 2012, respondent filed a complaint against appellant for failure to pay overtime wages in violation of Labor Code section 1194; failure to provide meal and rest periods in violation of Labor Code section 226.7; violation of Labor Code section 203; failure to keep accurate records in violation of Labor Code section 226; and unfair business practices in violation of Business and Professions Code section 17200 et seq. Respondent alleged that appellant is engaged in the business of operating an assisted living facility, and that respondent was employed by appellant as a dietary supervisor from December 6, 2010 through November 20, 2011. Respondent alleged, among other things, that appellant required respondent to work excess hours without paying overtime wages; failed to provide her the appropriate number of uninterrupted meal and rest periods; failed to provide her with itemized statements of her hours and rate of pay; failed to maintain adequate employment records; and failed to pay her all unpaid overtime wages at the time of the termination of her employment.

Appellant answered the complaint on May 17, 2012, and filed its motion to compel arbitration on the same date. Respondent explained that when she was first hired, she received an employee handbook providing for arbitration of any claims relating to her employment. Respondent provided written acknowledgement of receipt of the handbook and the arbitration agreement. Appellant argued that the current controversy fell within the scope of the agreement to arbitrate and that the agreement is enforceable. Appellant provided a declaration of Seid Sadat, the accountant for appellant, attaching the relevant agreements and handbook.

Respondent opposed the motion to compel arbitration arguing that the "claims covered" by the arbitration agreement do not include her causes of action for Labor Code violations. Respondent further argued that the arbitration agreement is unconscionable, both procedurally and substantively. Finally, respondent argued that her fifth cause of action for injunctive relief under Business and Professions Code section 17200 cannot be arbitrated. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315.)

Respondent's opposition included a declaration of respondent, stating that beginning in December 2010, she was employed by appellant as a dietary supervisor. She was told to sign a few documents as a condition of her employment, but was not provided an opportunity to negotiate any of the terms set forth in those documents. Approximately one month after her employment, she was told to sign another document as a condition of her employment. She was not given the opportunity to fully review the document, which was long and complex. She was never afforded an opportunity to make any changes to the documents, and she understood that she had no choice but to sign them in order to continue being employed by appellant.

Appellant filed a reply memorandum arguing that arbitration agreements that are imposed as a condition of employment are valid and enforceable; that the scope of claims covered by the arbitration agreement covers respondent's Labor Code claims; that the arbitration provision is not so unconscionable as to render it unenforceable; that the nonarbitrability of respondent's cause of action for injunctive relief under Business and Professions Code section 17200 does not prevent an order of arbitration; and that the cause of action for injunctive relief under Business and Professions Code section 17200 should be severed.

The motion was heard on June 25, 2012. The court took the matter under submission to consider the parties' arguments. On June 29, 2012, the court filed an order denying appellant's motion to compel arbitration.

The court's order provided no basis for its order. In addition, the parties failed to obtain a court reporter for the oral proceedings. Therefore, on August 2, 2012, appellant

filed a motion seeking a settled statement. On September 20, 2012, the court denied appellant's motion for a settled statement, noting:

> "The court does not recall this particular hearing, and, without a reporter's transcript, judge's notes, and with only self-interested statements from interested parties, it is impossible to insure that the settled statement is accurate."

On August 3, 2012, appellant filed its notice of appeal from the trial court's denial of its motion to compel arbitration.

DISCUSSION

I. The arbitration agreement

Contractual arbitration arises only when the parties have agreed to arbitrate a controversy. (*Herman Feil, Inc. v. Design Center of Los Angeles* (1988) 204 Cal.App.3d 1406, 1414.) "'Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived.' [Citations.]" (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 569.)

Appellant attached to its motion to compel arbitration a document signed by respondent captioned "Acknowledge [*sic*] Receipt of Employee Handbook." The document, signed on December 6, 2010, contains the following paragraph:

> "I agree that any controversy or claim arising out of or relating to my employment with the Company, or the separation of my employment will be settled by binding arbitration. Judgment upon the award rendered by the arbitrator may be entered into any court having jurisdiction over the matter. I understand that an Arbitration Agreement is included as part of this handbook, and that I have been asked to sign that Agreement separately and return it to Administration."

Also attached was a copy of an "Employee Handbook," revised as of January 1, 2011. The handbook contained the following description of the "Alternative Dispute Resolution Policy":

> **"WHO IS COVERED BY THE ADR POLICY**
> The ADR policy will be mandatory for all employees. Any disputes which, arise and which, are covered by the ADR Policy must be submitted to final

and binding resolution through the procedures of the Company's ADR Policy.

"For employees covered by this Alternative Dispute Resolution Policy, alternative dispute resolution, including final and binding arbitration, is the exclusive means for resolving covered disputes (as defined below); no other action may be brought in court or in any other forum. This agreement is a waiver of all rights to a civil court action for a covered dispute; only an arbitrator, not a Judge or Jury, will decide the dispute.

"Nothing in this ADR Policy precludes the parties from discussing a mutually acceptable resolution of the dispute without the necessity of formal arbitration proceedings. Additionally, the parties may agree to engage in mediation prior to arbitration.

"CLAIMS COVERED
Covered disputes include any dispute arising out of or related to the terms and conditions of employment, termination of employment or alleged unlawful discrimination and/or harassment including, but not limited to, the following:

"• Alleged violations of federal, state and/or local constitutions, statutes or regulations;

"• Claims of unlawful harassment or discrimination which, cannot be resolved by the parties or during an investigation by an administrative agency (such as the Department of Fair Employment and Housing or the Equal Employment Opportunity Commission);

"• Claims based on any purported breach of contract (including breach of the covenant of good faith and fair dealing, claims of wrongful termination or constructive termination);

"• Claims of unfair demotion or reduction in pay;

"• Claims based on any purported breach of duty arising in tort, including alleged violations of public policy; and

"• Claims of defamation, pre and post-termination.
"The following types of disputes are expressly excluded and are not covered by this ADR policy:

"• Disputes related to workers' compensation and unemployment insurance;

"• Disputes or claims that are expressly excluded by statute or are expressly required to be arbitrated under a different procedure pursuant to the terms of a team member benefit plan.

"INITIATING THE ADR PROCEDURE
In the event a dispute should arise and you wish to initiate these procedures, deliver a written request for alternative dispute resolution to the Company within the time limits which would apply to the filing of a civil complaint in court. If a request for alternative dispute resolution is not submitted timely, the claim will be deemed to have been waived and forever released.

"THE ARBITATION
The dispute will be decided by a single decision-maker, called the arbitrator. The arbitrator will be mutually selected by the Company and the Employee. If the parties cannot mutually agree on an arbitrator, then a list of arbitrators will be obtained from the federal or state mediation and conciliation services (or similar neutral agencies that administer arbitration proceedings, such as the American Arbitration Association). The arbitrator will be selected by the parties according to the method of selection specified by the agency providing the list of proposed arbitrators.

"The arbitrator shall be bound by the provisions and procedures set forth in the National Rules for the Resolution of Employment Disputes promulgated by the American Arbitration Association. The applicable substantive law shall be the law of the State of California or federal law. If both federal and state law speak to a cause of action, the Employee shall have the right to elect his/her choice of law.

"The parties shall cooperate to the greatest extent practicable in the voluntary exchange of documents and information to expedite the arbitration. After selection of the arbitrator, the parties shall have the right to take depositions and to obtain discovery regarding the subject matter of the action and to use and exercise all of the same rights, remedies and procedures, and be subject to all of the same duties, liabilities and objections as provided in the California Code of Civil Procedure (commencing at section 2016). The arbitrator shall have the authority to rule on motions (including the power to issue orders and determine appropriate remedies) regarding discovery and to issue any protective orders necessary to protect the privacy and/or rights of parties and/or witnesses.

"The arbitrator shall have the same authority to award remedies and damages on the merits of the dispute as provided to a judge and/or jury

under parallel circumstances. However, the arbitrator shall only be permitted to award those remedies in law or equity which are requested by the parties and which, are supported by the credible, relevant evidence. The arbitrator shall issue a written opinion and award.

"Following the issuance of the arbitrator's decision, any party may petition a court to confirm, enforce, correct or vacate the arbitrator's opinion and award under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, if applicable, and/or applicable state law.

"FEES AND COSTS
Each party shall pay for its own costs and attorneys' fees, unless applicable law provides otherwise or the arbitrator so rules. Company shall pay for the cost of the mediator's and/or arbitrator's fees.

"SEVERABILITY
In the event that any provision of this ADR Policy is determined by a court of competent jurisdiction to be illegal, invalid or unenforceable to any extent, such term or provision shall be enforced to the extent permissible under the law and all remaining terms and provisions of this ADR Policy shall continue in full force and effect.

"Nothing in this Alternative Dispute Resolution Policy is intended to preclude any employee from filing a charge with the Equal Employment Opportunity Commission, the National Labor Relations Board or any similar federal or state agency seeking administrative resolution. However, any claim that cannot be resolved through administrative proceedings shall be subject to the procedures of this ADR Policy."

Appellant offered into evidence a copy of an acknowledgement of receipt of the employee handbook, signed by respondent on December 6, 2010; an acknowledgement of receipt of employment handbook, signed by respondent on January 19, 2011; and an "Arbitration Agreement Acknowledgement" signed by respondent on January 19, 2011.

Respondent does not deny that she signed these documents. However, respondent provided evidence in the form of a declaration that she signed the documents under oppressive circumstances and may not have been aware of what she was agreeing to. She had to sign some documents as part of her employment when she was hired, and she was not given the opportunity to negotiate any of the terms contained in the documents.

Approximately one month after she started working for appellant, she was told to sign another document as part of her employment. She did not have the opportunity to fully review that document. She was never allowed an opportunity to make any changes, and she felt she had no choice but to sign the documents in order to continue to be employed by appellant.

II. Standard of review

"When an order refusing to compel arbitration contains nothing respecting its basis, its legality must be determined from the record and the provisions of the Code of Civil Procedure, section 1281.2. [Citation.]" (*Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.* (1985) 164 Cal.App.3d 1122, 1126 (*Titan*).)

Code of Civil Procedure section 1281.2 states, in pertinent part:

> "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
>
> "(a) The right to compel arbitration has been waived by the petitioner; or
>
> "(b) Grounds exist for the revocation of the agreement."

Under the quoted language from Code of Civil Procedure section 1281.2, if the trial court determines that an arbitration agreement exists, it must order arbitration unless it also determines either that grounds for revocation of the agreement exist, or the right to compel arbitration has been waived by the party petitioning for it.[1] (*A. D. Hoppe Co. v. Fred Katz Constr.* (1967) 249 Cal.App.2d 154, 159.)

In determining whether "an agreement to arbitrate the controversy exists," we must first examine and construe the underlying agreement. (*Titan, supra*, 164

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[1] The defense of waiver has not been raised in this case, therefore is not at issue.

Cal.App.3d at p. 1126.) In doing so, we are not bound by the trial court's construction of the contract. In the absence of conflicting extrinsic evidence, the interpretation of a contract becomes a question of law to be decided on our independent review. (*Id.* at p. 1127.)

"The determination of the validity of an arbitration clause, which may be made only 'upon such grounds as exist for the revocation of any contract' (Code Civ. Proc., § 1281), 'is solely a judicial function unless it turns upon the credibility of extrinsic evidence.'. . .' [Citation.]" (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527, fn. omitted (*Stirlen*).) Thus, where no extrinsic evidence is presented, the determination of unconscionability is subject to de novo review. (*Ibid.*) Here, there are no disputed questions of fact. Although respondent presented evidence in the form of a declaration describing the conditions under which she signed the arbitration agreement, appellant does not dispute the facts set forth by respondent. Therefore, our review is de novo. (*Id.* at p. 1527.)

The judgment or order forming the basis of the appeal is presumed correct. (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1201 (*Hoover*).) "If the appealed judgment or order is correct on any theory, then it must be affirmed regardless of the trial court's reasoning, whether such basis was actually invoked. [Citations.]" (*Ibid.*) Where, as here, our review is de novo, "[w]e review the court's ruling, not its reasoning, and we will uphold its ruling if it is correct on any theory of law applicable to the case. [Citation.]" (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1561.)[2]

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[2] The parties raised several issues below. Among other things, respondent argued to the trial court that appellant's motion to compel arbitration should be denied because the claims covered by the arbitration agreement did not include her Labor Code violations, and because her fifth cause of action for injunctive relief under Business and Professions Code section 17200 is not subject to arbitration. Because we have no record of the trial court's reasoning below, we need not address each of these claims on appeal to assess error. Instead, we will only address the theory of law which we find presents a basis for upholding the trial court's decision. We therefore decline to address the scope of the

III. Unconscionability

We first consider the question of whether the arbitration agreement that appellant imposed as a condition of employment is valid. This involves an initial analysis of whether grounds exist for the revocation of the agreement. (Code Civ. Proc., § 1281.) In sum, we must determine whether there are reasons, based on general contract law principles, for refusing to enforce the present arbitration agreement. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 99 (*Armendariz*).) This question turns on "whether and to what extent the arbitration agreement was unconscionable or contrary to public policy, questions to which we now turn." (*Ibid*., fn. omitted.)

Unconscionability has both a procedural and a substantive element. (*Armendariz, supra,* 24 Cal.4th at p. 114.) The procedural element focuses "on oppression or surprise due to unequal bargaining power," and the substantive element focuses on "overly harsh or one-sided results." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 468-469 (*Gentry*).) "'"The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." [Citation.] . . .' [Citation.]" (*Ibid.*, quoting *Armendariz, supra*, 24 Cal.4th at p. 114.) However, they need not be present in the same degree. "'[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.]" (*Gentry, supra*, at p. 469.)

In the contract at issue before us, both elements of unconscionability are present.[3]

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covered claims or the arbitrability of the unfair business practices claim. We limit our discussion to the issue of unconscionability.

[3] The parties have, for the first time on appeal, raised the question of whether the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) preempts California law on certain issues. We need not decide the issue of preemption prior to deciding the issue of unconscionability. As set forth in *Armendariz*: "our inquiry into the enforceability of the arbitration agreement at issue in this case entails the same inquiry under the [California Arbitration Act] CAA as the FAA: Are there reasons, based on general contract law

A. Procedural unconscionability

We begin with an analysis of procedural unconscionability, and conclude that substantial evidence supports the trial court's implied finding of procedural unconscionability.

The evidence presented by respondent indicates that she was required to sign an arbitration agreement as a condition of employment. She had no opportunity to negotiate the terms of the agreement; was never afforded an opportunity to make any changes to the agreement; and she felt that she had no choice but to sign it in order to be employed in her position with appellant. Appellant does not dispute that the agreement was "mandatory for all employees." In other words, the arbitration agreement was imposed on employees as a condition of employment and there was no opportunity to negotiate.

"Procedural unconscionability may be proven by showing oppression, which is present when a party has no meaningful opportunity to negotiate terms or the contract is presented on a take-it-or-leave-it basis. [Citations.]" (*Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1246.) "'The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, "'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.'" [Citation.]' [Citation.]" (*Ibid*.)

Mandatory employment arbitration agreements such as the one at issue here are generally considered to be "adhesive" and thus procedurally unconscionable. (*Armendariz, supra*, 24 Cal.4th at pp. 114-115.) This is because "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 the position to refuse a job because of an arbitration requirement." (*Id.* at p. 115.) Because arbitration is advantageous to

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principles, for refusing to enforce the present arbitration agreement? In the present case, the answer turns on whether and to what extent the arbitration agreement was unconscionable or contrary to public policy . . . ." (*Armendariz, supra*, 24 Cal.4th at p. 99, fn. omitted.)

employers, it is almost inevitably the employer who seeks to compel arbitration. (*Ibid.*)

Under the circumstances, we find that respondent experienced significant oppression due to unequal bargaining power at the time she signed the agreement. Thus, the arbitration agreement is procedurally unconscionable.

B. Substantive unconscionability

"Given the lack of choice and the potential disadvantages that even a fair arbitration system can harbor for employees, we must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement." (*Armendariz, supra*, 24 Cal.4th at p. 115.) One such substantively unconscionable element of an arbitration agreement is a lack of mutuality. (*Id.* at pp. 115-116.) Where the contract requires the employee, but not the employer, to submit claims to arbitration, it lacks even a "'modicum of bilaterality'" and is substantively unconscionable. (*Id.* at p. 117.) "[T]he doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." (*Id.* at p. 118.)

The contract at issue does just that. As respondent points out, under the heading "WHO IS COVERED BY THE ADR POLICY," the arbitration agreement provides: "The ADR Policy will be mandatory for all employees." However, it contains no language suggesting that the employer is also bound to arbitrate any disputes it may have with the employee. Instead, the agreement specifies that the requirement of binding arbitration is limited to employees: "*For employees covered by this Alternative Dispute Resolution Policy*, alternative dispute resolution, including final and binding arbitration, is the exclusive means for resolving covered disputes (as defined below); no other action may be brought in court or in any other forum." (Italics added.) The agreement contains no language suggesting that the *employer* is giving up its right to litigate anything.

In addition, the scope of the "claims covered" are those which would logically be brought by an employee against an employer. Covered claims include "any dispute arising out of or related to the terms and conditions of employment, termination of

employment or alleged unlawful discrimination and/or harassment." Although the contract does not expressly authorize litigation of the employer's claims against the employee, such is the clear implication of the agreement. "Obviously, the lack of mutuality can be manifested as much by what the agreement does not provide as by what it does. [Citation.]" (*Armendariz, supra*, 24 Cal.4th at p. 120.)

The language in the agreement is distinguishable from that found in the arbitration agreement at issue in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 (*Little*). In *Little*, an employee brought discrimination and wrongful termination claims against an employer. The Supreme Court ordered the unconscionable portion of the agreement to be severed and the rest of the arbitration agreement enforced. In concluding that lack of mutuality was not an issue in that case, the high court noted that the employer's potential claims against the employee were not implicitly excluded. Instead, the agreement applied to "'any claim, dispute, or controversy . . . between [the employee] and the Company.'" (*Id.* at p. 1075, fn. 1.) The agreement before us contains no such broad language, instead applying only to certain claims specifically covered by the agreement -- those "related to the terms and conditions of employment, termination of employment or alleged unlawful discrimination and/or harassment."

Appellant argues that language in the "Abitration Agreement Acknowledgement" (acknowledgement) should be read to require mutuality in the arbitration provision itself. We disagree. The acknowledgement states: "BOTH PARTIES UNDERSTAND THAT BY SIGNING THIS AGREEMENT, THEY ARE WAIVING THEIR RIGHTS TO A TRIAL BY JURY WITH REGARD TO ANY OF THE MATTERS ADDRESSED IN THIS AGREEMENT." However, the language of the agreement itself makes it clear that the matters addressed therein are limited to matters initiated by the employee. As quoted above, the policy is "mandatory for all employees" -- not the employer -- and the "matters" addressed in the agreement are those brought by "employees covered" by the agreement. The employer cannot create mutuality by agreeing that it is bound to arbitrate

only those claims which the *employee* initiates. The agreement creates no mutual obligation to arbitrate, and the acknowledgement does not change that.[4]

Under the circumstances, we find that the agreement is unconscionably one-sided. (*Armendariz, supra*, 24 Cal.4th at p. 121.)

C. Severability of unconscionable provisions

Having found that the agreement is both procedurally and substantively unconscionable, we must evaluate the interplay between these two findings to make a final determination of unconscionability. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1286.) "In doing so, we apply a 'sliding scale' described in *Armendariz*; we compare the extent of regularity in the procedural process by which the contract was entered into with the degree of harshness or unreasonableness of the substantive terms of the contract. [Citation.]" (*Nyulassy*, at pp. 1286-1287.)

The contract is undeniably a contract of adhesion and is therefore highly procedurally unconscionable. In addition, the lack of mutuality alone is sufficient to render it substantively unconscionable. (*Armendariz, supra*, 24 Cal.4th at p. 120 ["an arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences"].)[5] Given the

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[4] Most of the "covered claims" listed in the arbitration agreement are those which would only be brought by an employee against an employer -- for example, claims related to termination of employment, unlawful discrimination and/or harassment, and claims of unfair demotion or reduction in pay, to name a few. However, as the *Armendariz* court made clear, "[t]he fact that it is unlikely that an employer will bring claims against a particular type of employee is not, ultimately, a justification for a unilateral arbitration agreement." If there is no justification for "categorically exempting employer claims," the arbitration agreement is impermissibly unilateral. (*Armendariz, supra*, 24 Cal.4th at p. 121.)

[5] We note that California courts have agreed that not all lack of mutuality in a contract of adhesion is necessarily invalid. Where the party with superior bargaining power can articulate a legitimate commercial need for extra protection, such a unilateral contract may be enforceable. "'However, unless the "business realities" that create the special need for such an advantage are explained in the contract itself, which is not the

high degree of both procedural and substantive unconscionability, we have little trouble concluding that the arbitration agreement is impermissibly unconscionable.

Pursuant to Civil Code section 1670.5, if a court finds a contract, or a clause of a contract, to be unconscionable, the court may refuse to enforce the contract or it may enforce the remainder of the contract without the unconscionable clause. The statute gives the trial court "some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement." (*Armendariz, supra*, 24 Cal.4th at p. 122.) However, "it also appears to contemplate the latter course only when an agreement is 'permeated' by unconscionability." (*Ibid.*) Where the agreement is affected by a lack of mutuality, "such permeation is indicated by the fact that there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement." (*Id.* at pp 124-125.) "Rather, the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms. Civil Code section 1670.5 does not authorize such reformation by augmentation, nor does the arbitration statute." (*Armendariz*, at p. 125.)

As the *Armendariz* court concluded, "[b]ecause a court is unable to cure this unconscionability through severance or restriction and is not permitted to cure it through reformation and augmentation, it must void the entire agreement. [Citation.]" (*Armendariz, supra*, 24 Cal.4th at p. 125.)

We therefore find the trial court did not err in determining that the entire arbitration agreement is void and unenforceable.[6]

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case here, it must be factually established.' [Citation.]" (*Armendariz, supra*, 24 Cal.4th at p. 117, quoting *Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at p. 1536.)

[6] For the first time on appeal, respondent has raised the point that her claims for Labor Code violations are not subject to arbitration under California law. (*Hoover, supra*, 206 Cal.App.4th 1193.) However, as appellant points out, if the FAA is applicable to the controversy at issue, California law is preempted and these wage disputes are arbitrable. (See *Perry v. Thomas* (1987) 482 U.S. 483, 490-491 ["clear federal policy [is] . . . in unmistakable conflict with California's [Labor Code section] 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the

DISPOSITION

The order is affirmed. Respondent is awarded her costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST

Supremacy Clause, the statute must give way"].) Because this issue was not raised below, the highly factual issue of whether the contract is governed by the FAA was not resolved. However, because we have found that the arbitration agreement was impermissibly unconscionable, we need not, and do not, reach the question of federal preemption.