Filed 4/24/17 Enyong v. Westlake Services CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KAMANCHI ENYONG, Plaintiff and Respondent, v. WESTLAKE SERVICES, LLC et al., Defendants and Appellants.	B275952 (Los Angeles County Super. Ct. No. BC599860)

APPEAL from an order of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Reversed and remanded, with directions.

Molino & Berardino, Michelle Cooper, for Defendants and Appellants.

Cummings & Franck, Scott O. Cummings and Lee Franck, for Plaintiff and Respondent.

Plaintiff and respondent Kamanchi Enyong filed a complaint alleging seven causes of action[1] under the Fair Employment and Housing Act (the FEHA) (Gov. Code, § 12900 et seq.) against defendant and appellant Westlake Services, LLC d/b/a Westlake Financial Services, and seven other entities (collectively Westlake).[2] The trial court denied Westlake's petition to compel arbitration, finding the agreement to arbitrate unconscionable. We conclude the arbitration agreement contains only one unconscionable term, which may be severed, and reverse the order denying the petition to compel arbitration.

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[1] The specifics of the various causes of action are not relevant to the issues on appeal.

[2] Enyong alleged that Westlake and all other defendants were: an "integrated enterprise;" "alter egos of each other;" "joint employers" of Enyong; and "acting as partners" or a "joint venture" in Enyong's employment.

Westlake's Petition to Compel Arbitration

Westlake petitioned to compel arbitration on Enyong's claims under the Federal Arbitration Act (9 U.S.C. § 2) (the FAA) and the California Arbitration Act (Code Civ. Proc., § 1281.2) (the CAA.) The petition alleged that Enyong signed a two-page document entitled "**DISPUTE RESOLUTION AGREEMENT**" (the agreement) on her first day of employment with Westlake Services, LLC. The agreement was attached to the declaration of Erika Angel, Director of Human Resources for Westlake. Angel declared that Westlake "is a privately held finance company that specializes in the acquisition and servicing of prime to subprime automotive retail installment contracts from over 15,000 new and used car dealerships throughout the United States," and that "Westlake's employees deal with consumers and automobile dealers in all 50 states in the course of their employ."

Under the language of the agreement, Westlake and Enyong "consent[ed] to the resolution by arbitration of all claims or controversies, for which a court otherwise would be authorized by law to grant relief, in any way arising out of, relating to, or associated with the Employee's employment with the Company, or its termination . . . ." The agreement exempted "claims by the Company for injunctive and/or other equitable relief for unfair competition and/or unauthorized disclosure of trade secrets or confidential

information . . . ." Any arbitration would be held, at the discretion of the defending party, before the Judicial Arbitration and Mediation Services (JAMS) or the American Arbitration Association (AAA).

Opposition to the Petition to Compel Arbitration

Enyong's opposition argued the agreement is not enforceable because: it is not a contract; it is procedurally and substantively unconscionable; and severance cannot cure the defects because they represent a lack of mutuality. The opposition was supported by Enyong's declaration, which sets forth the following facts. Westlake's human resources representative met with Enyong. Enyong was presented with a stack of documents which she was told she would have to sign, without changes or modifications, if she wanted to work at Westlake. Enyong did not have an opportunity to negotiate the agreement, nor did she have time to have anyone review it. She was informed that she had to sign the documents right away. Westlake, not Enyong, drafted the agreement, and Enyong had no say as to its terms or the ability to negotiate its terms. She did not receive the JAMS or AAA rules for review. She was not told where to obtain the rules, nor was she told which arbitration company Westlake would select. She understood the agreement was not a contract because it said it was not a contract. Enyong never understood or mutually assented to creating a contract for arbitration.

Reply to the Opposition and the Trial Court's Ruling

Westlake filed a reply addressing the three issues raised in the opposition. The trial court considered argument from the parties. The court adopted its tentative decision as the decision of the court, denying the petition to compel arbitration on the basis that the agreement was unenforceable on grounds of unconscionability.

First, the trial court rejected Enyong's argument that the agreement was not a contract. While the agreement states it does not create an employment contract, it is a contract to arbitrate disputes.

Second, the court addressed procedural and substantive unconscionability. The court found procedural unconscionability because the agreement was presented on a take-it-or-leave-it basis. Enyong had to sign the agreement without changes in order to be employed by Westlake. Enyong was not provided with the rules of JAMS or AAA, nor could she know which rules would apply until after she made a claim subject to arbitration. The rules might change by the time Enyong filed a claim.

On the issue of substantive unconscionability, the court found the agreement one-sided and lacking in mutuality, because only Westlake was permitted to seek equitable or injunctive relief related to unfair competition, trade secrets, non-competition, and intellectual property. Although the claims exempted are those most likely to be brought by the

employer, employees sometimes seek relief for unfair competition, and under the agreement Enyong would be limited to arbitration while Westlake could seek injunctive relief outside of arbitration. Although JAMS and AAA "are both well-respected forums, and the choice of either is not likely to result in a biased arbitrator in a forum as large as Los Angeles, the circumstances of the choice are likely to favor the employer." The court reasoned that Westlake would most likely be the party defending the action, and it would be able to determine which arbitrator it prefers after seeing the nature of Enyong's claims. As a result the court concluded, "There is some unconscionability here."

Third, the trial court rejected the notion that the unconscionable portions of the agreement could be severed. The court concluded severance was improper where an agreement is permeated with unconscionability or unlawfulness. Because the court found significant procedural and substantive unconscionability, and the offending provisions were not severable, the petition to compel arbitration was denied.

DISCUSSION

Westlake argues the trial court erred in denying the petition to compel arbitration. Preliminarily, Westlake argues the agreement is subject to the FAA, but that it is equally enforceable under the CAA. On the merits, Westlake argues the agreement is neither procedurally nor

substantively unconscionable. Any unconscionable provision should have been severed by the trial court in order to effectuate the balance of the agreement. In an argument raised for the first time on appeal, Westlake further contends the issue of the validity of the arbitration agreement was delegated to the arbitrator and not to the trial court.[3]

Standard of Review

"The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability. (*Engalla v. Permanente Medical Group, Inc.* [(1997)] 15 Cal.4th [951,] 972, 64 Cal.Rptr.2d 843.) Where, as here, the evidence is not in conflict, we review the trial court's denial of arbitration de novo. (*Service Employees Internat. Union, Local 1021 v. County of San Joaquin* (2011) 202 Cal.App.4th 449, 455.)" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

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[3] Because we resolve the appeal on other grounds, we do not address the merits of Westlake's contention that the validity of the agreement was delegated to the arbitrator, or whether Westlake forfeited the argument by failing to raise it in the trial court.

Application of the FAA

Westlake first argues the agreement is subject to the FAA. We agree. The undisputed evidence before the trial court was that Westlake "is a privately held finance company that specializes in the acquisition and servicing of prime to subprime automotive retail installment contracts from over 15,000 new and used car dealerships throughout the United States," and that "Westlake's employees deal with consumers and automobile dealers in all 50 states in the course of their employ." The FAA "rests on the authority of Congress to enact substantive rules under the commerce clause, requiring courts to enforce arbitration agreements in contracts involving interstate commerce. (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 10–11 (*Keating*).)" (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 383–384.) The agreement, on this record, is a contract involving interstate commerce subject to the FAA.[4]

The FAA reflects a "'liberal federal policy favoring arbitration,'" and the "'fundamental principle that arbitration is a matter of contract.'" (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 (*Concepcion*).) The FAA

[4] Enyong makes no argument that the FAA is inapplicable, but instead contends the trial court's finding of unconscionability is correct without regard to whether the FAA or CAA controls. As an alternative argument, Westlake also argues the agreement is enforceable under the CAA.

is intended to ensure that private arbitration agreements are enforced according to their terms. (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 237–238 (*Carbajal*).)

The Agreement is a Contract to Arbitrate

Enyong argued in the trial court that the dispute resolution agreement is not a contract to arbitrate. Enyong's contention focused on provision No. 7 in the agreement, which included the following bolded title: "**NOT AN EMPLOYMENT AGREEMENT**." Provision No. 7 reads as follows: "This agreement is not, and shall not be construed to create, any contract or covenant of employment, express or implied." As the trial court properly found, this provision establishes that the agreement did not create a contract of employment, but the agreement as a whole unquestionably created a contract to arbitrate certain disputes. Provision No. 1 of the agreement expressly creates an "**AGREEMENT TO ARBITRATE**" between "the Company and the Employee." "The above language eliminates any argument the parties did not agree to arbitrate their employment-related disputes." (*Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 397 (*Cruise*); see *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1249 (*Baltazar*) ["The arbitration agreement at issue here makes clear that the parties mutually agree to arbitrate all employment-related claims: that is, 'any claim or action arising out of or in any way related to the hire, employment, remuneration,

separation or termination of Employee.'"].) This type of agreement is enforceable by way of petition to compel arbitration. (Code Civ. Proc., § 1281.2 ["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," subject to specified exceptions].)

Principles of Procedural and Substantive Unconscionability

The doctrine of unconscionability has procedural and substantive elements. Procedural unconscionability focuses on oppression or surprise due to unequal bargaining power; substantive unconscionability looks for overly harsh or one-sided results. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910 (*Sanchez*), citing *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133.) Both procedural and substantive unconscionability must be present in order for a court to refuse to enforce a contract or clause as unconscionable. (*Ibid.*) Procedural and substantive unconscionability need not be present to the same extent. "'[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.' (*Armendariz v. Foundation Health Psychcare*

Services, Inc. (2000) 24 Cal.4th 83, 114 (*Armendariz*).)" (*Sanchez*, *supra*, at p. 910.)

Unconscionability is not synonymous with making a bad bargain. (*Sanchez*, *supra*, 61 Cal.4th at p. 911.) Instead, contracts are unconscionable where they impose terms that are overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided. (*Ibid*.) "[T]hese formulations, used throughout our case law, all mean the same thing"—unconscionability requires a substantial degree of unfairness and "[a] party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect, was unfair or a bad bargain." (*Ibid*.) "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." (*Id.* at p. 912.) "[T]he application of unconscionability doctrine to an arbitration clause must proceed from general principles that apply to any contract clause. In particular, the standard for substantive unconscionability—the requisite degree of unfairness beyond merely a bad bargain—must be as rigorous and demanding for arbitration clauses as for any contract clause." (*Ibid.*)

Procedural Unconscionability

The trial court pointed to the following factors in finding procedural unconscionability: the dispute resolution agreement was presented on a take-it-or-leave-it basis;

Enyong had to sign the agreement without changes in order to be employed by Westlake; and Enyong was not provided with the rules of JAMS or AAA, nor could she know which rules would apply until after she made a claim subject to arbitration because the rules might change by the time Enyong filed a claim.

The Take-it-or-Leave-it Requirement Imposed on Enyong

The "**AGREEMENT TO ARBITRATE**" is identified in the first paragraph, in bolded capital letters. It is undisputed that the arbitration agreement was presented to Enyong as a condition of employment, without room for negotiation. As such, "the arbitration agreement was part of an adhesion contract. [Fn. Omitted.]" (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1470 (*Roman*).) Although the agreement "was adhesive in nature, there was no element of surprise" (*Baltazar*, *supra*, 62 Cal.4th at p. 1245) because Enyong knew of the arbitration agreement. The arbitration agreement was just two pages long, and the agreement to arbitrate was contained in a clearly defined paragraph. (*Roman*, *supra*, at pp. 1470–1471 ["whatever procedural unfairness is inherent in an adhesion agreement in the employment context, it was limited in this case. The arbitration provision was not buried in a lengthy employment agreement"].)

The agreement did not involve "any oppression or sharp practices" on the part of' Westlake, and Enyong "was

not lied to, placed under duress, or otherwise manipulated into signing the arbitration agreement." (*Baltazar*, *supra*, 62 Cal.4th at p. 1245.) We are required "to be 'particularly attuned' to her claim of unconscionability [citation], but we do not subject the contract to the same degree of scrutiny as '[c]ontracts of adhesion that involve surprise or other sharp practices' (*Gentry v. Superior Court* [(2007)] 42 Cal.4th [443,] 469)." (*Baltazar*, *supra*, at p. 1245.)

We next discuss whether other portions of the agreement Enyong show procedural unconscionability.

Failure to Attach the JAMS and AAA Rules

The trial court found there was an element of procedural unconscionability due to the failure to attach the rules of JAMS and AAA. This contention has been settled by our Supreme Court's decision in *Baltazar*, *supra*, 62 Cal.4th at page 1246, in which the plaintiff argued "a somewhat greater degree of procedural unconscionability is present here—warranting closer scrutiny of the substantive fairness of the agreement's terms—because Forever 21 did not provide Baltazar with a copy of the AAA's rules for arbitration of employment disputes, which, by the terms of the arbitration agreement, govern any arbitration between the parties." After reviewing various Courts of Appeal decisions that "'have held that the failure to provide a copy of the arbitration rules to which the employee would be bound supported a finding of procedural unconscionability,'" the

Baltazar court noted that in each of the cases "the plaintiff's unconscionability claim depended in some manner on the arbitration rules in question." (*Ibid.*) "These cases thus stand for the proposition that courts will more closely scrutinize the substantive unconscionability of terms that were 'artfully hidden' by the simple expedient of incorporating them by reference rather than including them in or attaching them to the arbitration agreement. [Citation.] Baltazar's argument accordingly might have force if her unconscionability challenge concerned some element of the AAA rules of which she had been unaware when she signed the arbitration agreement. But her challenge to the enforcement of the agreement has nothing to do with the AAA rules; her challenge concerns only matters that were clearly delineated in the agreement she signed. Forever 21's failure to attach the AAA rules therefore does not affect our consideration of Baltazar's claims of substantive unconscionability." (*Ibid.*; see also *Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 249 ["failure to attach the applicable AAA rules did not increase the procedural unconscionability of the application or its arbitration provision"]; *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 691 ["the failure to attach a copy of the AAA rules did not render the agreement procedurally unconscionable"].)

Enyong makes no argument regarding the fairness of the rules of JAMS or AAA. Her contention is limited to the failure to attach the rules to the agreement. Based on the

foregoing authorities, we conclude that the trial court erred in finding procedural unconscionability based on the failure of Westlake to attach the JAMS and AAA rules to the agreement.

Substantive Unconscionability

The trial court found the agreement one-sided and lacking in mutuality in two respects. First, only Westlake was permitted to seek equitable or injunctive relief related to unfair competition, trade secrets, non-competition, and intellectual property. The court reasoned that although the equitable or injunctive claims exempted are most likely to be brought by an employer, employees sometimes seek relief for unfair competition, and under the agreement Enyong would be limited to arbitration while Westlake could seek injunctive relief outside of arbitration. Second, although JAMS and AAA "are both well-respected forums, and the choice of either is not likely to result in a biased arbitrator in a forum as large as Los Angeles, the circumstances of the choice are likely to favor the employer." The court reasoned that the choice of the arbitration would be made after a dispute arises, and that dispute would be based on a claim by Enyong, because Westlake's likely claims were excluded from arbitration. The court believed this favored Westlake, which would be able to determine which arbitration service it preferred after viewing Enyong's claim.

Westlake's Right to Seek Equitable and Injunctive Relief Outside of Arbitration

"[C]ourts repeatedly have found an employer-imposed arbitration agreement to be substantively unconscionable when it requires the employee to arbitrate the claims he or she is mostly likely to bring, but allows the employer to go to court to pursue the claims it is most likely to bring. (*Carlson* [*v. Home Team Pest Defense, Inc. (2015)*] 239 Cal.App.4th [619,] 634; *Serafin [v. Balco Properties, Ltd., LLC (2015)*] 235 Cal.App.4th [165,] 181; *Carmona* [*v. Lincoln Millennium Car Wash, Inc. (2014)*] 226 Cal.App.4th [74,] 87.)" (*Carbajal*, *supra*, 245 Cal.App.4th at p. 249.) Westlake's attempt to distinguish this line of cases fails, as these authorities accurately represent the state of California law, and Westlake cites no contrary authority supporting its position.

Westlake argues that the dispute resolution agreement is distinguishable from the unbroken line of cases holding similar carve-out provisions substantively unconscionable. This is so, according to Westlake, because there are sound business justifications for the provision allowing it alone to seek injunctive and equitable relief. But Westlake presented no evidence to support this proposition, and its contention "is just argument with no evidence to support it . . . ." (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 177 (*Mercuro*) [rejecting employer's claim that it had "a reasonable

business justification for not arbitrating claims for injunctive or other equitable relief"].)

We conclude this portion of the agreement is substantively unconscionable.

The Right to Select Between JAMS and AAA

The agreement provides that "[t]he arbitration will be conducted by an impartial arbitrator experienced in employment law selected from either" JAMS or AAA "at the election of the defending party in accordance with the applicable entity's then-current employment arbitration rules (except as otherwise provided in this agreement.)" The trial court found that "JAMS and AAA are both well-respected forums, and the choice of either is not likely to result in a biased arbitrator in a forum as large as Los Angeles," but "the circumstances for the choice are likely to favor the employer." The court concluded that claims subject to arbitration were more likely to be brought by the employee, and "[o]nce that happens, the employer can make the determination which forum it will prefer, based on the arbitrator available and the current rules of arbitration. There is some unconscionability here."

We accept the trial court's conclusion that selection of either JAMS or AAA is not likely to result in a biased arbitrator, a proposition Enyong does not challenge on appeal. "We assume that the arbitrator will operate in a reasonable manner in conformity with the law." (*Dotson v.*

Amgen, Inc. (2010) 181 Cal.App.4th 975, 984 (*Dotson*).) We disagree with the trial court's conclusion that the power of the defending party to select between two groups of neutral arbitration services is substantively unconscionable. Allowing a defending party to make this choice is not the type of provision, in the context of this case, which shocks the conscience because it is unduly harsh or oppressive.

Citing *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 177–178 (*Western Pizza*)[5] and *Mercuro*, *supra*, 96 Cal.App.4th 167 at pages 178–179, Enyong argues that the provision allowing the employer to decide which arbitration service will be selected[6] "has already been determined by Courts to be substantively unconscionable for lack of a neutral arbitrator." These cases do not support the proposition asserted by Enyong.

The circumstances in *Western Pizza* bear no relationship to the dispute resolution agreement in this case.

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[5] *Western Pizza* was abrogated in part on another ground in *Concepcion*, *supra*, 563 U.S. 333, as stated in *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348, 366.

[6] The argument misstates the language of the agreement. The agreement does not delegate to Westlake the right to select the arbitration service. The agreement provides that the *defending party* may select between JAMS and AAA. Mutuality of this provision is ensured by our determination, *post*, that the carve-out provision allowing Westlake to seek injunctive relief must be severed from the agreement on the ground of unconscionability.

Western Pizza involved "the designation of a 'panel' of arbitrators consisting of a single arbitrator selected by Western Pizza [which] created a false appearance of mutuality in the selection of an arbitrator. Moreover, the effective designation of a single arbitrator in what appears to be a standard arbitration agreement applicable to a large number of corporate employees gives rise to a significant risk of financial interdependence between Western Pizza and the arbitrator, and an opportunity for Western Pizza to gain an advantage through its knowledge of and experience with the arbitrator. [Citations.] We conclude that this provision is unfairly one-sided and substantively unconscionable." (*Western Pizza*, *supra*, 172 Cal.App.4th at pp. 177–178.)

The agreement between Westlake and Enyong did not create a situation in which there exists only one potential arbitrator. The parties agreed that the defending party would select "an impartial arbitrator experienced in employment law" from JAMS or AAA. Enyong does not suggest that JAMS and AAA have a limited number of qualified employment law arbitrators. Enyong also does not suggest that Westlake's employees engage in a large number or arbitrations which would create an inherent bias in favor of Westlake. The holding in *Western Pizza* provides no support for Enyong's argument that courts have resolved the issue presented here.

Enyong's reliance on *Mercuro* fares no better. The arbitration agreement in *Mercuro* resulted in a group of "only eight" arbitrators having offices in the Central District

of California. The employer was a large corporation compared to the relatively few arbitrators, which "means employees . . . will be victims of the 'repeat player effect.' The fact an employer repeatedly appears before the same group of arbitrators conveys distinct advantages over the individual employee." (*Mercuro*, *supra*, 96 Cal.App.4th at p. 178.) There is nothing in the record to show that Enyong will be subject to the repeat player effect as described in *Mercuro*. The record contains no evidence on the frequency of employee lawsuits against Westlake, the size of Westlake's business operation, whether Westlake has utilized JAMS or AAA in the past, or whether other employee agreements specify the use of different arbitration services. Enyong has not carried her burden of showing the arbitration selection provision is unconscionable.

Severance

Westlake argues that if any portion of the agreement is unconscionable, the trial court abused its discretion by failing to sever the offending provision and enforcing the agreement to arbitrate. We have concluded that the agreement is a contract of adhesion, but it does not involve sharp practices, oppression, or an element of surprise. (*Baltazar*, *supra*, 62 Cal.4th at p. 1245.) There is only one portion of the agreement that is substantively unconscionable—the provision permitting only Westlake to seek equitable and injunctive relief in a court of law. The

trial court abused its discretion by failing to sever this one provision and thereby refusing to enforce an otherwise valid arbitration agreement as favored by the FAA.

When an agreement to arbitrate contains an unconscionable clause, under Civil Code section 1670.5, subdivision (a), the trial court "may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." The focus of the trial court, after finding a provision of the agreement unconscionable, is to determine if the interests of justice would be furthered by severance. (*Dotson*, *supra*, 181 Cal.App.4th at p. 986; *Roman*, *supra*, 172 Cal.App.4th at p. 1477.) Although the statute gives a trial court discretion to sever or restrict the unconscionable provision, or refuse to enforce the entire agreement, it contemplates "'the latter course only when an agreement is "permeated" by unconscionability.' [Citation.]" (*Roman*, *supra*, at pp. 1477–1478; accord, *Dotson*, *supra*, at p. 986.)

"Where, as here, only one provision of the agreement is found to be unconscionable and that provision can easily be severed without affecting the remainder of the agreement, the proper course is to do so. In *Little* [*v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064], the arbitration agreement included only one unlawful provision, allowing review by a second arbitrator of any award over $50,000. *Little* concluded that this provision could be severed without disturbing the rest of

the arbitration agreement and that no reformation was need[ed]. (*Little, supra,* 29 Cal.4th at pp. 1071–1075.) *Little* further stated that there was 'no indication that the state of the law was "sufficiently clear at the time the arbitration agreement was signed to lead to the conclusion that th[e] . . . provision . . . was drafted in bad faith." [Citation.]' (*Id.* at pp. 1075–1076.) *Little* concluded that severance was appropriate and the arbitration agreement was valid and enforceable with the unconscionable provision stricken. (*Id.* at p. 1076.)" (*Dotson*, *supra*, 181 Cal.App.4th at p. 985.)

The recent opinion of our colleagues in the First Appellate District in *Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257 (*Farrar*), is instructive. In *Farrar*, the appellate court found that one portion of an employment arbitration agreement—allowing the employer alone to seek relief in court for claims of breach of a confidentiality agreement—was substantively unconscionable. (*Id.* at p. 1273.) The *Farrar* court concluded, however, that there was no other substantive unconscionability in the arbitration agreement, and severed the offending provision. "Thus, in this case, the one aspect in which the arbitration provision is substantively unconscionable is readily remedied—by severing out the exception for claims arising from the confidentiality agreement. This is not a case in which the arbitration provision is 'permeated' by unconscionability and, thus, would have to be 'reformed' in order to eliminate unconscionability. (See *Armendariz*, *supra*, 24 Cal.4th at p. 125.)" (*Id.* at p. 1275.)

The situation presented here is indistinguishable from that in *Farrar*. The agreement to arbitrate between Westlake and Enyong is not permeated with unconscionability. The lone substantively unconscionable provision, allowing only Westlake to seek injunctive or equitable relief in a court of law, may easily be denied enforceability while preserving the balance of the agreement. Severance of this singularly offensive provision and enforcement of the arbitration agreement is consistent with the FAA's liberal policy enforcing agreements to arbitrate. The trial court accordingly erred in denying the motion to compel arbitration by failing to sever the carve-out provision favoring Westlake.

DISPOSITION

The order denying the petition to compel arbitration is reversed. The trial court is directed to issue a new and different order, severing the provision permitting Westlake to seek equitable and injunctive relief in a court of law, and granting Westlake's petition to arbitrate. Costs on appeal are awarded to appellants.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.