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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MIGUEL A. DIAZ et al., Plaintiffs and Respondents, v. HUTCHINSON AEROSPACE & INDUSTRY, INC., et al., Defendants and Appellants.	B271563 (Los Angeles County Super. Ct. No. BC600200)

APPEAL from an order of the Superior Court of Los Angeles County, Michelle Rosenblatt, Judge. Affirmed.

McLeod & Witham, Daniel J. Turner and Jennifer S. Grock for Defendants and Appellants.

Turk & Associates, Salim Naim Turk; Law Office of Herb Fox and Herb Fox for Plaintiffs and Respondents.

* * * * * *

Appellants Hutchinson Aerospace & Industry, Inc., and employee Marie Dhaine (together Hutchinson) appeal after the trial court denied their motion to compel arbitration of employment-related claims brought by former employees Miguel Diaz and Jose Martinez. The court refused to enforce the arbitration agreement because it was unconscionable. We affirm.

BACKGROUND

Diaz began working for Hutchinson in 2009 and Martinez began working for Hutchinson in 2013. They worked in Hutchinson's Federal Aviation Administration (FAA) Certified Repair Station repairing and overhauling airplane component parts. As part of the paperwork when Hutchinson hired them, both signed a document entitled, "AGREEMENT REGARDING ARBITRATION AND TERMINATION OF EMPLOYMENT,"[1] which provided in relevant part:

"[A]ny dispute arising out of or regarding this Agreement or the termination of my employment with Barry Controls Aerospace [(the name under which Hutchinson did business at the time)] will be resolved exclusively by arbitration in Los Angeles, California, including but not limited to any claim of harassment, discrimination, wrongful demotion, and/or the termination of employment with Company, shall be determined by arbitration in accordance with California Code of Civil Procedure Section 1281, et seq., excepting that each party will [be] allowed and limited as to discovery to service of one set of

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[1] Hutchinson could not locate a signed copy of the arbitration agreement for Martinez, and in the trial court Martinez disputed he agreed to arbitration. The trial court resolved this factual conflict in Hutchinson's favor, finding Martinez did agree to arbitrate. Martinez has not challenged that finding on appeal.

thirty-five (35) interrogatories, one set of Demands for Documents and one Deposition in the manner and in accordance with the applicable statu[t]es of the California Code of Civil Procedure. Except as provided herein, there shall be no additional pre-hearing discovery (Interrogatories, are written questions to be answered in writing under oath" [*sic*] and "Document [*sic*] Demands are written requests to produce categories of documents, which must be responded to in writing under oath).

"The parties shall mutually agree on an arbitrator, who shall be a retired Superior Court or Federal Court Judge with at least 5 years['] experience as a judge. If no agreement can be made a neutral arbitrator shall be appointed by the appropriate Court on Petition to Compel Arbitration. The decision of the arbitrator appointed to hear the case will set forth in writing findings of fact and conclusions of law upon which the decision was based, and will be FINAL and BINDING on both sides. Each party waives [the] right to trial by Jury and further review or appeal of the arbitrator's ruling, except as provided in California Code of Civil Procedure Section 1286.2. The parties mutually agree that the Company shall pay all costs of the arbitration, except that each party shall bear its own attorney's fees, subject to an award of attorney's fees by the arbitrator if such are otherwise available by statute."

Diaz and Martinez also signed a separate document entitled, "AGREEMENT CONCERNING INVENTIONS, PATENT RIGHTS, TRADE SECRETS AND CONFIDENTIAL INFORMATION" (hereinafter the confidentiality agreement). As the name suggests, it basically set forth Hutchinson's ownership of its proprietary information and prevented Diaz and Martinez

from disclosing it. In a clause in that agreement, the employees agreed, "In addition to all of the remedies otherwise available to the COMPANY, including, but not limited to, recovery of damages and reasonable attorney's fees in the enforcement of this AGREEMENT, the COMPANY shall have the right to injunctive relief to restrain and enjoin any actual or threatened breach of any provisions of the AGREEMENT. All of the COMPANY remedies for the breach of this agreement shall be cumulative and the pursuit of one remedy shall not be deemed to exclude any other remedies." This separate document does not reference the arbitration agreement set out above.

After Diaz and Martinez's employment was terminated, they filed suit, alleging a host of employment-related claims including retaliation, violation of the California Private Attorneys General Act (PAGA), disability discrimination and related claims under the Fair Employment and Housing Act (FEHA), wrongful termination, libel, and slander. The details of their terminations are unnecessary to this appeal, but Diaz and Martinez essentially alleged Hutchinson wrongfully terminated them in retaliation for complaining about noncompliance with FAA regulations. Martinez also separately alleged he was injured on the job and Hutchinson subjected him to a variety of unlawful acts related to his disability.

Hutchinson moved to compel arbitration. Diaz and Martinez opposed, arguing among other points that the arbitration agreement was unenforceable because it was unconscionable.

The trial court denied the motion. As relevant to this appeal, the court concluded the agreement was procedurally unconscionable "to a slight to moderate degree" because it failed

to identify any rules that would govern the arbitration, it was written on a preprinted, standardized form, and it was offered on a take-it-or-leave-it basis. The court found the agreement substantively unconscionable for two reasons: first, the employees were required to arbitrate all their claims while the separate confidentiality agreement reserved Hutchinson's right to seek injunctive relief in court; and second, the arbitration agreement severely restricted discovery during arbitration, which the trial court viewed as the "greater issue."

Because two clauses were unconscionable, the court refused to enforce the entire agreement. In its words, "It is clear to the Court that the purpose of the Arbitration Agreement in this case was not to allow for the speedy and efficient resolution of disputes, but was rather an attempt to limit Plaintiffs to a forum that works to Defendants' advantage. As such, the Court finds that the Arbitration Agreement is permeated with unconscionability and declines to exercise its discretion to sever any of the unconscionable provisions from the Arbitration Agreement."

Hutchinson timely appealed the court's order.

DISCUSSION

"Arbitration agreements permit parties to voluntarily submit their disputes for resolution outside of a judicial forum and are 'valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.' (Code Civ. Proc., § 1281.) California law favors the enforcement of arbitration agreements and any 'doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration.' " (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 711 (*Fitz*).)

A court may refuse to enforce an arbitration agreement if it is unconscionable. (*Fitz, supra,* 118 Cal.App.4th at p. 711.) Unconscionability essentially means the " ' " ' "absence of a 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*).)

Both procedural and substantive unconscionability must be present, but they exist on a sliding scale so " '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.' " (*Baltazar, supra*, 62 Cal.4th at p. 1244.) " ' "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." ' " (*Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1265 (*Farrar*).)

The party opposing arbitration bears the burden to demonstrate an agreement is unconscionable. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).) When the evidence is not disputed, as in this case, we review the refusal to enforce the arbitration agreement de novo. (*Farrar, supra,* 9 Cal.App.5th at p. 1265.) We review the decision whether to sever portions of the arbitration agreement for abuse of discretion. (*Carmona v.*

Lincoln Millennium Car Wash, Inc. (2014) 226 Cal.App.4th 74, 83 (*Carmona*).)

1. Procedural Unconscionability

As noted, procedural unconscionability involves oppression or surprise in the formation of the contract. Oppression exists when " ' "a contract involves lack of negotiation and meaningful choice," ' " and surprise exists " ' "where the allegedly unconscionable provision is hidden within a prolix printed form." ' " (*Pinnacle, supra,* 55 Cal.4th at p. 247.)

" '[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. . . . Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum. [Citation.] Ordinary contracts of adhesion, although they are indispensable facts of modern life that are generally enforced [citation], contain a degree of procedural unconscionability even without any notable surprises, and "bear within them the clear danger of oppression and overreaching." ' " (*Baltazar, supra,* 62 Cal.4th at p. 1244.) In the context of employment agreements, we must be " 'particularly attuned' " to this danger, where " 'economic pressure exerted by employers on all but the most sought-after employees may be particularly acute.' " (*Ibid.*)

Hutchinson does not dispute the arbitration agreement was adhesive because it was preprinted and presented to Diaz and Martinez as a condition of their employment without an opportunity to negotiate. That alone carries at least a minimal degree of procedural unconscionability. (*Baltazar, supra*, 62 Cal.4th at p. 1244; see *Armendariz v. Foundation Health*

Psychcare Services, Inc. (2000) 24 Cal.4th 83, 114-115 (*Armendariz*); *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 248 (*Carbajal*).) But Diaz and Martinez do not argue they were unfairly surprised by the arbitration agreement, so "we do not subject the contract to the same degree of scrutiny as '[c]ontracts of adhesion that involve surprise or other sharp practices.' " (*Baltazar, supra,* at p. 1245.)

We disagree with the trial court that the failure to attach any governing arbitration rules in this case contributed to procedural unconscionability, however. As our high court in *Baltazar* noted, " '[N]umerous cases have held that the failure to provide a copy of the arbitration rules *to which the employee would be bound* supported a finding of procedural unconscionability.' " (*Baltazar, supra*, 62 Cal.4th at p. 1246, italics added; see *Carbajal, supra*, 245 Cal.App.4th at pp. 244-245 [citing cases].) These cases do not apply here because the agreement did not bind Diaz and Martinez to any governing arbitration rules or even an arbitration provider, so Diaz and Martinez could not have been unfairly surprised by agreeing to a set of rules they were not provided.

Also, *Baltazar* clarified the failure to attach governing arbitration rules contributes to procedural unconscionability only when the plaintiff also challenges some element of those rules as substantively unconscionable. (*Baltazar, supra,* 62 Cal.4th at p. 1246.) Diaz and Martinez do not challenge any arbitration rules; they only challenge two matters "clearly delineated in the agreement," so any failure to attach governing rules "does not affect our consideration of [their] claims of substantive unconscionability." (*Ibid.*)

Because the agreement is adhesive but " 'there is no other indication of oppression or surprise, "the degree of procedural unconscionability . . . is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high." ' " (*Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1470.)

2. Substantive Unconscionability

Substantive unconscionability refers to " 'terms that are "unreasonably favorable to the more powerful party" [citation]. These include "terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction." ' " (*Baltazar, supra,* 62 Cal.4th at pp. 1244-1245.) 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. 1245.)

The trial court identified two aspects of the agreements it deemed substantively unconscionable: the apparent exemption of Hutchinson's claims for injunctive relief to enforce the separate confidentiality agreement, and the strict limits on discovery in the arbitration agreement itself. We agree both provisions were one-sided and substantively unfair.

As to the injunctive relief clause, the trial court correctly recognized that an arbitration agreement may be substantively unconscionable if it imposes arbitration for claims brought by an

employee but not for claims brought by an employer, "without at least some reasonable justification for such one-sidedness based on 'business realities.' " (*Armendariz, supra*, 24 Cal.4th at 117; see *Carbajal, supra*, 245 Cal.App.4th at p. 248.) As a result, an employer generally may not exempt from arbitration claims arising out of confidentiality or intellectual property agreements, which are more likely to be brought by the employer. (See *Farrar, supra*, 9 Cal.App.5th at p. 1273.) That includes carving out the employer's right to seek injunctive relief in court for an employee's breach of a confidentiality agreement. (See *Carbajal, supra,* at p. 249 [citing cases and calling carve-out "blatantly one-sided"].) On the other hand, *Baltazar* concluded it was not unfair for an employer to reserve its statutory right to seek *provisional* remedies in court during the pendency of arbitration, such as a preliminary injunction pursuant to Code of Civil Procedure section 1281.8, subdivision (b). (*Baltazar, supra*, 62 Cal.4th at pp. 1247-1248.)

Here, the arbitration agreement contained no express exemptions for any claims brought by either party related to Diaz and Martinez's termination of employment. But in the confidentiality agreement, Hutchinson reserved for itself any claims for injunctive relief it might pursue to prevent or stop any breach of that separate agreement.[2] Although Hutchinson argues the confidentiality agreement was a separate document, we can easily conceive of situations in which a claim for

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[2] The carve-out in the confidentiality agreement for injunctive relief does not expressly state Hutchinson can seek that relief *in court*. But the trial court interpreted the clause to allow Hutchinson to seek an injunction in court and Hutchinson does not argue otherwise on appeal.

injunctive relief under the confidentiality agreement would be bound up in an employee's arbitrable wrongful termination case. "An employee terminated for stealing trade secrets, for example, must arbitrate his wrongful termination claim under the agreement but [Hutchinson] can avoid a corresponding obligation to arbitrate its trade secrets claim against the employee by the simple expedient of requesting injunctive or declaratory relief." (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 176; see *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 274 (*O'Hare*) [" 'An employee terminated for stealing trade secrets, for example, must arbitrate his or her wrongful termination claim under the agreement while the employer has no corresponding obligation to arbitrate its trade secrets claim against the employee.' "].) In conjunction with the confidentiality agreement, the arbitration agreement thus lacks mutuality. (See *Carbajal, supra*, 245 Cal.App.4th at p. 249 [accepting similar argument that injunctive relief clause contained in separate paragraph of employment agreement created carve-out for arbitration provision].)

Nor is the injunctive relief clause in the confidentiality agreement saved by *Baltazar*. That case made clear a carve-out for *provisional* injunctive relief was permissible because it "does no more than recite the procedural protections already secured by [Code of Civil Procedure] section 1281.8(b), which expressly permits parties to an arbitration to seek preliminary injunctive relief during the pendency of the arbitration." (*Baltazar, supra*, 62 Cal.4th at p. 1247; see *Farrar, supra*, 9 Cal.App.5th at p. 1272.) Here, the confidentiality agreement was not limited to provisional relief; it extended to all injunctive relief, which could include a permanent injunction. (See *Carbajal, supra*, 245

Cal.App.4th at p. 250 [injunctive relief clause was broader than Code Civ. Proc., § 1281.8 because it authorized employer "to seek any type of injunctive relief in court, including a permanent injunction"].)[3]

As for the clause limiting discovery, when an employee asserts nonwaivable statutory rights—as Diaz and Martinez do here—the parties may limit discovery, but the arbitration agreement "must 'ensure minimum standards of fairness' so employees can vindicate their public rights." (*Fitz, supra*, 118 Cal.App.4th at p. 716; see *Armendariz, supra,* 24 Cal.4th at p. 106.) Here, the agreement limited discovery to one set of 35 interrogatories, one set of document demands, and one deposition, and it expressly barred any further discovery. We can see no way in which Diaz and Martinez could adequately vindicate their rights with these limits in place. Diaz and Martinez's claims involve complex issues about Hutchinson's compliance with FAA regulations and its handling of Martinez's

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[3] Diaz and Martinez contend the carve-out in the confidentiality agreement goes a step further to exempt *all* of Hutchinson's claims from arbitration, including claims for damages. This is certainly a plausible implication of the language preserving Hutchinson's right to injunctive relief "[i]n addition to all of the remedies otherwise available to the COMPANY, including, but not limited to, recovery of damages and reasonable attorney's fees in the enforcement of this AGREEMENT." (See *O'Hare, supra,* 107 Cal.App.4th at p. 275 [interpreting language that carved out injunctive relief " 'in addition to all other rights' " to include carve-out for any claim by employer].) We need not finally resolve this issue because the clause is unfairly one-sided even if it only carves out Hutchinson's right to seek injunctive relief.

workplace injury. We cannot fathom how those issues could be properly explored with only a single deposition and the other limited discovery, especially without any option for an arbitrator to allow more discovery if necessary.

Courts have found broader limits than these unconscionable. In *Fitz*, for example, the court found a limit of depositions for two individuals and any expert witnesses was insufficient, even though the agreement also permitted the arbitrator to allow additional discovery upon a showing that a fair hearing is impossible without additional discovery. (*Fitz, supra*, 118 Cal.App.4th at p. 717.) The court's reasoning is particularly apt in light of the single-deposition limit here: "Given the complexity of employment disputes, the outcomes of which are often determined by the testimony of multiple percipient witnesses, as well as written information about the disputed employment practice, it will be the unusual instance where the deposition of two witnesses will be sufficient to present a case." (*Ibid.*) Further, although the discovery limits in this case appear mutual, Hutchinson is in a far better position because it almost certainly " 'has in its possession many of the documents relevant to' " this case, " 'as well as having in its employ many of the relevant witnesses.' " (*Id.* at p. 716.)

Hutchinson cites several cases to suggest the discovery limits in this case were reasonable. But the limitations in those cases contained clauses granting the arbitrator authority to allow additional discovery as needed. (See, e.g., *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 982 [one deposition, any expert witness depositions, document requests, and other discovery " 'upon a showing of need' "]; *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1475 [delegation of authority to arbitrator to

order discovery]; cf. *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 118-119 [declining to decide whether clause was unconscionable when it limited discovery one deposition, one document request, and other discovery upon showing " 'substantial need,' " but noting it "compound[ed] the one-sidedness of the arbitration agreement"].) The agreement here not only lacked any such relief valve, but it expressly prohibited any additional discovery.

For similar reasons, we reject Hutchinson's claim that "any arbitration service the parties ultimately select will give the arbitrator broad authority to order whatever discovery Plaintiffs may show is necessary to arbitrate their FEHA and Labor Code claims." In support of this argument, Hutchinson cites a single purported rule from a single arbitration provider. That hardly shows *any* arbitration service the parties select would enable the arbitrator to order more discovery. More to the point, Hutchinson has not explained how an arbitrator could order more discovery when the parties have expressly prohibited it in their agreement.

3. Severability

Having concluded two clauses were substantively unconscionable, we must decide whether the trial court abused its discretion in refusing to enforce the entire agreement rather than severing the offending clauses. "A trial court has the discretion to refuse to enforce an agreement as a whole if it is permeated by unconscionability. [Citation.] 'The overarching inquiry is whether " 'the interests of justice . . . would be furthered' " by severance.' [Citation.] If the central purpose of a contractual provision, such as an arbitration agreement, is tainted with illegality, then the provision as a whole cannot be

enforced. If the illegality is collateral to the main purpose of the contractual provision, and can be severed or restricted from the rest, then severance is appropriate." (*Carmona, supra*, 226 Cal.App.4th at p. 90.)

Further, "[w]hen an arbitration agreement contains multiple unconscionable provisions, '[s]uch multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. [Citation.] Under such circumstances, a trial court does not abuse its discretion in determining the arbitration agreement is permeated by an unlawful purpose." (*Carmona, supra*, 226 Cal.App.4th at p. 90.)

Hutchinson only mentions severability in two footnotes in its brief on appeal and does not explain how the court abused its discretion in refusing to sever the offending clauses. Given the trial court correctly found the two clauses unconscionable, including the severe restriction on discovery, we cannot say the court's refusal to sever those provisions was an abuse of discretion. (*Armendariz, supra,* 24 Cal.4th at p. 122 [trial court properly refused to sever two unconscionable provisions].)

DISPOSITION

The order is affirmed. Respondents are awarded costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J. RUBIN, J.