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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

CHRISTOPHER WISE, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; NATURE'S BEST, LLC et al., Real Parties in Interest.	B287534 (Los Angeles County Super. Ct. No. BC649808)

ORIGINAL PROCEEDINGS; petition for writ of mandate. William F. Highberger, Judge. Petition granted.

Harris & Ruble, Alan Harris, David Garrett, Min Ji Gal, for Petitioner.

No appearance for Respondent.

Ballard Rosenberg Golper & Savitt, John B. Golper, Jeffrey P. Fuchsman and John J. Manier, for Real Parties in Interest.

An employee filed a petition for a writ of mandate, contending the respondent court erred when it granted his employers' motion to compel arbitration of his claims. Because neither the collective bargaining agreement (CBA) nor the Side Letter to that agreement contains a clear and unmistakable waiver of the employee's right to a judicial forum for his Labor Code claims, we grant the petition.

I. BACKGROUND

A. Collective Bargaining Agreement and Side Letter

The facts relevant to the issue of arbitrability were largely undisputed. Where facts were in dispute, we adopt the respondent court's resolution of the dispute, when supported by substantial evidence. (*Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348.)

Petitioner Christopher Wise ("plaintiff") was employed as a truck driver by defendant Nature's Best Distribution, LLC ("Nature's Best") and continued in his position after Nature's Best was acquired by defendant KeHE Distributors, Inc. (KeHE Distributors) on August 18, 2014. Plaintiff was a member of Teamsters Local 848 (the "Union"), and covered by a CBA[1]

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[1] The relevant CBA with the Union covered the period from June 1, 2014 to May 31, 2018. The relevant provisions in the

entered into by the Union and defendant Nature's Best (we refer to defendants collectively as the "Company").

Article 17 of the CBA was titled, "HOURS OF WORK, PAYDAY" and contained detailed provisions for hours of work and overtime and stated that pay rates "shall be as set forth in the Appendices." It did not reference the CBA's grievance procedure or any statutes. It also did not include any discussion of remedies for violations.

Article 18, titled "REST PERIOD, LUNCH BREAK, MEALS," described the provisions for meal and rest breaks. It did not reference the grievance procedure or any statutes. It also did not discuss any remedies for violations.

Article 28 of the CBA was titled "GRIEVANCE & ARBITRATION PROCEDURE." Article 28, section A, defined a grievance "as an alleged violation by the Company or the Union of a specific provision of this AGREEMENT." It described a three-step grievance process.

[Step 1:] "The parties desire that complaints and grievances be settled whenever possible by the Supervisor and the employee(s). . . .

"Step 2: In the event an employee is unable to resolve any matter with his/her immediate Supervisor, he/she may within seven (7) calendar days from the date of the cause for grievance, reduce the grievance to writing. . . . The department Manager will meet with the aggrieved employee, Steward, and Supervisor in an attempt to settle the grievance.

"Step 3: If the grievance is not resolved during the preceding procedure, the Union Business Representative and the

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prior CBA, which covered the period from June 1, 2010 to May 31, 2014, were the same in all material respects.

Company Representative . . . shall meet within seven (7) calendar days in an attempt to resolve the grievance before appealing the grievance to the arbitration procedure. The seven-day period may be extended by mutual agreement between the parties."

Article 28, section B, provided, "[t]he Company and the Union agree that any grievance not satisfactorily settled at step 1 and 2 above, may be, within seven (7) calendar days from the date of the Company's last answer, referred to arbitration. It is expressly understood and agreed, however, that the arbitrator shall have no power to modify, amend, add to, take away from, change or alter the terms and conditions of this collective bargaining agreement and that all such decisions shall be based upon and controlled by the express terms of this AGREEMENT."

On June 6, 2017, the Company and the Union negotiated a Side Letter to the CBA. The Company and the Union signed the Side Letter after plaintiff filed his lawsuit, three days before the Company filed its motion to compel arbitration. The respondent court concluded that the Side Letter was "considered part of the CBA, and ha[d] the same force and effect as the CBA itself."

Paragraph 2 of the Side Letter stated, "[w]ork schedules, including meal and rest period breaks, will be scheduled for intrastate drivers, pursuant to California's Code or Regulations, Title 13, Motor Vehicles, Division 2, Department of The California Highway Patrol, Chapter 6.5, Motor Carrier Safety, Article 3, General Driving Requirements, Section 1212. It is understood that 13 CCR 1212.5(a) will specifically apply to the scheduling of intrastate drivers."[2]

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[2] California Code of Regulations, title 13, sections 1212 and 1212.5 set maximum driving hours for all intrastate motor

Paragraph 4 of the Side Letter provided, "[i]t is expressly agreed that all drivers are presently exempt from the California meal break rules set forth in Labor Code [section] 512[, subdivisions] (e), (f)[3] because under the Agreement, drivers are paid more than 30 [percent] above the state minimum wage (currently $13.65/hour) and receive premium pay for overtime hours. Drivers can submit grievances concerning meal breaks to final and binding arbitration under the grievance procedure."

Finally, paragraph 5 of the Side Letter provided, "[d]isputes over meal breaks, rest breaks, wages and overtime, are subject to final and binding arbitration under the grievance procedure of this Agreement. All such grievances which are initiated by the Union asserting violations of this Sideletter [*sic*] or the Agreement, the DOT 'hours of service' rules, and/or the California Rules and Regulations, as specified above, may be brought on behalf of all drivers and the Arbitrator shall have the authority to hear and fully and finally resolve such grievances on the merits."

B. Plaintiff's Lawsuit

On February 8, 2017, plaintiff filed a class action complaint against the Company for: (1) failure to pay hourly and overtime wages and failure to pay overtime (§ 1194; California Industrial Welfare Commission (IWC) wage order No. 9-2001); (2) failure to

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carriers and drivers. These code sections do not address wage or overtime compensation.

[3] All further statutory references are to the Labor Code, unless otherwise stated.

provide meal periods or compensation in lieu thereof (§§ 226.7, 512; IWC wage order No. 9-2001(11); Cal. Code Regs., tit. 8, § 11090 (11)); (3) failure to provide rest periods or compensation in lieu thereof (§ 226.7; IWC wage order No. 9-2001(11); Cal. Code Regs., tit. 8, § 11090 (11)); (4) knowing and intentional failure to comply with itemized wage statements (§ 226, subd. (a)); (5) violations of unfair competition law (Bus. & Prof. Code, § 17200 et seq.); and (6) violation of the Private Attorneys General Act of 2004 (PAGA). (§ 2698 et seq.)

On June 9, 2017, the Company moved to compel arbitration of plaintiff's claims pursuant to the CBA. Plaintiff opposed the motion. The court held a hearing on August 10, 2017, and September 20, 2017. On November 15, 2017, the respondent court issued a written ruling, granting the Company's motion to compel arbitration. The court stayed the PAGA cause of action pending completion of the arbitration process.

The court stated, "[a]ssuming the clear and unmistakable waiver requirement applies to any (or all) of [plaintiff's] claims, the Court finds that the Side Letter constitutes a clear and unmistakable waiver of the right to sue [for overtime, meal breaks and rest breaks] in court."

As an alternative holding, the court concluded that plaintiff's claims arose from the CBA rather than the Labor Code. Accordingly, the general presumption favoring arbitration, rather than a requirement that a waiver to a judicial forum for statutory claims be clear and unmistakable, applied to plaintiff's case. The court explained that based on the CBA, which included an appendix of wage rates, "[plaintiff] and other drivers earn well in excess of 30 [percent] more than the State minimum wage." Accordingly, "all of the requirements for the CBA meal break

exemption under [section 512, subdivisions (e), (f)][4] are met." Therefore, "[plaintiff's] claims for overtime and meal breaks derive from the CBA, and not from violations of statute because the Labor Code provisions on overtime and meal breaks do not apply to [plaintiff]. . . . Although this Court does not decide the merits of [d]efendants' exemption defense, the Court finds it must consider the terms of the CBA when deciding the gateway issue of arbitrability of [p]laintiff's claims."

Plaintiff timely filed a petition for writ of mandate in this court, challenging the respondent court's order granting the motion to compel arbitration.

II. DISCUSSION

A. Standard of Review

We review an order granting a petition to compel arbitration "for abuse of discretion unless a pure question of law is presented, in which case we review the order de novo." (*Vasserman v. Henry Mayo Newhall Memorial Hospital* (2017) 8 Cal.App.5th 236, 244 (*Vasserman*).) Where, as here, the order "'involves a purely legal question or a predominantly legal mixed question,'" we independently review the respondent court's order compelling arbitration "'because we can ourselves conduct the same analysis.'" (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 348-349, quoting *Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.)

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[4] The court earlier stated that the requirements for the exemption at section 514 were also satisfied.

B. Governing Principles

"A petition to compel arbitration should be granted if the court determines that an agreement to arbitrate the controversy exists. (Code Civ. Proc., § 1281.2.) Fundamental to this inquiry is whether the parties have agreed to arbitrate their dispute. (See *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228, 233 [it is an "overarching principle that arbitration is a matter of contract"] [citations].)" (*Cortez v. Doty Bros. Equipment Company* (2017) 15 Cal.App.5th 1, 11 (*Cortez*).)

"A union representative may agree on an employee's behalf as part of the collective bargaining process to require the employee to arbitrate controversies relating to an interpretation or enforcement of a CBA. (*14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 256-257 (*Penn Plaza*) ["'arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself'"]; *Wright v. Universal Maritime Service Corp.* (1998) 525 U.S. 70, 79 (*Wright*).) In fact, when a CBA includes an arbitration provision, contractual matters under a CBA are presumed arbitrable; that is, arbitration must be granted as long as the CBA is reasonably susceptible to an interpretation in favor of arbitration. (*Wright, supra*, 525 U.S. at pp. 78-79.)" (*Cortez, supra*, 15 Cal.App.5th at pp. 11-12.)

"However, the presumption of arbitration in a CBA does not apply to statutory violations. [*Wright, supra*, 525 U.S. at pp. 78-79] . . . . [T]he United States Supreme Court has made clear that waiver of the right to prosecute a statutory violation in a judicial forum is only effective if it is explicit, "'clear and unmistakable.'" [Citations.]" (*Cortez, supra*, 15 Cal.App.5th at

p. 12.) We "analyze the facts of this case under the clear-and-unmistakable standard." (*Vasserman, supra*, 8 Cal.App.5th at p. 245.)[5]

"[I]n determining whether there has been a sufficiently explicit waiver, courts look to the generality of the arbitration clause, explicit incorporation of statutory requirements, and the inclusion of specific contractual provisions." (*Vasserman, supra*, 8 Cal.App.5th at p. 246, citing *Vasquez v. Superior Court* (2000) 80 Cal.App.4th 430, 434 (*Vasquez*).) A waiver in a CBA is sufficiently clear if it is found in an explicit arbitration clause. (*Carson v. Giant Food, Inc.* (4th Cir. 1999) 175 F.3d 325, 331.) "'"Under this approach, the [CBA] must contain a clear and unmistakable provision under which the employees agree to submit to arbitration all [state and federal statutory] causes of action arising out of their employment." [Citation.]' [Citation.]" (*Vasserman, supra*, 8 Cal.App.5th at pp. 246-247.)

"A waiver in a [CBA] may also be sufficiently clear if broad, nonspecific language in the arbitration clause is coupled with 'an "explicit incorporation of statutory . . . requirements" elsewhere in the contract. [Citation.] If another provision, like a nondiscrimination clause, makes it unmistakably clear that the discrimination statutes at issue are part of the agreement, employees will be bound to arbitrate their [state and federal statutory] claims.' [Citation.]" (*Vasquez, supra*, 80 Cal.App.4th at p. 435, fn. omitted.)

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[5] We need not "decid[e] whether a union may waive an individual's statutory rights under the circumstances presented here." (*Vasserman, supra*, 8 Cal.App.5th at p. 245, compare *Cortez, supra*, 15 Cal.App.5th at p. 12; *Volpei v. County of Ventura* (2013) 221 Cal.App.4th 391, 394 (*Volpei*).

C. Plaintiff Alleged Labor Code Violations

The respondent court, in its alternative holding, reasoned that because the exemptions set forth in Labor Code sections 512 and 514 applied to plaintiff's claims, plaintiff's causes of action necessarily arose from the CBA, rather than the Labor Code. Accordingly, the respondent court concluded that the presumption in favor of arbitration applied to plaintiff's claims.

Section 512 creates an exemption for meal periods if an employee is covered by a valid CBA and the CBA expressly provides for "the wages, hours of work, and working conditions of employees, and expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate." (§ 512, subd. (e).) Section 514 creates a similar exemption for the overtime provisions of the Labor Code. The respondent court concluded that these exemptions applied because plaintiff's Department of Transportation Logs and pay records as well as the wage schedules attached to the CBA demonstrated that plaintiff and other drivers earned well in excess of 30 percent more than the state minimum wage.

We conclude that the respondent court should not have reached the merits of whether sections 512 and 514's exemptions applied to plaintiff's claims, when considering the Company's motion to compel arbitration. We find the court's reasoning in *Vasserman, supra*, 8 Cal.App.5th at p. 236 persuasive. The defendants in that case made a similar argument that the exemption in section 514 applied to plaintiff's claims.

(Vasserman, supra, 8 Cal.App.5th at p. 248 [§ 514]; see also *Araquistain v. Pacific Gas & Electric Company* (2014) 229 Cal.App.4th 227, 231 [§ 512].) The court stated, "[t]his argument ultimately may be a defense to [plaintiff's] claims, but it does not compel a conclusion that the . . . CBA includes a valid waiver." (*Vasserman, supra*, 8 Cal.App.5th at p. 248.)

The respondent court relied on two inapposite cases in reaching a contrary conclusion, *Coria v. Recology, Inc.* (N.D. Cal. 2014) 63 F.Supp.3d 1093 (*Coria*), and *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233 (*Sandquist*). *Coria* did not consider whether a CBA included a valid waiver of the right to a judicial forum for statutory claims. Rather, the court considered whether a plaintiff's wage and hour class action was properly removed to federal court or whether it should be remanded to state court. While the court necessarily had to determine whether plaintiff's claims arose from state statute or the CBA at issue in that case, the court did not consider whether the CBA included a clear and unmistakable waiver of a judicial forum. (*Coria, supra*, at pp. 1096, 1100-1101.) In *Sandquist*, the court reviewed the arbitration clause at issue in that case to determine whether the parties intended for the court or arbitrator to consider the arbitrability of class action claims. (*Sandquist, supra*, at p. 241.) The court in *Sandquist* did not consider whether the arbitration clause included a clear and unmistakable waiver of a judicial forum for statutory claims. By contrast, the court in *Vasserman* analyzed the very issue present here. (*Vasserman, supra*, 8 Cal.App.5th at p. 248; see also *AT&T Technologies v. Communications Workers of America* (1986) 475 U.S. 643, 649-650 ["in deciding whether the parties agreed to submit a particular grievance to arbitration, a court is not to rule

on the potential merits of the underlying claims. . . . even if it appears to the court to be frivolous"].) The respondent court thus erred in its alternative holding, that plaintiff's claims arose from the CBA rather than the Labor Code.

D. No Clear and Unmistakable Waiver

As a threshold matter, we disagree with the Company's position that the clear and unmistakable standard only applies to statutory discrimination claims, and not to statutory wage and hour claims. Two recent cases have found that the clear and unmistakable standard applies to statutory wage and hour claims (*Cortez, supra*, 15 Cal.App.5th 1;*Vasserman, supra*, 8 Cal.App.5th 236), and no case has held to the contrary.

1. *Arbitration Clause*

Having concluded that the clear and unmistakable standard applies in this case, we turn to an examination of the arbitration clause. Article 28 provided, in part, "[t]he Company and the Union agree that any grievance not satisfactorily settled . . . *may be*, within seven (7) calendar days from the date of the COMPANY'S last answer, *referred to arbitration*." (Italics added.) By its own terms, the article permits but does not require arbitration. Indeed, it is nearly identical to the arbitration clause in *Volpei, supra*, 221 Cal.App.4th at pages 393-394, which stated: "'A grievance unresolved in the steps enumerated above *may be submitted to arbitration by the [union]* by submitting a letter requesting that the grievance be submitted to arbitration . . . .'" The court concluded that the provision

"[was] not a clear and unmistakable agreement to arbitrate [the employee's] statutory claims against the [employer]." (*Id.* at p. 394.) "[T]he provision that unresolved grievances 'may be submitted to arbitration by the [union]' does not clearly and unmistakably require an employee to submit a grievance to arbitration as the 'sole and exclusive remedy' for a statutory violation. ([*Penn Plaza, supra*, 556 U.S.] at p. 252.)" (*Volpei, supra*, 221 Cal.App.4th at p. 395.) "The word 'may' does not create a clear and unmistakable waiver here. It is permissive, or at least susceptible of a permissive meaning, particularly where 'shall' is used elsewhere in the same provision." (*Volpei, supra*, 221 Cal.App.4th at p. 396.)[6] "More is required to waive an employee's right to a judicial forum for statutory claims." (*Volpei, supra*, 221 Cal.App.4th at p. 396.)

Moreover, Article 28, like the arbitration clause in *Vasserman*, "does not include any reference to the Labor Code or any other state or federal statutes[; and] does not include any agreement to submit statutory causes of action to arbitration." (*Vasserman, supra*, 8 Cal.App.5th at 247.) Therefore, it "cannot be reasonably read to include an explicitly stated, clear and unmistakable waiver of a judicial forum for employees' statutory claims." (*Ibid.*)

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[6] Here, "shall" is used throughout Article 28, including in section A, subdivision (1), to state that Union and Company representatives "shall" meet within seven (7) calendar days if Step 1 is not satisfied; in section C, to state that the expenses of arbitration "shall be borne equally [by the Union and Company];" and in section E, to state that any grievance not appealed "shall be considered settled."

2. *Side Letter*

Even where an arbitration clause does not include a sufficiently explicit waiver, if another provision of the CBA "'"makes it unmistakably clear that the . . . statutes at issue are part of the agreement, employees will be bound to arbitrate their [state and federal] statutory claims." [Citation.]' [Citation.]" (*Vasserman, supra*, 8 Cal.App.5th at pp. 247-248, fn. omitted.) The respondent court concluded that the Side Letter did "contain a clear and unmistakable waiver of the right to assert claims for overtime, meal breaks and rest breaks in court." We disagree.

The respondent court analogized the Side Letter here to the agreement in *Cortez*. In that case, the plaintiff was employed as a truck driver. (*Cortez, supra*, 15 Cal.App.5th at p. 6.) Plaintiff's union entered into a CBA that provided, "[a]ny dispute or grievance arising from . . . Wage Order [16][7] shall be processed under and in accordance with" the arbitration procedure outlined in the applicable CBA. (*Idid.*) The court concluded: "[Plaintiff's] claims under the Labor Code for overtime, meal and rest breaks and violation of record keeping provisions (his first through fifth causes of action) arise under Wage Order 16 and thus are within the CBA's provision compelling arbitration." (*Id.* at p. 15.)

Unlike the mandatory language, "shall," in *Cortez,* here, the Side Letter provided, "[d]isputes over meal breaks, rest breaks, wages and overtime, are subject to final and binding

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[7] The Labor Code authorizes the Industrial Welfare Commission to promulgate wage orders, which regulates the wages of all employees in the state, based on industry. (§ 1173.) Wage Order 16 applies to employees in the construction industry. (Cal. Code Regs., tit. 8, § 11160.)

arbitration *under the grievance procedure of this Agreement*." The Side Letter expressly defined "Agreement" as "the current CBA." "'We must give significance to every word of a contract, when possible, and avoid an interpretation that renders a word surplusage.'" (*Advanced Network, Inc. v. Peerless Ins. Co.* (2010) 190 Cal.App.4th 1054, 1063.) Giving appropriate significance to the words "under the grievance procedure of this Agreement," we conclude the Side Letter incorporated the grievance procedure set forth in Article 28. As we discussed above, the grievance procedure permitted, but did not require, arbitration. That disputes over meal breaks, rest breaks, wages, and overtime were "subject" to the permissive arbitration procedure described in Article 28, did not require plaintiff to submit such disputes to arbitration.

Nor do the remaining portions of paragraph 5 of the Side Letter demonstrate a clear and unmistakable waiver: "All such grievances which are initiated by the Union asserting violations of this Sideletter [*sic*] or the Agreement, the DOT 'hours of service' rules, and/or the California Rules and Regulations, as specified above, may be brought on behalf of all drivers and the Arbitrator shall have the authority to hear and fully and finally resolve such grievances on the merits." The provision that such grievances "*may* be brought on behalf of all drivers" was permissive, not mandatory. (*Volpei, supra*, 221 Cal.App.4th at p. 396.) Nor did the Side Letter's description of the authority the arbitrator "shall" enjoy, limit plaintiff to arbitration as his "'sole and exclusive remedy.'" (*Id.* at p. 395; see also *Wright, supra*, 525 U.S. at p. 72 [an agreement that "'[m]atters under dispute which cannot be promptly settled between [the Union and the Company] shall, no later than 48

hours after such discussion, be referred in writing covering the entire grievance to a Port Grievance Committee,'" did not constitute an explicit waiver].) Because the Side Letter did not include an agreement to submit the statutory causes of action at issue in plaintiff's case solely to arbitration, "it cannot be reasonably read to include an explicitly stated, clear and unmistakable waiver of a judicial forum for employees' statutory claims." (*Vasserman, supra*, 8 Cal.App.5th at p. 247.)[8]

In defense of the Side Letter, the Company argues that the letter memorialized a long-standing past practice between the Company and the Union that grievances over wages, breaks, and other alleged wage and hour violations are covered by the CBA grievance and arbitration procedure. The Company's argument of past practice is not persuasive. The decision to arbitrate an employee's contractual claim by itself neither waives nor precludes the subsequent litigation of statutory claims arising out of the same underlying facts. (See e.g., *Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728, 745-746

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[8] The respondent court found, "as in *Cortez*, the Side Letter specifically refers to the 'California Rules and Regulations' on meal and rest breaks, wages and overtime, and specifically to Labor Code [section 512, subdivisions] (e), (f)." The California regulations described in the Side Letter, however, did not address wages or overtime but instead set maximum driving hours. Nor did the Side Letter refer to a specific wage order or any other statute or regulation upon which plaintiff based his claims. Although the Side Letter did reference section 512, it did so by reciting that the requirements of subdivisions (e) and (f) were met and therefore the exemption applied. As discussed above, this exemption may be used as a defense to plaintiff's claims, but it does not compel a conclusion that the CBA included a valid waiver.

[employee could bring a suit alleging minimum wage violations under federal law even though he had already unsuccessfully submitted a claim based on the same facts to a joint grievance committee under the CBA]; *Marcario v. County of Orange* (2007) 155 Cal.App.4th 397, 407 [claims of workplace retaliatory reassignment in violation of the Labor Code were not precluded by prior arbitration].) Moreover, memorializing a long-standing past practice does not equate to a clear and unmistakable waiver of an employee's right to bring a statutory claim to court.

We conclude, based on our de novo review of the CBA and Side Letter, that neither included a clear and unmistakable waiver of plaintiff's right to a judicial forum for his statutory claims.[9]

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[9] In light of our holding, we need not address whether the court abused its discretion in denying plaintiff's discovery motion.

III. DISPOSITION

Let a peremptory writ of mandate issue directing the respondent court to vacate its November 15, 2017 order granting the motion to compel arbitration, and issue a new order denying the motion. Petitioner Christopher Wise shall recover his costs in this proceeding.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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