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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

DANIEL HOLMES,  Plaintiff and Respondent,  v.  NATURES IMAGE, INC.,  Defendant and Appellant.	B340262  (Los Angeles County Super. Ct. No. 22STCV36319)
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APPEAL from an order of the Superior Court of Los Angeles County. Lawrence P. Riff, Judge. Reversed and remanded with directions.

Kilpatrick Townsend & Stockton, Emil W. Herich, James Smith, and Kevin L. Quan for Defendant and Appellant.

Hosseini Legal, Kaveh S. Hosseini; Kent Legal and Jonathan D. Kent for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Natures Image, Inc. (Natures Image) appeals from the trial court’s order allowing plaintiff Daniel Holmes to withdraw from arbitration his wage and hour claims against Natures Image. Natures Image contends the court erred when it strictly applied Code of Civil Procedure<sup>1</sup> section 1281.97 to find the company waived its right to compel arbitration of Holmes’s claims by failing to timely pay the initial arbitration fees.

According to Natures Image, section 1281.97 does not apply in this case because the parties’ arbitration agreement is governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.; FAA) and, in any event, that statute is preempted by federal law because it treats arbitration agreements differently than other types of contracts.

After the parties filed their appellate briefs, the California Supreme Court decided *Hohenshelt v. Superior Court* (2025) 18 Cal.5th 310 (*Hohenshelt*), which held that section 1281.98, the companion statute to section 1281.97, is not preempted by federal law. While rejecting a strict application of section 1281.98, the court held that “the statute does not abrogate the longstanding principle, established by statute and common law, that one party’s nonperformance of an obligation automatically extinguishes the other party’s contractual duties only when nonperformance is willful, grossly negligent, or fraudulent.” (*Hohenshelt*, at p. 323.) The parties submitted supplemental briefs addressing *Hohenshelt*’s impact on this appeal.

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<sup>1</sup> All undesignated statutory references are to the Code of Civil Procedure.

We conclude that section 1281.97 applies in this case and that *Hohenshelt* governs the statute's waiver provisions, which are materially identical to those included in section 1281.98. We therefore reverse the trial court's order allowing Holmes to withdraw his wage and hour claims from arbitration based on its strict application of 1281.97's waiver provisions. We remand the matter for the trial court to consider in light of *Hohenshelt* whether Natures Image may be excused for its failure to timely pay arbitration fees.

## **BACKGROUND**

Holmes worked for Natures Image as an hourly employee from January 2020 until July 2022. Before he started working for Natures Image, Holmes signed an arbitration agreement that required him to arbitrate any claims or disputes related to his employment. The arbitration agreement stated that any arbitration between the parties would be conducted in accordance with the American Arbitration Association's (AAA) employment arbitration rules. The agreement did not include any other choice of law provision.

In November 2022, Holmes filed two complaints against Natures Image, one asserting individual disability discrimination and wrongful termination claims (discrimination lawsuit) and one asserting individual and class wage and hour claims (wage and hour lawsuit). Holmes later added a second named plaintiff, Andrei Coello, to his wage and hour lawsuit. This appeal arises out of Holmes's wage and hour lawsuit.

In March 2024, the trial court in Holmes's discrimination lawsuit granted Natures Image's motion to compel arbitration of Holmes's discrimination-based claims. Later that month, Holmes filed a demand for arbitration of the claims asserted in his

discrimination lawsuit. In late March 2024, AAA sent Natures Image an invoice for the initial arbitration fees in Holmes's discrimination action, which Natures Image paid.

In April 2024, the trial court in Holmes's wage and hour lawsuit granted Natures Image's motion to compel arbitration of Holmes's and Coello's individual wage and hour claims and to dismiss their class wage and hour claims. In doing so, the court found that the FAA governed the parties' arbitration agreement because Holmes's employment contract with Natures Image evidenced a transaction involving interstate commerce.

In late April 2024, Holmes and Coello filed separate demands for arbitration of their individual wage and hour claims. In May 2024, the AAA sent Natures Image separate invoices for the initial fees in Holmes's and Coello's arbitration proceedings. Natures Image's counsel forwarded the invoices to his law firm's finance department and authorized the firm to pay the invoices immediately. The law firm paid only the invoice pertaining to Coello's arbitration proceedings.

In late May 2024, the AAA sent Natures Image a letter notifying the company that it had yet to pay the initial arbitration fees for Holmes's wage and hour proceedings. In early June 2024, the AAA notified Natures Image that under section 1281.97, it closed the arbitration proceedings pertaining to Holmes' wage and hour claims because Natures Image did not timely pay the initial arbitration fees.

Shortly, after receiving the notice of closure from the AAA, Natures Image's counsel asked Holmes's counsel if Holmes would agree to return his wage and hour claims to arbitration if Natures Image immediately paid the outstanding fees for those

proceedings. Holmes's counsel refused to agree to re-open Holmes's wage and hour arbitration proceedings.

In late June 2024, Natures Image filed a renewed motion to compel Holmes to arbitrate his wage and hour claims. Holmes filed his own motion to withdraw his wage and hour claims from arbitration.

Among other things, Natures Image urged the trial court to exercise its discretion under section 473, subdivision (b), to excuse the company's inadvertent failure to pay the initial arbitration fees for Holmes's wage and hour claims. In support of this argument, Natures Image's counsel testified that he believed that his law firm paid the initial fees for Holmes's wage and hour arbitration proceedings. Counsel did not realize that his firm paid only Coello's arbitration fees because the invoices for Holmes's and Coello's wage and hour proceedings were very similar and sought payment for the same amount of fees, and Holmes's and Coello's proceedings were based on identical claims. Accordingly, counsel believed that the invoice for Holmes's wage and hour arbitration proceedings was a duplicate of the other invoices that the law firm had already paid. Counsel did not realize that his firm did not pay the initial arbitration fees for Holmes's wage and hour claims until he received notice from the AAA that it closed Holmes's proceedings.

In August 2024, the trial court denied Natures Image's renewed motion to compel arbitration and granted Holmes's motion to withdraw his wage and hour claims from arbitration. As a threshold matter, the court found the California Arbitration Act's (CAA) procedural provisions applied, even though the FAA governed the arbitrability of Holmes's wage and hour claims, because Natures Image pointed to nothing in the parties'

arbitration agreement expressly incorporating the FAA’s procedural provisions. The court then found that Holmes was entitled under section 1281.97, subdivision (a)(1), to withdraw his wage and hour claims from arbitration. Relying on a series of appellate court decisions, the court explained that section 1281.97, subdivision (a)(1)’s time limits for paying initial arbitration fees “are strict and leave the Court no discretion to excuse their violation.” Thus, the court concluded that Natures Image waived its right to arbitrate Holmes’s wage and hour claims, even though the parties did not dispute that the company’s failure to pay the initial arbitration fees “was the result of an innocent mistake.”

Natures Image appeals.

### **DISCUSSION**

Natures Image argues that the trial court erred when it allowed Holmes to withdraw his wage and hour claims from arbitration because the company did not timely pay the initial arbitration fees under section 1281.97. First, Natures Image contends the CAA, including section 1281.97, does not apply to this case because the parties’ arbitration agreement is governed by the FAA. Second, Natures Image argues that, to the extent the CAA applies, section 1281.97 is preempted by the FAA because that statute treats arbitration agreements differently than other contractual provisions.

We reject Natures Image’s first argument because, even though the trial court found the FAA applies in this case, the parties did not specify in their arbitration agreement that the FAA’s procedural provisions would apply in place of the CAA’s procedural provisions. As for Natures Image’s second contention, the Supreme Court resolved that issue in *Hohenshelt*, which was

decided after Natures Image filed its reply brief. Now that the parties have had an opportunity to submit supplemental briefs addressing *Hohenshelt*'s impact on this case, we reverse the court's order allowing Holmes to withdraw his wage and hour claims based on its strict application of section 1281.97's waiver provisions. (See *Hohenshelt, supra*, 18 Cal.5th at p. 323.)

### **1. The CAA applies to the parties' arbitration agreement**

"[T]he CAA's procedural rules apply by default to cases brought in California courts, including those in which the FAA governs the arbitrability of the controversy." (*Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562, 582 (*Quach*).) The FAA's procedural rules may apply, however, "if the parties expressly agree they do or if the CAA's procedural rules are preempted." (*Ibid.*)

Here, the parties' arbitration agreement does not mention the FAA or the CAA. Although the agreement states that any arbitration shall be governed by the AAA's employment arbitration rules, it does not state that the parties intended for the FAA's procedural provisions to apply in place of the CAA's procedural provisions. Even though the court found that the FAA's substantive rules applied in this case, it did so based on evidence showing that the parties' agreement evidenced a transaction involving interstate commerce (see 9 U.S.C. § 2), not because of any language in the agreement. Because Holmes filed this lawsuit in a California court and the parties' arbitration agreement does not expressly state that the FAA's procedural rules apply, the CAA's procedural rules presumptively apply. (*Quach, supra*, 16 Cal.5th at p. 582.)

Natures Image relies on *Hernandez v. Sohnen Enterprises, Inc.* (2024) 102 Cal.App.5th 222 (*Hernandez*), disapproved on another ground by *Hohenshelt, supra*, 18 Cal.5th at p. 349, to argue that the CAA does not apply because the trial court found that the FAA governs the issue of arbitrability. Natures Image's reliance on *Hernandez* is misplaced.

The arbitration agreement in *Hernandez* included a choice of law provision, which stated that the agreement was “governed by the FAA.” (*Hernandez, supra*, 102 Cal.App.5th at p. 241.) The appellate court concluded that provision was “broad, encompassing both the procedural and substantive provisions of the FAA,” because the parties’ agreement “consistently refer[red] to procedures contained in the FAA, such as allowing a party to seek appointment of an arbitrator pursuant to the FAA.” (*Id.* at pp. 241–242.) In addition, the parties’ agreement stated that the Federal Rules of Civil Procedure would apply to any arbitration. (*Id.* at p. 242.) Because the parties’ agreement did not mention the CAA but instead expressly stated that the FAA and federal civil procedure rules would govern any arbitration between the parties, the court in *Hernandez* concluded that the CAA’s procedural rules, including section 1281.97, did not apply. (*Hernandez*, at p. 242.)

Unlike the agreement in *Hernandez*, the parties’ arbitration agreement in this case does not reference the FAA or the Federal Rules of Civil Procedure, let alone state that either of the procedural provisions from either of those statutory schemes shall govern the arbitration in this case. *Hernandez*, therefore, does not support Natures Image’s argument that the CAA’s procedural rules do not apply in this case.

## **2. *Hohenshelt* requires reversal**

“In 2019, the Legislature passed Senate Bill No. 707 (2019–2020 Reg. Sess.) (Senate Bill 707) . . . in response to ‘a concerning and troubling trend’ in consumer and employment arbitrations: ‘employers are refusing to pay required fees to initiate arbitration, effectively stymieing the ability of employees to assert their legal rights.’ . . . The Legislature noted instances in which companies, having drafted and enforced waivers of class proceedings in employment contracts, faced large numbers of individual arbitration demands and then failed to timely pay arbitration fees, thereby frustrating adjudication of employees’ claims.” (*Hohenshelt, supra*, 18 Cal.5th at p. 329.)

Senate Bill 707 added sections 1281.97 and 1281.98. (Stats. 2019, ch. 870, § 4; *Hohenshelt, supra*, 18 Cal.5th at p. 330.) Section 1281.97 provides that if the drafting party of an employment or consumer arbitration contract fails to pay within 30 days any fees and costs required to initiate an arbitration proceeding, that party “is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration.” (§ 1281.97, subd. (a)(1).) In the event of such a breach, the employee or consumer may withdraw his or her claims from arbitration and proceed with those claims in court or compel arbitration in which the drafting party shall pay reasonable attorney’s fees and costs related to the arbitration. (*Id.*, subd. (b).) Section 1281.98 operates in an identical manner, except it addresses when the drafting party of an employment or consumer arbitration contract fails to timely pay fees required to continue an arbitration proceeding that is already in progress. (§ 1281.98, subds. (a)(1), (b).)

In *Hohenshelt*, the Supreme Court addressed whether the FAA preempts section 1281.98 to the extent the statute compels waiver of a drafting party’s right to arbitrate if that party fails to timely pay arbitration fees. (*Hohenshelt, supra*, 18 Cal.5th at pp. 322–323.) As the Supreme Court noted, the FAA establishes an equal-treatment principle, through which courts may invalidate arbitration agreements “‘ ‘based on ‘generally applicable contract defenses’ like fraud or unconscionability, but not on legal rules that ‘apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’ ’ ’ ” (*Id.* at p. 327.)

The Supreme Court acknowledged “that if section 1281.98 were construed to mean that any failure to make timely payment, regardless of the circumstances, invariably results in forfeiture of arbitral rights, the statute would be anomalous in the context of general contract law principles.” (*Hohenshelt, supra*, 18 Cal.5th at p. 343.) The court held, however, that “section 1281.98, properly construed, is not preempted by the FAA” because “the statute does not abrogate the longstanding principle, established by statute and common law, that one party’s nonperformance of an obligation automatically extinguishes the other party’s contractual duties only when nonperformance is willful, grossly negligent, or fraudulent.” (*Id.*, at p. 323.)

The Supreme Court rejected a strict application of section 1281.98’s deadlines, explaining that “the Legislature sought to deter companies and employers from engaging in *strategic* nonpayment of arbitration fees.” (*Hohenshelt, supra*, 18 Cal.5th at p. 323.) The court found “no indication that [the Legislature] intended to strip companies and employers of their contractual

right to arbitration where nonpayment of fees results from a good faith mistake, inadvertence, or other excusable neglect.” (*Ibid.*)

The Supreme Court directed “the Court of Appeal to remand the matter to the trial court for consideration of whether [the employer] may be excused for its failure to timely pay arbitration fees, such that the stay of litigation should not be lifted and the parties should be returned to arbitration, and whether the delay resulted in compensable harm to [the employee].” (*Hohenshelt, supra*, 18 Cal.5th at p. 349.)

The trial court in this case applied section 1281.97, the companion statute to section 1281.98, to conclude that Natures Image waived its right to arbitrate Holmes’s wage and hour claims, even though the court found that it was undisputed that the company’s failure to pay the initial arbitration fees “was the result of an innocent mistake.” At the time the court made its ruling, it followed several pre-*Hohenshelt* decisions that held the waiver provisions in sections 1281.97 and 1281.98 must be strictly applied. The Supreme Court disapproved each of those decisions to the extent they are inconsistent with *Hohenshelt*. (*Hohenshelt, supra*, 18 Cal.5th at p. 349.)

Although *Hohenshelt* addressed whether section 1281.98 is preempted by the FAA, its analysis and holding apply equally to section 1281.97, which includes forfeiture provisions that are identical to those included in section 1281.98. The only material difference between the two statutes for purposes of this appeal is that section 1281.97 concerns the failure to timely pay initial arbitration fees, while section 1281.98 concerns the failure to timely pay fees required to continue arbitration. (Compare § 1281.97 with § 1281.98.) Thus, like section 1281.98, section 1281.97 would be preempted if applied strictly because it

would “be anomalous in the context of general contract law provisions.” (*Hohenshelt, supra*, 18 Cal.5th at p. 343.)

Because the trial court strictly applied section 1281.97 to find Natures Image waived its right to compel arbitration of Holmes’s wage and hour claims, its order allowing Holmes to withdraw those claims from arbitration must be reversed.

We now must determine the proper disposition.

In its supplemental brief, Natures Image relies on *Wilson v. Tap Worldwide, LLC* (2025) 114 Cal.App.5th 1077 (*Wilson*) to urge us to find as a matter of law that its failure to timely pay the initial arbitration fees was not willful, grossly negligent, or fraudulent. Holmes, on the other hand, argues that we should conclude as a matter of law that Natures Image’s failure to pay was willful, grossly negligent, or fraudulent because the company has yet to pay any arbitration fees concerning his wage and hour claims. At the very least, Holmes argues, the matter must be remanded so that the trial court can make that determination under *Hohenshelt*’s guidance.

In *Wilson*, after the trial court compelled the plaintiff employee’s lawsuit against his employer to arbitration, the arbitration provider sent an invoice to the employer, stating that payment was due 30 days from the invoice date. (*Wilson, supra*, 114 Cal.App.5th at p. 1082.) The employer initiated an electronic bill payment on the 30th day, which was a Friday, but the payment was not processed, and the arbitration provider did not receive it, until the next Monday, after the payment window closed. (*Ibid.*) The trial court granted the employee’s motion to vacate arbitration, strictly applying section 1281.98’s waiver provision. (*Id.* at p. 1083.) The court also awarded the employee

over \$10,000 in attorney fees and costs under section 1281.98, subdivision (c)(1). (*Ibid.*)

Our colleagues in Division One reversed the trial court's order awarding the employee attorney's fees and costs (the employer dismissed its appeal from the order vacating the order compelling arbitration). (*Wilson, supra*, 114 Cal.App.5th at pp. 1084, 1086–1090.) Applying *Hohenshelt*, Division One held that the trial court erred when it strictly applied section 1281.98's waiver provisions to issue the award of attorney's fees and costs. (*Id.* at p. 1088.)

Division One then addressed the proper disposition. (*Wilson, supra*, 114 Cal.App.5th at pp. 1088–1091.) It noted that the trial court made factual findings that the employer timely initiated the payment of arbitration fees but, because of a processing delay, the arbitration provider received the payment after the deadline expired. (*Id.* at pp. 1089–1090.) The reviewing court held as a matter of law that “these uncontested findings fail to establish defendant’s untimely payment was strategic, willful, grossly negligent, or fraudulent.” (*Id.* at p. 1090.) Division One, therefore, reversed the order awarding the employee attorney's fees and costs without remanding the matter for the trial court to determine whether the employer's failure to timely pay the arbitration fees should be excused. (*Id.* at p. 1091.)

*Wilson* is distinguishable. Unlike the employer in that case, Natures Image did not try to initiate payment for the arbitration fees in Holmes's wage and hour proceedings before the 30-day deadline expired. Instead, Natures Image admitted that it failed to make that payment at all, although it claimed its failure to do so was the result of an honest mistake. Further, while the court stated that it was “undisputed” that Natures

Image's failure to pay the arbitration fees was an "innocent mistake," the court did not address Holmes's argument to the contrary. Specifically, Holmes argued in his motion to withdraw his claims from arbitration that there was evidence from which the trial court could find Natures Image's failure to pay the initial arbitration fees was not the result of excusable neglect. For instance, Holmes argued that Natures Image should have become aware of its failure to pay the initial arbitration fees when the AAA sent the company a letter, before the expiration of section 1281.97's 30-day deadline, noting that it had yet to pay those fees.

While there certainly was evidence from which the trial court could find that Natures Image's failure to pay the arbitration fees was not the result of willful, grossly negligent, or fraudulent conduct, we cannot make that finding as a matter of law on the record before us. Rather, like in *Hohenshelt*, we conclude the proper disposition is to allow the trial court to determine in the first instance whether Natures Image's failure to timely pay the arbitration fees should be excused under section 1281.97. (See *Hohenshelt, supra*, 18 Cal.5th at p. 349.)

## **DISPOSITION**

The order allowing Holmes to withdraw his wage and hour claims from arbitration is reversed. The matter is remanded for the trial court to consider whether Natures Image may be excused for its failure to timely pay arbitration fees. The parties shall bear their own costs on appeal.

VIRAMONTES, J.

WE CONCUR:

WILEY, Acting P. J.

UZCATEGUI, J.\*

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