PARTIES/ATTORNEYS

Plaintiff	Cameron Nicholson	John G. Yslas Jeffrey C. Bils Aram Boyadjian Andrew Sandoval Wilshire Law Firm
Defendant	Primus Group, Inc.	Katherine C. Den Bleyker Kyle W. Thompson O'Hagan Meyer LLP
Defendants	Luttrell Staffing, Inc; and Luttrell Staffing California, LLC	Hieu T. Williams Michelle C. Freeman Hirschfeld Kraemer LLP

RECOMMENDATION

For all the reasons discussed below, the court finds the Agreement at issue to be permeated with at least a low degree of procedural unconscionability and an intermediate degree of substantive unconscionability. The court thus finds the Agreement to be unconscionable and unenforceable. The court denies the request for severance. The motion to compel arbitration is denied.

Utility Staffing and defendant Luttrell Staffing Group are staffing agencies that provide temporary labor to various companies. Utility Staffing obtains back office, marketing, and business development services from Luttrell Staffing Group. In or about September 2023, Utility Staffing hired plaintiff Cameron Nicholson and placed him with one of Utility Staffing's clients, defendant Primus Group Inc. Plaintiff worked there until December 2023 as an hourly-paid, non-exempt employee. Plaintiff filed the instant complaint on May 30, 2024, against Lutrell Staffing, Inc., Lutrell Staffing California (together, Lutrell), and Primus Group, alleging the following causes of action on behalf of plaintiff individually and as a class action: (1) Failure to Pay Minimum and Straight Time Wages (Cal. Lab. Code §§ 204, 1194, 1194.2, 1197, and 1197.1); (2) Failure to Pay Overtime Wages (Cal. Lab. Code §§ 1194 and 1198); (3) Failure to Provide Meal Periods (Cal. Lab. Code §§ 226.7, 512); (4) Failure to Authorize and Permit Rest Periods (Cal. Lab. Code §§

226.7); (5) Failure to Timely Pay Final Wages at Termination (Cal. Lab. Code §§ 201-203); (6) Failure to Provide Accurate Itemized Wage Statements (Cal. Lab. Code § 226); (7) Failure to Indemnify Employees for Expenditures (Cal. Lab. Code § 2802); (8) Failure to Produce Requested Employment Records (Cal. Lab. Code §§ 226 and 1198.5); and (9) Unfair Business Practices (Cal. Bus. & Prof. Code §§ 17200, et seq.).

On August 15, 2024, plaintiff filed a separate action (Case No. 24CV04587) against the same defendants alleging one cause of action for civil penalties under PAGA. On the accompanying Civil Case Cover Sheet Addendum, plaintiff failed to identify the instant case as a related case and failed to file its own Notice of Related Case, a violation of California Rules of Court, rule 3.300(b). On September 18, 2024, defendants filed a Notice of Related Case. On January 6, 2025, this court ordered the cases related.

On January 13, 2025, defendant Primus Group filed a motion to compel arbitration. On February 3, 2025, plaintiff filed opposition, asserting the arbitration agreement was unconscionable. Reply has been filed.

On February 2, 2025, Lutrell filed a joinder in Primus Group's motion. A joinder is timely if it is served and filed within the time for noticing the particular motion at issue. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1176-1177.) Here, Lutrell concedes it did not timely file the joinder but argues that it was not aware of the pending motion until it received plaintiff's opposition thereto. There is no opposition to the joinder. The court determines that absent opposition, the joinder will be considered as if it were timely.

FAA Applies

The Binding Arbitration Agreement and Class Action Waiver at issue here specifically provides the Federal Arbitration Act applies. (Ortiz Decl., Exh. A, ¶ 9-- "The Federal Arbitration Act, 9 U.S.C. § 1 et seq., shall govern the interpretation and enforcement of this Agreement and arbitral proceedings."].)[1]

This issue is usually immaterial because both the Federal Arbitration Act (FAA) and the California Arbitration Act (CAA) provide for enforcement of arbitration agreements. (Code Civ. Proc. § 1280 et seq.; 9 USC § 1 et seq.) Moreover, under both the FAA and the CAA, the court may deny an application to arbitrate if it finds the party resisting arbitration did not, in fact, agree to arbitrate. (FAA, § 4[4]; Code of Civ. Proc., § 1281.2.) Even when the FAA applies, however, "the FAA

[1] Anna Ortiz is Staffing Manager for Defendants Luttrell Staffing, Inc. dba Utility Staffing and Luttrell Staffing California, LLC dba Luttrell Staffing Group. (Ortiz Decl., ¶ 1.) Her declaration was provided by Luttrell's counsel to Kyle Thompson, counsel for Primus Group. Attorney Thompson authenticated it and filed it as an attachment to his own declaration in this proceeding.

relies on state-law contract principles" in determining whether an arbitration agreement exists. (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1466.)

Here, defendants rely on the principle that the FAA incorporates a strong federal policy of enforcing arbitration agreements, including agreements to arbitrate statutory rights in response to some of plaintiff's substantive unconscionability arguments. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 96.) However, California law, like federal law, favors enforcement of valid arbitration agreements. (*Armendariz, supra,* 24 Cal.4th at 97.) Thus, under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (9 U.S.C. § 2; see also, Code Civ. Proc., § 1281.) In other words, under California law, as under federal law, an arbitration agreement may only be invalidated for the same reasons as other contracts. (*Armendariz, supra*, 24 Cal.4th at 98.)

Even when the FAA applies, interpretation of the arbitration agreement is governed by state law principles. (*Western Bagel Co., Inc. v. Superior Court* (2021) 66 Cal.App.5th 649, 662.) While the Ninth Circuit has held that "[a]ny general state-law contract defense, based [on] unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA" (*Mortensen v. Bresnan Communications, LLC* (9th Cir. 2013) 722 F3d 1151, 1159, 1161), California's unconscionability law has been challenged based on that holding and the challenge was rejected. (See *Carlson v. Home Team Pest Defense, Inc*. (2015) 239 Cal.App.4th 619, 639 & fn. 7—"until the United States Supreme Court holds otherwise, we are bound to follow California Supreme Court authority on this issue"; see also *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 906-907, 912-913—same unconscionability standard applies to both arbitration and nonarbitration contracts.)

Thus, the court rejects defendants' general arguments that rulings that favor unconscionability must be rejected because they are contrary to the FAA. The FAA incorporates California law on these points. Unconscionability remains a valid defense in California under the authorities above when arbitration is governed by the FAA.

Existence of Agreement

Code of Civil Procedure section 1281.2 provides that a court "shall order the petitioner and the respondent to arbitrate a controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that (a) the right to compel arbitration has been waived by the petitioner . . . ." As our high court has explained, whether the arbitration is governed by the Federal Arbitration Act (FAA) or the California Arbitration Act (CAA), "when a petition to compel arbitration is

filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see [Code Civ. Proc.,] § 1281.2, subds. (a) & (b))—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal* v. *Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; see also *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951. 972-976 [opposing party has burden to show a defense, such as waiver, by a preponderance of evidence].)

Whether an agreement to arbitrate exists is analyzed on state law principles. (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938; *Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1466—the FAA relies on state-law contract principles in determining whether an arbitration agreement exists.) The initial burden is on the party petitioning to compel arbitration to prove the existence of the agreement by a preponderance of the evidence. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1230.) By attaching a copy of the agreement to its petition, defendant may satisfy the initial burden of establishing the existence of an arbitration agreement. (*Condee v. Longwood Management Corp*. (2001) 88 Cal.App.4th 215, 217–219.)

Here, defendants present evidence that in September 2023, Utility Staffing hired plaintiff to place him with its client, Primus Group; that Utility Staffing uses professional employer organization DecisionHR, Inc. ("DecisionHR") to process payroll and administer insurance benefits to its temporary employees, including new hire paperwork; on September 5, 2023, plaintiff attended a new hire orientation at Utility Staffing where he was provided access to a desktop computer to review and sign new hire paperwork provided by DecisionHR; and that he electronically signed a document labeled Binding Arbitration Agreement and Class Action Waiver ("Agreement") as part of the package. (Ortiz Decl., ¶¶ 6-7.)

The Agreement provides:

> "Any controversy, claim or dispute covered by this Binding Arbitration Agreement that arises out of or relates to employment with DecisionHR/worksite[2] or any application for employment with DecisionHR that is not resolved in mediation, must be resolved by binding arbitration, and

[2] According to Ortiz, "worksite" includes Utility Staffing and any worksite at which it places the employee. (Ortiz Decl., ¶ 7.) It does not appear to be otherwise defined in the Agreement.

> administered by the American Arbitration Association (the "AAA") pursuant to the AAA Employment Arbitration Rules and Mediation Procedures "Rules"). The controversies, claims, and disputes covered by this Binding Arbitration Agreement include all controversies, claims, and disputes, whether or not arising out of employment or termination of employment that would constitute a cause of action in court against DecisionHR and/or its employees, agents and direct and indirect parent companies, subsidiary companies, and affiliated companies."
>
> (Ortiz Decl., Exh. A, ¶ 1.)

Primus presents authority that it as a nonsignatory may compel arbitration under the Agreement either as a third-party beneficiary (*Macaulay v. Norlander* (1992) 12 Cal.App.4th 1, 7-8) or under the theory of equitable estoppel (*JSM Tuscany, LLC v. Sup.Ct. (NMS Properties, Inc.)* (2011) 193 CA4th 1222, 1237-1241). Plaintiff raises no opposition to either theory. The court finds that Primus has thus adequately shown the existence of the Agreement, and that the disputes at issue in the action are covered by the Agreement.

Unconscionability

While plaintiff does not deny the existence of the Agreement, he argues it is "irredeemably unconscionable." Arbitration may be refused where grounds exist for revocation or rescission of the agreement to arbitrate under state law. (9 USC § 2—"grounds as exist at law or in equity for the revocation of any contract"; Code Civ. Proc. § 1281—"grounds as exist for rescission of any contract.")[3]

Unconscionability as it pertains to contracts has both a procedural and substantive element. The prevailing view is that procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree. Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation,

[3] In the employment context, there is an additional consideration of fairness. (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 103, 106, 113.) The following requirements must be shown before an arbitration agreement in the employment context is enforceable: (1) the arbitration agreement may not limit damages normally available under the statutes; (2) there must be discovery "sufficient to adequately arbitrate their statutory claim; (3) there must be a written arbitration decision and judicial review "sufficient to ensure the arbitrators comply with the requirements of the statute"; and (4) the employer must "pay all types of costs that are unique to arbitration." (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 103, 106, 113.) This inquiry is distinct from an unconscionability determination. (*Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478, 504, fn. 7 [the two inquiries are distinct].) However, whether an agreement satisfies *Armendariz's* requirements may inform the determination whether it or any of its provisions is unconscionable." (*Ramirez, supra,* 16 Cal.5th at p. 504, fn. 7.) In light of *Ramirez*, the court analyzes any possible *Armendariz* violations through the prism of unconscionability.

that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves. In other words, 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. (*Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal.4th 83, 114, 119; see also *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406–1407 ["There is a sliding scale where the greater the evidence of procedural unconscionability, the less evidence is needed of substantive unconscionability"].) Plaintiff has the burden to prove both procedural and substantive unconscionability. The greater the evidence there is of one of these, the less is required of the other. (*Crippen v. Central Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159, 1165.) The burden of proving unconscionability rests upon the party asserting it. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126.)

a. Procedural Unconscionability

Procedural unconscionability addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246.) This element is generally established by showing the agreement is a contract of adhesion, i.e., a "standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478, 492).) Adhesion contracts are subject to scrutiny because they are "not the result of freedom or equality of bargaining." (*Ibid.*) Courts must be particularly attuned to this danger in the employment setting, where economic pressure exerted by employers on all but the most sought-after employees may be particularly acute. (*Ramirez, supra,* 16 Cal.5th at 494.)

Procedural unconscionability pertains to the making of an agreement and requires oppression or surprise, usually as a contract of adhesion. (*Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 285; see *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 9843 ["[i]n determining whether a contract term is unconscionable, we first consider whether the contract ... was one of adhesion"].) The 'oppression' component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party. The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*Grand Prospect Partners, L.P. v. Ross*

Dress for Less, Inc. (2015) 232 Cal.App.4th 1332, 1348.) Surprise is defined as "the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." (*Lennar Homes of California, Inc. v. Stephens* (2014) 232 Cal.App.4th 673, 688.)

Here, plaintiff convincingly demonstrates that the contract was one of adhesion, as the onboarding documents clearly suggested acceptance was a term of employment. The document titled a "Covered Employee Acknowledgemen," explains DecisionHR's relationship with the employee and the Worksite Employer. In paragraph 10, it states: "Worksite Employer and PEO utilize binding arbitration to resolve disputes, as set forth in the Worksite Employer/PEG Arbitration Agreement. *You will be required* to execute the applicable Arbitration Agreement, which by this reference is incorporated into this Acknowledgment." (Kim Decl., Exh. A, ¶ 10, emphasis added.) Similarly, the Employee Handbook Acknowledgment signed by plaintiff states: "I further acknowledge that my Worksite and Decision HR utilize binding arbitration to resolve disputes, as set forth in the applicable Arbitration Agreement. I understand and agree that I *will be required* to execute the applicable Arbitration Agreement, which by this reference is incorporated into this Acknowledgment." (Kim Decl., Exh. B, ¶ 3, emphasis added.)

The court is satisfied there is at least a low degree of procedural unconscionability under these circumstances. (See, e.g., *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1573 [low-to-medium level of procedural unconscionability found when evidence showed contract of adhesion, weak bargaining, and no ability to negotiate terms, and defendant did not call attention to arbitration terms, while at the same time the arbitration term is not hidden in a prolix form].)

b. Substantive Unconscionability

As noted above, both procedural and substantive unconscionability must be present for a court to exercise its discretion to refuse to enforce a contract or clause. (*Armendariz, supra*, 24 Cal.4th at 114.) "(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." (*Id.*; *Mercuro v. Sup.Ct. (Countrywide Secur. Corp.)* (2002) 96 Cal.App.4th 167, 174-175—given employer's highly oppressive conduct in obtaining employee's consent to arbitration agreement, employee was required to make only minimal showing of substantive unconscionability.)

Unconscionability is not synonymous with making a bad bargain. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 912.) Instead, contracts are substantively unconscionable where they impose terms that are overly harsh or one-sided. (*Id.* at p. 910.) "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." (*Sanchez* at 912) Put another way, an arbitration provision is substantively unconscionable when the terms are unreasonably favorable to the more powerful party. (*Id.* at p. 911.) The paramount consideration is mutuality. (*Nyulassy v. Lockheed Martin Corp*. (2004) 120 Cal.App.4th 1267, 1287.) In evaluating the substantive terms of an arbitration agreement, a court applying the unconscionability doctrine must consider not only what features of dispute resolution the agreement eliminates but also what features it contemplates. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1146.)

1. Scope

Here, plaintiff argues that the arbitration term is substantively unconscionable because it is overly broad. (*Cook v. University of Southern California* (2024) 102 Cal.App.5th 312.) In *Cook*, plaintiff was an employee of the University of Southern California. She signed an arbitration agreement that required the arbitration of "all claims, whether or not arising out of Employee's University employment, remuneration or termination, that Employee may have against the University or any of its related entities, including but not limited to faculty practice plans, or its or their officers, trustees, administrators, employees or agents, in their capacity as such or otherwise; and all claims that the University may have against Employee." The court held that plain language of the agreement required Cook to arbitrate claims that are *unrelated* to her employment with USC, which is unconscionable. It observed: "It is difficult to see how it is justified to expect Cook—as a condition of her employment at the university—to give up the right to ever sue a USC employee in court for defamatory statements or other claims that are completely unrelated to Cook's employment." (*Cook, supra,* 102 Cal.App.5th at 325.)

Here, the Agreement states:

> 1. **BINDING ARBITRATION:** Any controversy, claim or dispute covered by this Binding Arbitration Agreement that arises out of or relates to employment with DecisionHR/worksite or any application for employment with DecisionHR that is not resolved in mediation, must be resolved by binding arbitration, and administered by the American Arbitration Association (the "AAA") pursuant to the AAA Employment Arbitration Rules and Mediation Procedures "Rules"). The controversies, claims, and disputes covered by this Binding Arbitration Agreement include all controversies, claims, and disputes, whether or not arising out of employment or termination of employment that would constitute a cause of action in court against DecisionHR and/or its employees, agents and direct and indirect parent companies, subsidiary companies, and affiliated companies.

(Ortiz Decl., Exh. A, ¶ 1.)

Plaintiff highlights the second sentence, which states that "The controversies, claims, and disputes covered by this Binding Arbitration Agreement include all controversies, claims, and disputes, ***whether or not arising out of employment or termination of employment*** that would constitute a cause of action in court against DecisionHR and/or its employees, agents and direct and indirect parent

companies, subsidiary companies, and affiliated companies." Plaintiff characterizes this to be overly broad in that it requires arbitration of claims that are unrelated to employment, which is proscribed by *Cook*.

Defendant counters this argument by pointing out the first sentence limits coverage to employment issues: "Any controversy, claim, or dispute covered by this Binding Arbitration Agreement that ***arises out of or related to employment with DescionHR/worksite*** or any application for employment with DecisionHR…must be resolved by binding arbitration…" (Ortiz Decl., Exh. A, ¶ 1 (emphasis added).) Defendant argues that at a minimum, this language creates a dispute regarding the scope of the Agreement that must be resolved in favor of arbitration.

Even when the FAA applies, interpretation of the arbitration agreement is governed by state law principles. Under California law, ordinary rules of contract interpretation apply to arbitration agreements. (*Western Bagel Co., Inc. v. Superior Court* (2021) 66 Cal.App.5th 649, 662.) A contract must be interpreted so as to give effect to the mutual intent of the parties. The terms of a contract are determined by objective rather than subjective criteria. The question is what the parties' objective manifestations of agreement or objective expressions of intent would lead a reasonable person to believe. (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1111.)

Under ordinary rules of contract interpretation, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) "[W]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Code Civ. Proc., § 1858.) Here, defendant points out that Section 1 of the Agreement references the use of the American Arbitration Association's ("AAA") "Employment Arbitration Rules and Mediation Procedures." (Ortiz Decl., Exh. A, ¶ 1.) The incorporation of this reference, according to defendants, suggests that the Agreement's scope is likewise limited to employment disputes despite the broad language defining "controversies, claims or disputes." However, the designation of the AAA Employment Arbitration Rules is also consistent with the interpretation that "all controversies, claims, and disputes, whether or not arising out of employment or termination of employment" are included in the scope with the employment related claims as a subset of the whole being arbitrated pursuant to the AAA Employment Arbitration Rules. Moreover, this interpretation elevates one part of the agreement over another, rather than giving effect to both. This interpretation is thus not dispositive.

Another rule of contract interpretation provides that "[i]n cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." (Civ. Code, § 1654.) Here, the party most closely aligned with the drafter is

defendant Primus, who seeks to enforce the Agreement. Thus, the court finds the scope of the Agreement to be overly broad and unconscionable pursuant to *Cook*.[4]

2. Lack of Mutuality

Plaintiff also argues that the Agreement lacks mutuality in that it requires plaintiff to arbitrate claims against defendants' "related entities" without requiring those entities to arbitrate against plaintiff, and that the Agreement favors the employer in terms of the claims to be arbitrated. The court finds in favor of plaintiff on both points.

In *Cook*, the agreement required Cook to arbitrate any and all claims she may have against USC "or any of its related entities, including but not limited to faculty practice plans, or their officers, trustees, administrators, employees or agents, in their capacity as such or otherwise." However, the agreement did not require USC's "related entities" to arbitrate their claims against Cook. The *Cook* court observed: "This confers a benefit on USC and its broadly-defined "related entities" that is not mutually afforded to Cook." Thus, the court found the arbitration was substantively unconscionable for lack of mutuality. (*Id*. at 328.) The terms here are similarly one-sided.

Moreover, the Agreement favors the employer in terms of the claims to be arbitrated. Arbitration agreements which require arbitration of most claims of interest to employees but exempt from arbitration most claims of interest to

---

[4] Civil Code section 1654 codifies the common law principle of interpretation known as contra proferentem. (See, e.g., *Mitchell v. Exhibition Foods* (1986) 184 Cal.App.3d 1033, 1042 [using contra proferentem as a synonym for the rule embodied in section 1654].) However, "[a]lthough courts may ordinarily [construe arbitration agreements] by relying on state contract principles, [citation], state law is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA, [citation]" such as " 'by "interfer[ing] with fundamental attributes of arbitration." ' (*Lamps Plus, Inc. v. Varela* (2019) 587 U.S. 176, 184.) In *Lamps Plus,* there was ambiguity in the agreement on whether it included class arbitration. The US Supreme Court concluded that an "individualized form of arbitration [is] envisioned by the FAA" and that class arbitration lacks the benefits of the individualized form. Applying contra preferentem to an ambiguity concerning whether the parties agreed to class arbitration would " 'reshape traditional individualized arbitration .... without the parties' consent[,]' " and thus " 'interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.' (*Lamps Plus, supra,* 587 U.S. at 189.) In *Western Bagel Company, Inc. v. Superior Court* (2021) 66 Cal.App.5th 649, the agreement (governed by the FAA) contained an ambiguity whether it called for a binding or nonbinding arbitration. The court found that the expectation that the arbitrator's decision will be both binding and final is a fundamental attribute of arbitration. Consequently, the trial court could not apply "[t]he doctrine of contra proferentem [as a] substitute for the requisite affirmative 'contractual basis for concluding' " the parties had agreed to forgo "the central benefits of arbitration itself" by submitting their disputes to nonbinding arbitration. (*Western Bagel Company v. Superior Court, supra,* 66 Cal.App.5th at 666.) Here, defendants have not identified either this line of authority or what fundamental attribute might be interfered with by construing the scope of the Agreement against it. (See *Lamps Plus, Inc. v. Varela* (2019) 587 U.S. 176, 184—"Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the *issues subject to arbitration*, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." [emphasis added].)

employer are unfairly one-sided, and thus substantively unconscionable. (See *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 175—finding arbitration agreement substantively unconscionable which excluded "claims for injunctive and/or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information.") Here, the instant Agreement does not cover "claims by the Company/Employer for injunctions or other types of equitable relief for unfair competition, use or unauthorized disclosure of trade secrets or confidential information, or violations of noncompetition agreements as to which the Company/Employer may seek and obtain relief from the courts . . ." ." (Ortiz Decl. (attached to Thompson Decl.), Exh. A, ¶ 1.) This is impermissibly one-sided.

The court finds the lack of mutuality to be substantively unconscionable.

3. Violation of EFAA

In 2022, Congress amended the FAA by adopting the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA). In relevant part, the EFAA provides: "Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, ... no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute." (9 U.S.C. § 402(a).)

Here, there are no allegations of sexual assault or harassment. Although plaintiff argues there are good policy reasons for extension of the prohibition regardless, he has cited no cases that have so held. The court declines to make such a finding.

4. PAGA Waiver

The Agreement provides: "Any proceeding to resolve or litigate any dispute, whether in arbitration, in court, or otherwise, will be conducted solely on an individual basis, and that neither the Applicant or Employee nor DecisionHR will seek to have any controversy, claim, or dispute heard as a class action, a representative action, a collective action, ***a private attorney-general action***, or in any proceeding in which the Applicant or Employee or DecisionHR acts or proposes to act in a representative capacity." (Ortiz Decl. (attached to Thompson Decl.), Exh. A, ¶ 2.) Plaintiff argues this wholesale waiver of his right to bring an action under the Private Attorney General Act is unenforceable and thus unconscionable.

PAGA waivers have been the subject of two US and California Supreme Court cases of late: *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639 (*Viking*

River) and *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104 (*Adolph*). The analysis in these cases implicated yet another California Supreme Court case: *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*). The three primary lessons to be distilled from *Viking River* and *Adolph* are:

(1.) The FAA does not preempt *Iskanian's* "principal rule" that prohibits waivers of representative standing to bring PAGA claims (*Viking River, supra*, 596 U.S. at p. 649; see *DeMarinis v. Heritage Bank of Commerce* (2023) 98 Cal.App.5th 776, 784 (*DeMarinis*));

(2.)The FAA does preempt *Iskanian's* secondary rule that prohibited parties from contracting around PAGA's claim joinder device by splitting arbitrable individual claims from nonarbitrable nonindividual claims (*Viking River, supra,* at p. 659; see *Nickson v. Shemran, Inc.* (2023) 90 Cal.App.5th 121, 129 (*Nickson*)); and

(3.)Subject to any separate limitations on severability, trial courts should generally compel arbitration of individual PAGA claims while preserving the plaintiff's ability to litigate nonindividual claims in court (*Adolph, supr*a, 14 Cal.5th at p. 1123; see *Nickson*, at pp. 134–135; *DeMarinis*, at p. 787).

Thus, plaintiff's purported waiver of his representative standing to bring PAGA claims is unenforceable. While defendants argue the individual claims may be severed from the nonindividual claims, this does not undermine the fact that the provision is unenforceable. The court thus finds this effort to obtain a waiver to be unconscionable. (See *Alberto v. Cambrian Homecare* (2023) 91 Cal.App.5th 482, 495.)

5. Confidentiality Clause

The Agreement provides: "Except as may be required by law, neither a party, nor an arbitrator may disclose the existence, content or results of any arbitration hereunder without the prior written consent of all parties." (Ortiz Decl. (attached to Thompson Decl.), Exh. A, ¶ 7.) Plaintiff argues this provision is prohibited by statutes prohibiting employees from discussing their wages. (Lab. Code, §§ 232, 1197.5, subd. (k)(1).) He argues this provision unfairly impairs his ability to investigate and prosecute wage-related claims by blocking him from speaking with other employees and witnesses regarding wage violations. Defendants simply respond that "these state statutory code sections are preempted" because of the FAA's strong federal policy of enforcing arbitration agreements.

This confidentiality provision is comparable to the one in *Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1067. There, the arbitration provision at issue provided that "all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence." (*Ibid.*) Because the clause required the plaintiff employee to keep all aspects of arbitration secret, this court held, she would violate

it if she tried to contact any witness outside of formal discovery. (*Id*. at p. 1066.) Such a limitation would increase the costs of discovery by requiring the plaintiff to conduct depositions instead of informal interviews, which would "defeat[ ] the purpose of using arbitration as a simpler, more time-effective forum for resolving disputes," and it unreasonably favored the defendant employer to the detriment of employees. (*Ibid*.) For all of these reasons, the court found the clause to be substantively unconscionable. (*Id*. at pp. 1066–1067.)

This court likewise concludes that the confidentiality clause in the Agreement benefits only defendants and is substantively unconscionable.

Summary of Conclusions re Unconscionability

The court finds there is at least a low level of procedural unconscionability present in these circumstances based on the inequality in bargaining power between the low-wage employees and their employer.

The court finds the scope, mutuality and confidentiality provisions along with the PAGA waiver in the Agreement to be substantively unconscionable to an intermediate degree.

The court finds this Agreement is thus unconscionable and unenforceable.

Severance

If a contractual term is found unconscionable, the court may, in its discretion, choose to do one of the following: 1) refuse to enforce the contract; 2) sever an unconscionable term or clause; or 3) limit the application of any clause to avoid an unconscionable result. The strong legislative and judicial preference, however, is to sever the offending term and enforce the balance of the agreement. (*Ramirez, supra*, 16 Cal.5th at p. 512.) Refusal to sever and enforce the remaining portions of the arbitration agreement is appropriate only when the agreement is permeated by unconscionability. (*Ibid*.)

No bright-line rule requires a court to refuse enforcement if a contract has more than one unconscionable term. Likewise, a court is not required to sever or restrict an unconscionable term if an agreement has only a single such term. The appropriate inquiry is qualitative and accounts for the two factors initially identified in *Armendariz* – if the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality, however, is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then severance and restriction are appropriate. (*Id*. at p. 515.)

Additionally, even if a contract can be cured, the court should ask whether the unconscionability *should* be cured through severance of restriction because the interests of justice would be furthered. This part of the inquiry focuses on whether mere severance of the unconscionable terms would function to condone an illegal scheme. The court should take into account the presence of a severance clause in the contract. (*Id.* at p. 517.) In the end, courts may liberally sever any unconscionable portion of a contract and enforce the rest when: the illegality is collateral to the contract's main purpose; it is possible to cure the illegality by means of severance; and enforcing the balance of the contact would be in the interests of justice." (*Id.* at pp. 516-517.)

Here, the court need go no further than the consideration re illegality. In *Armendariz*, the court rejected the proposition that the "agreement's lack of mutuality" was collateral to the contract's main purpose. The court reasoned that "such permeation is indicated by the fact that there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement." (*Armendariz, supra*, 24 Cal.4th at pp. 124–125.) Instead, "the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms." (*Id.* at p. 125.)

The court finds the same to be true; similarly, the Agreement is tainted with unconscionability because its central purpose appears to be the ability for the parties to arbitrate all possible disputes between each other, whether related to employment or not, with defendant able to move for arbitration of claims against it and its related entities, but plaintiff only able to move for arbitration of claims by defendants against her, all while requiring plaintiff to maintain confidentiality about the proceeding and purporting to force a waiver of PAGA claims. (See *Cook*, at p. 329-330.)

The motion to compel arbitration is denied.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)