

## PROPOSED TENTATIVE

On December 14, 2023, plaintiff Juan Martinez Rodriguez filed a complaint against defendant Coastal Vineyard Care Associates, raising six causes of action: disability discrimination in violation of the Fair Employment and Housing Act (FEHA); failure to provide reasonable accommodations in violation of FEHA; failure to engage in good faith interactive process in violation of FEHA; retaliation in violation of FEHA; failure to prevent discrimination in violation of FEHA; and wrongful termination in violation of public policy (a common law tort). Briefly, plaintiff began working for defendant in March 2009; on April 3, 2023, plaintiff suffered a workplace injury, and due to the injury, restrictions were placed on his work; defendant failed to provide reasonable accommodations for his disability, and when he took a temporary leave on April 26, 2023, he was terminated. Defendant has not answered.

Defendant has filed a motion to compel arbitration, pursuant to Code of Civil Procedure section 1281.4, based on a written arbitration agreement with plaintiff, in Spanish, signed by plaintiff on December 12, 2022. According to defendant, the arbitration agreement is governed by the Federal Arbitration Act, is valid and enforceable, governs the existing FEHA causes of action, and therefore should be enforced. He asks the court to stay the current lawsuit and order the matter to arbitration.

Plaintiff has filed opposition. He seems to concede that he signed the agreement, that it is governed by the FAA, and that it governs the FEHA disputes in the complaint. He claims, however, that the court should not enforce the arbitration agreement due to procedural and substantive unconscionability principles. On October 20, 2024, Coastal Vineyard filed a reply, advanced three evidentiary objections to plaintiff's declaration, and made a "Request for a Statement of Decision."

The court will examine defendant's evidentiary objections, as well as defendant's request for a statement of decision. The court will then detail the relevant principles that frame the court's inquiry; address whether defendant has met its burden to show an enforceable arbitration clause in an employment contract, including whether the arbitration agreement satisfies the requirements for minimal fairness required by our high court; address whether plaintiff has shown both procedural and substantive unconscionability; and, if so, whether the unconscionable terms can be severed, meaning the remaining portions of the arbitration agreement can be enforced. The court will finish with a summary of its conclusions.

### *A) Evidentiary Objections and Request for Statement of Decision*

Coastal Vineyards advances three evidentiary objections to the declaration of plaintiff Juan Martinez Rodriguez. It claims the entirety of the declaration is inadmissible because 1) plaintiff did not sign it under penalty of perjury (under the laws of California); 2) plaintiff did not comply with California Rules of Court, rule 3.1110(g), which provides that exhibits "written in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter"; and 3) the declaration lacks foundation.

The court sustains defendant's first evidentiary objection. Plaintiff's declaration was not signed under penalty of perjury per California law, a precondition for admissibility at any law and motion hearing. Pursuant to California Rules of Court, rule 3.1306(a), evidence received at a law and motion hearing (of which a motion to compel arbitration is an example) "must be by declaration . . . , unless the court orders otherwise for good cause shown." Any statement not made by a witness testifying in court before the fact finder constitutes hearsay evidence when offered for the truth, which is the case here, and because a declarant is absent, hearsay evidence is considered less reliable. In these limited kinds of judicial proceedings, however, when hearsay evidence is the primary form of evidence, declarations/affidavits are admissible, if they comport with Code of Civil Procedure section 2015.5, which requires a declaration within this state be made, inter alia, to be executed under the penalty of perjury (under California law). (See, e.g., *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 608 619.) Plaintiff's declaration without the perjury attestation will be considered inadmissible hearsay. Plaintiff must submit a new declaration by the hearing to correct this obvious deficiency.

The court also sustains defendant's second evidentiary objection. The declaration offered by plaintiff should have been in Spanish, with a certified English translation, as required by California Rules of Court, rule 3.1110(g). Plaintiff attempted to sidestep this requirement by declaring, in the English version of his declaration, that before "signing this declaration, my attorney reviewed the above information with me and all information was translated for me in Spanish and I have clear knowledge of the validity of this declaration." Declarant cannot testify to this by himself. The court will allow plaintiff to cure this deficiency as well, however, if he provides at least by the hearing a new declaration from counsel indicating that the substance of plaintiff's declaration, offered in English, was accurately translated by counsel in Spanish, along with an explanation of counsel's fluency in Spanish and English. The court is permitting this because there is no definition of "qualified interpreter" in the Rules of Court or existing case law; the court is affording plaintiff's attorney an opportunity to convince it that plaintiff's declaration accurately reflects plaintiff's version of events.

The court wants to be clear. It has sustained defendant's two evidentiary objections to plaintiff's declaration as described above. The court will allow plaintiff an opportunity to correct these defects by submitting two new declarations, as follows: 1) a new declaration from plaintiff, indicating the declaration was signed under penalty of perjury; and 2) a new declaration from counsel, indicating that he or she was qualified to translate plaintiff's declaration from Spanish to English, and that everything conveyed in English was adequately understood by plaintiff via translation. If plaintiff does not submit these two new documents at least by the hearing, plaintiff will be deemed not to have satisfied his burden to show unconscionability, discussed below, and the motion to compel arbitration will be granted for that reason alone, for plaintiff will be deemed not to have presented evidence to show unconscionability after defendant has met its initial burden to show a written arbitration agreement applies and includes the present conflicts. If two new declarations are submitted at least by the hearing, the court will overrule all three evidentiary objections advanced by defendant, for in that situation plaintiff will have presented an adequate foundation to demonstrate unconscionability.

The court grants defendant's request for a statement of decision, pursuant to Code of Civil Procedure section 1291. (See *Metis v. Development LLC v. Bohacek* (2011) 200

Cal.App.4th 679, 687.) This written tentative, once finalized, will satisfy this request. (See Cal. Rules of Court, rule 3.1590.)

### *B) Legal Background*

Defendant has sought to compel arbitration under the California Arbitration Act (Code Civ. Proc.<sup>1</sup>, §§ 1281, et seq.) and the FAA (9 U.S.C. § 2, et seq.). Generally, under both schemes, a litigant may be compelled to arbitration where the moving party can show the existence of an arbitration agreement covering the dispute. (Code Civ. Proc., § 1281.2; see also *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 98 (*Armendariz*).) But also under both schemes, the litigant unwilling to arbitrate can demonstrate the arbitration agreement should be revoked for grounds which would apply to any contract. (See *Armendariz, supra*, 24 Cal.4th at p. 98.) One such ground is unconscionability. Once defendant has established the existence of an applicable arbitration agreement, the burden shifts to plaintiff to show unconscionability. (*Nelson v. Dual Diagnosis Treatment Center, Inc.* (2022) 77 Cal.App.5th 643, 653-654.)

Initially, regarding the motion to compel arbitration, defendant must state the provisions of the written agreement and identify the paragraph that provides for arbitration. (Cal. Rules of Court, rule 3.1330.) The court must determine if a written agreement exists to arbitrate the controversies at issues by a preponderance of evidence. If a party opposing the motion raises a defense to enforcement – such as unconscionability – that party bears the burden of proving the defense. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) Here, plaintiff raises only one defense – unconscionability.

Nuance is required in the present context, as the case involves an employment contract with a mandatory arbitration clause. Our high court has expressly required defendant employer to show that the mandatory arbitration agreement meets a five-part test to establish minimal fairness. More specifically, the arbitration agreement must provide for a neutral arbitrator, more than minimal discovery, a written award and judicial review, the same types of relief available in a court action, and no additional costs for the employee beyond what the employee would incur if he or she were bringing a claim in court. (*Armendariz, supra*, 25 Cal.4<sup>th</sup> at pp. 102, 110-111; see *Fitz v. NCR Corp.* (2004) 118 Cal.App.4<sup>th</sup> 702, 712-713 [to be enforceable, an arbitration agreement that applies to the resolution of an employee's public rights must not only be unconscionable, but also satisfy the five *Armendariz* requirements].) *Armendariz* remains good law even when the FAA is implicated. (*Ramos v. Superior Court* (2018) 28 Cal.App.5<sup>th</sup> 1042, 1055.) If the *Armendariz* requirements are satisfied, the arbitration agreement remains subject to claims of unconscionability. (*Armendariz, supra*, 24 Cal.4th at p. 113 [distinguishing between the minimum requirements for fairness as a condition precedent and the more general inquiry involving unconscionability]; see also *Jones v. Humanscale Corp.* (2005) 130 Cal.App.4th 401,

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

411 [our Supreme Court in *Armendariz* considered two separate issues concerning the enforceability of pre-dispute mandatory arbitration clauses in employment contracts; unconscionability and the minimum requirements necessary to permit arbitration of unwaivable statutory claims]; *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1279-1280 [five requirements under *Armendariz* are separate from unconscionability as discussed in *Armendariz*].)<sup>2</sup>

The general principles of unconscionability are well established. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111,125.) “A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party. [Citation.] Under this standard, the unconscionability doctrine ‘has both a procedural and a substantive element.’ [Citation.] ‘The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement’s actual terms and to assessments of whether they are overly harsh or one-sided.’ [Citation.] [¶] Both procedural and substantive unconscionability must be shown for the defense to be established, but ‘they need not be present in the same degree.’ [Citation.] Instead, they are evaluated on ‘a sliding scale.’ [Citation.] ‘[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to’ conclude that the term is unenforceable. [Citation.] Conversely, the more deceptive or coercive the bargaining tactics employed; the less substantive unfairness is required. [Citations.] A contract’s substantive fairness ‘must be considered in light of any procedural unconscionability’ in its making. [Citation.] ‘The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all the relevant circumstances, that a court should withhold enforcement.’ [Citation.] “The burden of proving unconscionability rests upon the party asserting it.” (*OTO, supra*, 8 Cal.5th at pp. 125-126.) The ultimate determination of unconscionability is an issue of law not an issue of fact. (*Fisher v. MoneyGram International, Inc.*, (2021) 66 Cal.App.5th 1084, 1094; see also *Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478, 518 [it does not contravene the FAA to find that certain provisions of an arbitration agreement are unconscionable].)

An arbitration agreement found to be unconscionable is subject to severance, even under the FAA, pursuant to Civil Code section 1670.5. (*Ramirez, supra*, 16 Cal.5th at p. 513 [“If a contractual clause is found unconscionable, the court may, in its discretion, choose to do one of the following: (1) refuse to enforce the contract; (2) sever any unconscionable clause; or (3) limit the application of any clause to avoid unconscionable results”].) The “strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement.” (*Ibid.*) Though the “statute appears to give a trial court some discretion as to whether to sever or

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<sup>2</sup> To be clear, *Armendariz* involved separate discussions of the five-part test for minimal fairness (24 Cal.4th at pp. 103-113) and the test for unconscionability. (*Id.* at p. 113-121).

restrict the unconscionable provision or whether to refuse to enforce the entire agreement,” it “also appears to contemplate the latter course only when an agreement is ‘permeated’ by unconscionability.” (*Armendariz, supra*, 24 Cal.4th at p. 122.) After a review of this area, our high court distilled the inquiry to the following: the “basic principles of severability that emerge” from the statutes and case law regarding “illegal contracts appear fully applicable to the doctrine of unconscionability.” (*Armendariz, supra*, 24 Cal.4th at p. 124.) That is: “Courts . . . look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract cannot be enforced. If the illegality 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 such severance and restriction are appropriate.” (*Ibid.*; *Ramirez, supra*, 16 Cal.5th at p. 515.) It clarified that “no bright line 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 term. Instead, the appropriate inquiry is qualitative. . . .” (*Ramirez, supra*, at p. 517.) If the contract has a severance clause, the court should consider as an expression of the parties’ intent that an agreement curable by removing defective terms should otherwise be enforced. (*Id.* at p. 517.)

If there is a severance clause, a court should ask whether the central purpose of the contract is tainted with illegality. If so, the contract cannot be cured through severance. If that is not the case, the court should then ask whether the contract’s unconscionability can be cured purely through severance or restriction of its terms, or whether reformation by augmentation is necessary. If no reformation is required, the offending provision can be severed or limited, and the rest of the arbitration agreement left intact, then severance or restriction is the preferred course for provisions that are collateral to the agreement’s main purpose. If the unconscionability cannot be cured by extirpating or liming the offending provision, but instead requires augmentation to cure the unconscionability, then the court should refuse to enforce the contract, because a court cannot “rewrite the agreements and impose terms to which neither party has agreed.” (*Ramirez, supra*, 16 Cal.5th at p 516.) Further, even if a contract can be cured, the court should also ask whether the unconscionability should be cured through severance or restriction because the interests of justice would be furthered by such actions, focusing on whether mere severance of the unconscionable terms would function to condone an illegal scheme and whether the defects in the agreement indicate that the stronger party engaged in systematic efforts to impose arbitration on the weaker party not simply as an alternative to litigation, but to secure a form that works to the stronger party’s advantage. if the answer to either is yes, the court should refuse to enforce the agreement. (*Ramirez, supra*, at pp. 515-517.) With all of this, “although there are no bright line numerical rules regarding severance it is fair to say that the greater number of unconscionable provisions a contract contains the less likely it is that severance will be the appropriate remedy.” (*Id.* at p. 517.)

#### *B) Merits*

- i) Has Defendant Met its Burden under Code of Civil Procedure section 1281.2 to Show The Existence of an Enforceable Arbitration Contract? *Yes*.

Defendant has shown, as required per section 1281.2, that the parties entered into a valid a written arbitration agreement; and, further, that the FEHA causes of action at issue fall within the scope of the arbitration clause (“all disputes arising out of, or related directly or indirectly to, my employment relationship with, or the termination of my employment from, the Company . . . shall be resolved only by an Arbitrator . . . ,” including “discrimination, harassment, and claims arising under state and federal statutes and/or common law . . . .” Plaintiff does not argue to the contrary.

Further, the arbitration agreement satisfies the minimal fairness requirements mandated in *Armendariz* and progeny, for it is a mandatory employment arbitration agreement. The arbitration agreement provides for a neutral arbitrator and does not limit statutorily imposed remedies, such as punitive damages or attorney’s fees. (*Armendariz*, *supra*, 24 Cal.4th at p. 103.) It also provides for adequate discovery. (*Id.* at p. 104.) Further, per *Armendariz*, the arbitration agreement must require a written arbitration award and adequate judicial review “sufficient to ensure the arbitrators comply with the requirements of the statute [.]” (*Id.* at p. 106.) It does. Finally, the arbitration agreement must not require employees to pay unreasonable costs and arbitration fees or expenses as a condition of access to the arbitration forum. (*Id.* at p. 110-111.) The arbitration clause satisfies these requirements. At no point does plaintiff contend the mandatory arbitration agreement fails to comply with *Armendariz*.

The court finds that the defendant employer has met its burden to show an arbitration was agreed upon by the parties, it governs or includes the disputes in this action, and all *Armendariz* requirements have been satisfied.

- ii) Has Plaintiff Met His Burden to Show the Arbitration Clause is both Procedurally and Substantively Unconscionable? *Yes*.

**If plaintiff does not submit the two new declarations discussed above in Section A, *ante*, at least by the hearing date, the remainder of this order is moot, meaning the court will grant the motion to compel arbitration because plaintiff has failed to meet his burden to show a basis for unconscionability. The analysis below is pertinent only if plaintiff submits the two new declarations described above.**

According to plaintiff’s declaration, attached to his opposition, on December 19, 2022, “I was told that I need to sign a couple of documents before I can continue working. Multiple

documents were provided to me and other employees by Donya Cuca . . . on our break. Ms. Cuca never explained any of the documents I was signing and never asked if I had any questions. Ms. Cuca informed me that the documents were just in case of an accident and that I needed to sign the paperwork. During the break, I signed the documents,” including the arbitration agreement at issue. “I was not offered time to review the Agreement at home, was not advised I could negotiate the terms of the Agreement, what the Agreement means, or that I was giving up my right for a potential jury trial if I signed the Agreement. I was only told that I was signing the documents in case of any injuries, without any further explanation of what they were.” He signed the agreement “because I understood [it was] a condition of my continued employment.” He claims that he did not even know “what ‘arbitration’ meant.” Defendant seems to acknowledge that the arbitration agreement was one of adhesion but observes that it was presented in Spanish. Further, according to the declaration of Joseph Mallobox, who is Chief of Employee Services for defendant, plaintiff was given the arbitration agreement in Spanish by a Spanish-speaking employee, who was available to answer any questions. Further, it is defendant’s practice “to allow employees to spend as much time as they need to review the documentation prior to signing,” “including the Agreement.”

Although there may be some factual conflicts between the two relevant declarations detailed above, the court does not find that defendant engaged in particularly sharp practices, and thus does not find a high or significant degree of procedural unconscionability.<sup>3</sup> (*Balthazar, supra*, 62 Cal.4th at p. 1244.) True, the arbitration agreement was presented to plaintiff at his workplace, along with other documents; further, defendant did not actually explain its contents to plaintiff; and plaintiff was required to sign the agreement to keep his job, which he had for some time. Further, the plaintiff’s review was not aided by an attorney. But there is no evidence that defendant applied inordinate pressure to plaintiff to sign the arbitration agreement, and it appears plaintiff was given time to read its contents. The arbitration agreement was presented to plaintiff in his native language, Spanish, by someone in apparent power (a supervisor) who could explain its content in Spanish (thus plaintiff was not given the impression that that employee could not ask questions or that any questions would not be answered). Plaintiff was given a copy of the agreement he signed. Further, while plaintiff declares he does not possess a “formal legal education,” and did not understand what the word “arbitration” meant, there is no evidence that he was unable to read and understand the arbitration agreement in Spanish, and there is no

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<sup>3</sup> In *Oto, LLC v. Kho*, *supra*, 8 Cal.5th 111, the court found “significant” procedural unconscionability based on oppression and surprise under the following circumstances: 1) the agreement was presented at plaintiff’s workplace, along with other employment related documents; 2) neither its contents nor significance was explained to plaintiff; 3) plaintiff was required to sign the arbitration agreement to keep his job, which he had held for three years; 4) the employer selected a low level employee to present the agreement, creating the impression that no request for an explanation was expected and any such request would be unavailing, and there is no evidence that the low level employee had the knowledge or authority to explain its terms; 5) plaintiff was not given a copy of the arbitration agreement he had signed, and was not given a copy of the agreement in his native language; and 6) the agreement was a “paragon of prolixity” (tediously wordy), and “similarly opaque,” with statutory references, legal jargon, and lengthy sentences. (*Id.* at pp. 127-129.) While some of the circumstances from this list are present here, many are not.

indication he could not ask any questions. Additionally, the arbitration agreement is not particularly complex, and it is not permeated with long sentences, legal jargon, or tedious wording. (See *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1242, 1252–1253 [significant procedural unconscionability existed where arbitration clause was buried in 24-page, single-spaced document and “[a]lthough petitioners were required to place their initials in boxes adjacent to six other paragraphs, no box [for initials] appeared next to the arbitration provision”].) And the arbitration agreement was self-contained – plaintiff was not forced to go to another source to find the full import of what he was signing. (*Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406 [procedural unconscionability present when “[t]he customer is forced to go to another source to find out the full import of what he or she is about to sign—and must go to that effort *prior* to signing”].) Finally, it seems clear that the specter of arbitration was not hidden in the agreement. The fact of arbitration was set out at the top of the Spanish version of the agreement, in the second sentence of the agreement, and was emphasized later, highlighted in bold, just above the signature line, to the effect that “I understand that I must arbitrate whatever individual claims I have against the Company and that by signing this Agreement . . . .” While an employer is not required to highlight the arbitration clause in a contract (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 914), the fact the arbitration clause was highlighted seems to inure to employer’s benefit, and at a minimum can be seen (at least in part) to reduce the patina of procedural unconscionability.

In the court’s view, considering the totality of circumstances detailed above, and in comparison to cases in which significant procedural unconscionability was found, the court finds the present situation involves an “ordinary contract of adhesion,” presented to plaintiff on a take-it-or-leave-it basis and as a condition of employment, without an opportunity to negotiate the terms and conditions. (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 776; see *Ramirez, supra*, 16 Cal.5th at p. 494 [courts must be particularly attuned to this danger in the employment setting, where economic pressure is exerted by employers on all, but the most sought-after employees may be particularly acute].) Given these circumstances, the court finds only a *moderate* degree of procedural unconscionability.<sup>4</sup>

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<sup>4</sup> This case is also distinguishable from *Hasty, supra*, 98 Cal.App.5th 1041, in which the court found a “high degree or procedural unconscionability.” (*Id.* at p. 1058.) The appellate court based this conclusion on the presence of the following: 1) the contract was one of adhesion, imposed as a condition of employment, given on a standard form, on a take-it-or-leave-it basis, by an employer with superior bargaining power; 2) the arbitration agreement was written in extremely small font, with visually impenetrable paragraphs filled with statutory references and legal jargon, with dense paragraphs, drafted with an aim to thwart, rather than promote, understanding; 3) the documents were presented electronically, and there was evidence to show that plaintiff “had the ability to view the documents” in that way, and did not appear to provide any other alternative, notably as it was uncontested that plaintiff did not have computer; and 4) the difficulty of negotiating the electronic version of the document. (*Id.* at pp. 1056-1058.) As with *Oto*, discussed in footnote 3, *ante*, while some of these factors are present in this matter, most are not, thereby supporting a conclusion that there was a moderate, rather than a significant, level of procedural unconscionability.



As noted above, both procedural and substantive unconscionability must be shown for the defense to be established, although not in equal amounts. (*Baltazar, supra*, 62 Cal.4th at p. 1243-1243.) Plaintiff contends there is substantive unconscionability, based exclusively on the existence of a confidentiality clause in the arbitration agreement, which provides as follows: “Except as may be permitted by law, as determined by the Arbitrator, 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.” Plaintiff relies on *Murray v. Superior Court* (2023) 87 Cal.App.5th 1223.<sup>5</sup> Plaintiff argument is that this provision is substantively unconscionable because the benefit of the provision is very one-sided—it gives advantage to defendant as a “repeat player.”

California published case law has not been consistent on how courts should treat the impact of confidential provisions in arbitration agreements. In *Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, overruled on other grounds in *Ramirez v. Superior Court, supra*, 16 Cal.5th at page 505, the court concluded that the confidential provision of the dispute resolution rules and procedures (DRRP), part of the arbitration agreement, provided that “the arbitration (including the hearing and the record of the proceeding) be confidential and not open to the public unless the parties agree otherwise, as appropriate in any subsequent proceeding between the parties, or as otherwise may be appropriate in response to governmental or legal process.” *Sanchez* found the provision was not unconscionable, citing and relying on *Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 732, which concluded that “the fairness or desirability of a secrecy provision with respect to the parties themselves . . . we see nothing unreasonable or prejudicial about it, and it is not substantively unconscionable.”

More recently published California appellate authority has taken a different track. Appellate courts have found a confidentiality provision in an arbitration agreement, to the effect barring “disclosing the existence, content, or results from arbitration” – similar to the language here – to be substantively unconscionable. (*Haydon v. Elegance at Dublin* (2023) 97 Cal.App.5th 1280, 1290.) As noted by the *Haydon* court: “Another division of this court has explained that such a clause would restrict the plaintiff from gathering information informally, increasing his or her costs unnecessarily and “defeat[ing] the purpose of using arbitration as a simpler, more time-effective forum for resolving disputes.” (*Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1066, 239 Cal.Rptr.3d 679.) And requiring an elder abuse action like this one to be “kept secret” unreasonably favors defendants to the detriment of those ‘seeking to vindicate unwaivable statutory rights and may discourage potential plaintiffs’ from bringing such cases. (*Id.* at pp. 1066–1067 [addressing employment discrimination action]; cf. *Murrey v. Superior Court, supra*,

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<sup>5</sup> Plaintiff, in addition to *Murrey*, cites to *Ting v AT&T* (9th Cir. 2003) 319 F.3d 1126, and *Davis v. O’Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066 overruled on other grounds in *Kilgore v. KeyBank, Nat. Assn’*. (9th Cir. 2012) 673 F.3d 947, 960. Of course, the court is not bound by federal authority here. More importantly, however, given the wealth of more recent published California Court of Appeal case law exploring the relevant legal points, discussed in the body of this order, the court can forego discussion of these two cases.

87 Cal.App.5th at page 1255 [addressing sexual harassment action].) Further, *Haydon* observed that “these concerns are not addressed in the cases cited by defendants, which considered narrower provisions requiring only the proceedings themselves to remain confidential,” citing to *Woodside Homes of Cal., Inc.*, and *Sanchez*, *supra*.

Even more recently, in *Hasty v. American Automobile Assn. etc.* (2023) 98 Cal.App.5th 1041, the court, following our high court, concluded that a confidentiality provision in an arbitration agreement is not *per se* unconscionable when it is based on a legitimate commercial need (such as to protect trade secrets or propriety information), citing to *Baltazar v. Forever 21*, *supra*, 62 Cal.4th at page 1250. However, where the defendant has identified no commercial need for requiring “employment-related proceedings to remain confidential,” -- which is the case here -- the confidentiality provisions benefit only the defendant “with respect to harassment, retaliation, and discrimination, such as the claims here, and is thus substantively unconscionable. The fact that the provision applies to only ‘the extent permitted by law’ does not save it because the employee would have no way of knowing what could be covered or not covered by this provision. . . .” (*Id.* at p. 1062.) Many of the concerns in *Hasty* apply here.

Under the authority of *Hasty*, *Haydon*, *Ramos*, and *Murrey*, the court finds that the confidentiality provision here is substantively unconscionable, for the reasons stated in those opinions (and notably *Ramos*, *Murrey*, and *Hasty*), the latter two forms of employment discrimination, as is the case here. Indeed, defendant has failed to identify any legitimate commercial interest in confidentiality. Given the moderate level of procedural unconscionability, and the substantive unconscionability of the confidentiality agreement clause, plaintiff has met his burden to show the arbitration agreement is unconscionable and thus unenforceable.

iii) Can Unconscionable Terms Be Severed, with the Remaining Portions of the Arbitration Term Enforceable? *Yes*.

An unconscionability determination does not end the inquiry. As observed above, when unconscionability is shown, the court must determine whether there is a severance clause, and if there is, the court should take this an expression of the parties’ intent that an agreement that is curable by removing defective terms should otherwise be enforced. (*Ramirez*, *supra*, 16 Cal.5th at p. 517.) The contract at issue does contain a severance clause, in Item 9: “. . . Except as provided in Paragraph 7 above, in the event any portion of this Agreement is deemed unenforceable, the remainder of the agreement shall be enforceable . . .” Paragraph 7 involves class action waiver, which is inapplicable under the circumstances.

Plaintiff has identified only one substantively unconscionable provision in the agreement, making this case distinguishable from the cases cited above. In *Hasty*, in addition to the confidentiality provision, it found two other substantively unconscionable terms, and further, these provisions, collectively “permeated” the arbitration agreement with unconscionability, meaning the court would be required to rewrite the entirety of the agreement, and thus, severance was inappropriate. (*Hasty*, *supra*, at p. 1064-1065.) In *Haydon*, there were three substantively

unconscionable terms, and the appellate court concluded the arbitration provision was “permeated by unconscionability,” and thus could not be severed to be saved. (*Haydon, supra*, at p. 1292.) In *Murrey*, there was both a high degree of procedural unconscionability, and “multiple substantive unconscionable provisions, some of which would require [the court] to substantially rewrite the agreement to remove the offending provisions. When we consider the procedural and substantively unconscionable provisions together, they indicate a concerted effort to impose on an employee a forum with distinct disadvantages with distinct advantages for the employer,” and thus the arbitration agreement is “permeated by an unlawful purpose.” (*Murrey, supra*, at p. 1256.) And *Ramos* contained four unconscionable terms. “Because we are unable to cure the unconscionability simply by striking these clauses, and would have to reform the parties agreement in order to enforce it, we must find the agreement void as a matter of law,” and thus enforceable. (*Ramos, supra*, 28 Cal.App.5th at p. 1069.)

In the end, this case seems more akin to *Farrar v. Direct Commerce* (2017) 9 Cal.App.4th 1257, in which the appellate court determined that a confidential provision was substantively unconscionable. However, because it was the only substantive unconscionable provision at issue; and because it did not “permeate” the arbitration provision with unconscionability, the trial court abused its discretion by failing to sever the offending confidentiality provision. (*Id.* at p. 1275.) This conclusion was entirely commensurate with the severance clause itself, for severing out the offending clause was not contrary to the result intended by the parties. (*Ibid.*) *Farrar* is consistent with the recent observations made by our high court in *Ramirez*, which directed courts to ask whether the contract’s unconscionability can be cured purely through severance or restriction of its terms, and if so, the offending provision can likely be severed or limited, and the rest of the arbitration agreement left intact, meaning severance is the preferred course for provisions that are “collateral to the agreement’s main purpose.” (*Ramirez, supra*, 16 Cal.5th at p. 517.) Here, the confidentiality agreement appears collateral to the agreement’s “main purpose,” and thus, can be effectively severed, as was true in *Farrar*. Nor does it permeate the arbitration agreement with illegality or undermine its purpose. Indeed, such a conclusion is consistent with federal case authority, which indicates that “enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general.” (*Kilgore v. Keybank Nat’l Assn.* (9th Cir. 2013) 718 F.3d 1052, 1059, n. 9; see also *Frank v. Tesla, Inc.* (C.D. Cal., June 27, 2022, No. 222CV01590MEMFAGRX) 2022 WL 18284398, at \*9 [court finds arbitration agreement contains one unconscionable provision premised upon a problemed confidentiality-related claims; this “unconscionable taint” may be easily removed by severing the provision and does not require any additional terms to remedy the illegality].)

As the confidentiality provision’s illegality is collateral to the arbitration agreement’s main purpose, it is possible to cure the illegality through severance, thereby allowing the court to enforce the balance of the arbitration agreement, which would be in the interests of justice and commensurate with the parties’ wishes. (*Ramirez, supra*, 16 Cal.5th at p. 517.) Considering the

federal and state policy in favor of arbitration, the court severs the confidentiality provision from the arbitration agreement and grants the motion to compel arbitration for the remaining portions of the arbitration agreement. It stays the matter pursuant to Code of Civil Procedures section 1284.1, pending completion of arbitration.

**In Summary:**

- The court preliminarily sustains defendant's first two evidentiary objections to plaintiff's declaration (for failure to sign under penalty of perjury and for failure to comply with California Rules of Court, rule 3.1110(g)). The court, however, will afford plaintiff an opportunity to correct these deficiencies, if plaintiff's counsel submits by the hearing 1) a new declaration from plaintiff indicating he signed the declaration under penalty of perjury; and 2) a new declaration from plaintiff's counsel indicating that the contents of the plaintiff's declaration were adequately translated by counsel, and plaintiff's declaration properly reflects plaintiff's versions of events, including a description of counsel's language proficiencies. If these two documents are submitted by the hearing, the court will overrule all three of defendant's evidentiary objections. If plaintiff does not submit these two documents by hearing, the court will grant the motion to compel arbitration, for plaintiff, as is his burden, will have failed to demonstrate a factual basis to support unconscionability (thereby mooted any discussion of unconscionability and, thus, severance). The court grants defendant's request for a statement of decision, as reflected in this written order.
- The court finds that defendant has met its burden to show the existence of a valid, written arbitration agreement between the parties that covers the disputes at issue in this action, as required by Code of Civil Procedure section 1281.2. It also finds that defendant has demonstrated compliance with the five-part test in *Armendariz*, establishing minimal fairness regarding the mandatory employment arbitration agreement at issue. Plaintiff does not contend otherwise.
- Assuming plaintiff submits the two new documents directed above by the hearing, the court finds that plaintiff has demonstrated a moderate level of procedural unconscionability. Further, plaintiff has demonstrated a low level of substantive unconscionability based on the confidentiality clause in the arbitration agreement, per *Hasty v. American Automobile Assn. etc.* (2023) 98 Cal.App.5th 1041, *Haydon v. Elegance at Dublin* (2023) 97 Cal.App.5th 1280, *Murrey v. Superior Court* (2023) 87 Cal.App.5th 1223, and *Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042. No other part of the arbitration agreement is claimed to be substantively unconscionable. The court therefore finds the arbitration agreement unenforceable.
- The court nevertheless concludes that the substantively unconscionable term (involving the confidentiality provision) can be severed, under the authority of *Farrar v. Direct Commerce* (2017) 9 Cal.App.4th 1257, removing the taint of illegality,

pursuant to the recent standards enunciated by our high court in *Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478. This means the remaining portions of the arbitration agreement can be enforced.

- Accordingly, following severance of the unconscionable confidentiality term, the court grants the motion to compel arbitration as to the remaining portions of the arbitration agreement (i.e., without the confidentiality provision), and stays the present action pursuant to Code of Civil Procedure section 1281.4.
- Defendant is directed to prepare a proposed order for signature.
- The parties are directed to appear at the hearing in person or by Zoom. A CMC is scheduled for December 3, 2024, and likely should be vacated. The parties should come prepared to discuss these matters. Plaintiff is directed to prepare and submit two new declarations before or at the hearing.