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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STEPHEN MICHAEL MAYERS, Plaintiff and Respondent, v. VOLT MANAGEMENT CORP. et al., Defendants and Appellants.	G045036 (Super. Ct. No. 30-2010-00430432) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Simpson, Cameron, Medina & Autrey, Erin Nemirovsky Medina; Littler Mendelson and Henry D. Lederman for Defendants and Appellants.

Sessions & Kimball, Stephen C. Kimball and James R. Vogel for Plaintiff and Respondent.

* * *

INTRODUCTION

Plaintiff Stephen Michael Mayers filed a lawsuit against his former employer, Volt Management Corp., and its parent corporation, Volt Information Sciences, Inc. (collectively referred to as defendant), alleging several claims under the California Fair Employment and Housing Act (Gov. Code, § 12940 et seq.) (FEHA). Defendant filed a motion to compel arbitration based on plaintiff's agreement to submit employment-related claims to final and binding arbitration, as evidenced by his signed employment application, employment agreement, and acknowledgment of receipt of the employee handbook. The trial court denied the motion.

Defendant argues the trial court erred because the arbitration provisions were enforceable and did not contain any unconscionable elements. Defendant argues that, in any event, the trial court should have severed any offending provisions and ordered arbitration.

We affirm. The arbitration provisions contained in the employment application, employment agreement, and employee handbook each required that plaintiff submit employment-related claims to arbitration pursuant to the "applicable rules of the American Arbitration Association in the state" where plaintiff was employed or was last employed by defendant. Plaintiff was not provided with a copy of the controlling American Arbitration Association (AAA) rules or advised as to how he could find or review them. The provisions also failed to identify which set of rules promulgated by the AAA would apply. They further stated that the "arbitrator shall be entitled to award reasonable attorney's fees and costs to the prevailing party." For the reasons discussed *post*, such a prevailing party attorney fees term exposed plaintiff to a greater risk of being liable to defendant for attorney fees than he would have been had he pursued his FEHA claims in court.

Under well-established authority, the above discussed arbitration provisions were unconscionable and therefore unenforceable. Because the unconscionable terms cannot be severed from the rest of the arbitration provisions, plaintiff cannot be compelled to arbitrate his claims against defendant.

BACKGROUND

I.

DEFENDANT MOVES TO COMPEL ARBITRATION OF PLAINTIFF'S FEHA CLAIMS.

In December 2010, plaintiff filed a complaint against defendant, alleging claims for disability discrimination (Gov. Code, § 12940, subd. (a)), failure to accommodate (*id.*, § 12940, subd. (m)), failure to engage in the interactive process (*id.*, § 12940, subd. (n)), retaliation for taking leave under the Moore-Brown-Roberti Family Rights Act (*id.*, § 12945.2), and age discrimination (*id.*, § 12940, subd. (a)).

Defendant filed a motion to compel arbitration of plaintiff's claims and to stay judicial proceedings, "on the ground[] that there is a valid, written arbitration agreement between Plaintiff . . . and [defendant], covering any and all employment related disputes arising out of the conduct of [defendant]." Defendant's motion was supported by the declaration of defendant's vice-president of human resources, Louise Ross. Ross stated: "Based on my understanding, the arbitration provision is a mandatory condition of employment for all [defendant's] employees and [defendant] only accepts candidates for employment who unequivocally accept the terms and conditions contained in the Employment Agreement. It is further my understanding that by executing the Employment Application and Employment Agreement with [defendant] and continuing employment with [defendant], Plaintiff knowingly and voluntarily agreed to the terms and conditions contained in this document, including the mandatory arbitration provision."

In her declaration, Ross authenticated plaintiff's employment application, the employment agreement, and the acknowledgment of receipt of the handbook plaintiff signed along with a copy of defendant's alternative dispute resolution policy. A copy of each document was attached as an exhibit to Ross's declaration.

A.

Employment Application

Plaintiff's employment application stated, in part, that in the event defendant hired plaintiff, certain "terms and conditions" would apply to his employment including the following arbitration provision: "Agreement to arbitrate disputes. Any dispute, controversy or claim arising out of, involving, affecting or related in any way to this agreement or a breach of this agreement, or arising out of, involving, affecting or related in any way to your employment or the conditions of your employment or the termination of your employment, including but not limited to disputes, controversies or claims arising out of or related to the actions of [defendant]'s other employees, under federal, state and/or local laws, shall be resolved by final and binding arbitration, pursuant to the Federal Arbitration Act, in accordance with the applicable rules of the American Arbitration Association in the state where you are or were last employed by [defendant]. The arbitrator shall be entitled to award reasonable attorneys fees and costs to the prevailing party. The award shall be in writing, signed by the arbitrator, and shall provide the reasons for the award. Judgment upon the arbitrator's award may be filed in and enforced by any court having jurisdiction. This agreement to arbitrate disputes does not prevent you from filing a charge or claim with any governmental administrative agency as permitted by applicable law." (Underscoring & some capitalization omitted.)

B.

Employment Agreement

Plaintiff's employment agreement contained the following arbitration provision set in boldface type: "AGREEMENT TO ARBITRATE DISPUTES. Any

dispute, controversy or claim arising out of, involving, affecting or related to this Agreement, or breach of this Agreement, or arising out of, involving, affecting or related in any way to Employee's employment or the conditions of employment or the termination of Employee's employment, including but not limited to disputes, controversies or claims arising out of or related to the actions of [defendant]'s other employees, under Federal, State and/or local laws, and/or other such similar laws or regulations, shall be resolved by final and binding arbitration, pursuant to the Federal Arbitration Act, in accordance with the applicable rules of the American Arbitration Association in the state where Employee is or was last employed by [defendant]. The arbitrator shall be entitled to award reasonable attorney's fees and costs to the prevailing party. The award shall be in writing, signed by the arbitrator, and shall provide the reasons for the award. Judgment upon the arbitrator's award may be filed in and enforced by the court having jurisdiction. This Agreement to Arbitrate Disputes does not prevent Employee from filing a charge or claim with any governmental administrative agency as permitted by applicable law." (Boldface & underscoring omitted.)

Immediately below the above quoted arbitration provision and immediately above the signature blocks bearing, inter alia, plaintiff's signature, the employment agreement stated in boldface type: "I/WE CERTIFY THAT I/WE HAVE READ THE ABOVE AND THE ADDITIONAL TERMS ON THE REVERSE SIDE AND I/WE AGREE TO ALL TERMS AND CONDITIONS OF THIS AGREEMENT." (Boldface omitted.)

In her declaration, Ross stated that plaintiff was provided the employment agreement with a cover letter dated November 14, 2005. Plaintiff had one week to consider the terms and conditions of the employment agreement and ask any questions about them before he signed the employment agreement. Ross also stated the terms and conditions of the employment agreement, including the mandatory binding arbitration

provision, "remained in effect at all material times during [plaintiff's] employment with [defendant]."

C.

Acknowledgment of Receipt of Employee Handbook and Alternative Dispute Resolution Policy

Plaintiff signed an acknowledgment of his receipt of defendant's employee handbook. The acknowledgment form stated in part: "I have read, understand and agree to be bound by [defendant]'s Discrimination Complaint Procedures, including Arbitration, and expressly waive my right to sue [defendant], its agents and employees, in court and I agree to submit to final and binding arbitration any dispute, claim or controversy arising between me and [defendant] that I would have been otherwise entitled to file in court."

The employee handbook contained the following alternative dispute resolution provision: "[Defendant] believes that alternative dispute resolution is the most efficient and mutually satisfactory means of resolving disputes between [defendant] and its employees. Any dispute, controversy or claim which was not settled through the Concerns and Issues Procedure and arises out of, involves, affects or relates in any way to any employee's employment or a claimed breach of that employment relationship or the conditions of your employment or the termination of employment, including but not limited to disputes, controversies or claims arising out of or related to the actions of [defendant]'s other employees, under Federal, State and/or local laws shall be resolved by final and binding arbitration. The applicable rules of the American Arbitration Association in the state where employee is or was last employed by [defendant] shall prevail. [¶] The arbitrator shall be entitled to award reasonable attorneys fees and costs to the prevailing party. The award shall be in writing, signed by the arbitrator, and shall provide the reasons for the award. The Arbitrator may provide for any remedies that would be available in a comparable judicial proceeding, unless such remedies are

precluded under state law. This does not prevent you from filing a charge or claim with any governmental administrative agency as permitted by applicable law. [¶] Arbitration is an essential element of your employment relationship with [defendant] and is a condition of your employment. [¶] For further details, please contact your Human Resources Department."

There is no evidence plaintiff was provided a copy of or information about access to the applicable AAA rules referenced in the arbitration provisions. Ross stated in her declaration that if plaintiff had asked for a copy of the rules, defendant would have provided him with a copy.

II.

PLAINTIFF OPPOSES THE MOTION TO COMPEL ARBITRATION ON THE GROUND THE ARBITRATION PROVISIONS WERE UNCONSCIONABLE; THE TRIAL COURT DENIES THE MOTION TO COMPEL ARBITRATION; DEFENDANT APPEALS.

Plaintiff filed an opposition to the motion to compel arbitration, asserting that "[g]rounds exist for revocation of the agreement to arbitrate the alleged controversy in that the Defendant's Arbitration agreement is illegal under *Armendariz v. Foundation Health Psychcare Services, Inc.*, (2000) 24 Cal.4th 83, 90-91, and "the Defendant's Arbitration agreement is unconscionable." Plaintiff argued the arbitration provisions were procedurally unconscionable because (1) they were drafted by defendant and presented to plaintiff on a take-it-or-leave-it basis, and (2) defendant never gave plaintiff the AAA rules. Plaintiff also argued the arbitration provisions were substantively unconscionable because they contained an "illegal attorney fee provision" and were otherwise overly harsh, oppressive, and one-sided.

In a minute order, the trial court denied the motion to compel arbitration. Defendant appealed. (Code Civ. Proc., § 1294, subd. (a).)

DISCUSSION

I.

STANDARD OF REVIEW

"We review de novo a trial court's determination of the validity of an agreement to arbitrate when the evidence presented to the trial court was undisputed. [Citations.] We review under the substantial evidence standard the trial court's resolution of disputed facts. [Citation.] 'Whether an arbitration provision is unconscionable is ultimately a question of law. [Citations.]' [Citation.]" (*Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1567 (*Parada*).)

II.

THE FEDERAL ARBITRATION ACT AND *AT&T MOBILITY LLC V. CONCEPCION* (2011) 563 U.S. __ [131 S.CT. 1740].

In *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __, __ [131 S.Ct. 1740, 1745-1746] (*AT&T Mobility*), the United States Supreme Court recently reiterated the history and purpose of the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA) and the high court's interpretation of its provisions, stating: "The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. [Citation.] Section 2, the 'primary substantive provision of the Act,' [citation], provides, in relevant part, as follows: [¶] 'A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be 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. [¶] We have described this provision as reflecting both a 'liberal federal policy favoring arbitration,' [citation], and the 'fundamental principle that arbitration is a matter of contract,' [citation]. In line with these principles, courts must

place arbitration agreements on an equal footing with other contracts, [citation], and enforce them according to their terms, [citation].[1] [¶] *The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.*' This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or *unconscionability*,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. [Citations.]" (Italics added.)

The United States Supreme Court stated in *AT&T Mobility, supra*, 563 U.S. at page __ [131 S.Ct. at page 1748], "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of FAA's objectives." The Supreme Court further stated, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. [Citation.] But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." (*Id.* at p. __ [131 S.Ct. at p. 1747].)

The Supreme Court in *AT&T Mobility* held that section 2 of the FAA preempts a rule under California law "classifying most collective-arbitration waivers in consumer contracts as unconscionable" (*AT&T Mobility, supra*, 563 U.S. at p. __ [131 S.Ct. at p. 1746]), because such a rule "'stands as an obstacle to the accomplishment and

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[1] The Supreme Court also stated: "The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*AT&T Mobility*, *supra*, 563 U.S. at p. __ [131 S.Ct. at p. 1748].)

execution of the full purposes and objectives of Congress'" (*id.* at p. __ [131 S.Ct. at p. 1753]). The Supreme Court explained, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" (*Id.* at p. __ [131 S.Ct. at p. 1747].)

In the instant case, plaintiff opposed the motion to compel arbitration by arguing that the specific arbitration provisions before the court contained elements of procedural and substantive unconscionability, which render those elements unconscionable. Plaintiff did not argue the arbitration provisions were unenforceable under California law because they required the arbitration of a particular type of claim. (See *AT&T Mobility*, *supra*, 563 U.S. at p. __ [131 S.Ct. at p. 1747].) Nor has plaintiff based his unconscionability argument "'on the uniqueness of an agreement to arbitrate.'" (*Ibid.*) We therefore turn to review general principles of unconscionability under California law before applying those principles to the instant arbitration provisions.

III.

GENERAL PRINCIPLES OF CALIFORNIA LAW ON UNCONSCIONABILITY

Civil Code section 1670.5, subdivision (a) provides: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Panels of this court in *Parada*, *supra*, 176 Cal.App.4th 1554, and *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305 (*Morris*) have provided thorough explanations of California unconscionability law. We do not need to fully restate those explanations here and instead provide the following summary of the law.

In *Morris*, *supra*, 128 Cal.App.4th at page 1317, the appellate court stated: "In California, two separate approaches have developed for determining whether a contract or provision thereof is unconscionable. One, based upon the common law doctrine, was outlined by the California Supreme Court in *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807 . . . (*Graham*). Under *Graham*, the court first determines whether an allegedly unconscionable contract is one of adhesion. Upon making this finding, the court then must determine whether (a) the contract term was outside of 'the reasonable expectations of the [weaker] part[y],' or (b) was 'unduly oppressive or "unconscionable."' [Citation.] [¶] A separate test, based upon cases applying the Uniform Commercial Code unconscionability provision[,] views unconscionability as having 'procedural' and 'substantive' elements. (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473 . . . .) 'The procedural element requires oppression or surprise. [Citation.] Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. [Citation.] The substantive element concerns whether a contractual provision reallocates risks in an objectively unreasonable or unexpected manner.' (*Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539 . . . .) Under this approach, both the procedural and substantive elements must be met before a contract or term will be deemed unconscionable. Both, however, need not be present to the same degree. A sliding scale is applied so that '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, Inc.* (2000)] 24 Cal.4th [83,] 114.)" (Fn. omitted.)

The *Morris* court further stated: "Our Supreme Court in *Perdue* [*v. Crocker National Bank* (1985)] 38 Cal.3d 913, performed its unconscionability analysis exclusively under the *Graham* approach, but noted the two analytical approaches are not incompatible, declaring: 'Both pathways should lead to the same result.' (*Id.* at p. 925,

fn. 9.) Many years later in *Armendariz,* the court approved both approaches without expressing a preference for either one. (*Armendariz, supra,* 24 Cal.4th at pp. 113-114.) In the recent case of *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 . . . , our high court employed exclusively the procedural/substantive approach derived from *A & M Produce*." (*Morris, supra,* 128 Cal.App.4th at p. 1318.)

The appellate court in *Morris, supra,* 128 Cal.App.4th at pages 1318-1319, concluded: "[T]he procedural/substantive approach provides a useful framework when properly employed, and conforms more closely to cases decided under . . . section 2-302 of the Uniform Commercial Code, upon which California's unconscionability statute is based. (See *Perdue, supra,* 38 Cal.3d at p. 925, fns. 9 & 10.) Accordingly, we begin our analysis by considering the issue of procedural unconscionability with the following caveat in mind: Because procedural unconscionability must be measured in a sliding scale with substantive unconscionability, our task is not only to determine *whether* procedural unconscionability exists, but more importantly, *to what degree* it may exist." (See also *Parada, supra,* 176 Cal.App.4th at p. 1569 [same].)

Following *Morris, supra,* 128 Cal.App.4th 1305, and *Parada, supra,* 176 Cal.App.4th 1554, we consider the extent to which the arbitration provisions here contain elements of procedural and substantive unconscionability in determining their enforceability.

IV.

THE ARBITRATION PROVISIONS HAVE A HIGH DEGREE OF PROCEDURAL UNCONSCIONABILITY.

"'"Procedural unconscionability" concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. [Citation.] It focuses on factors of oppression and surprise. [Citation.] 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.'

[Citation.]" (*Morris, supra*, 128 Cal.App.4th at p. 1319.) "Procedural unconscionability occurs when the stronger party drafts the contract and presents it to the weaker party on a 'take it or leave it basis.'" (*Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393 (*Trivedi*).)

Here, it is undisputed the arbitration provisions constituted contracts of adhesion. They were presented to plaintiff in "printed, standardized forms" that were drafted by defendant. (*Parada, supra*, 176 Cal.App.4th at p. 1570.) It is also undisputed that the arbitration provisions were offered to plaintiff on a take-it-or-leave-it basis. Employment by defendant was expressly conditioned on plaintiff's assent to the arbitration provisions. Ross's declaration further established that "the arbitration provision is a mandatory condition of employment for all [defendant's] employees and [defendant] only accepts candidates for employment who unequivocally accept the terms and conditions contained in the Employment Agreement." There is no question that plaintiff was in the weaker bargaining position and could not negotiate the terms of the arbitration provisions.

Our conclusion, however, that the arbitration provisions "are adhesion contracts 'heralds the beginning, not the end, of our inquiry into its enforceability.' [Citation.] A procedural unconscionability analysis also includes consideration of the factors of surprise and oppression." (*Parada, supra*, 176 Cal.App.4th at p. 1571.) Here, the arbitration provisions were not hidden. The arbitration provision in the employment agreement appeared on the first page, was preceded by the heading "AGREEMENT TO ARBITRATE DISPUTES" (boldface & underscoring omitted), and was in boldface type. The acknowledgment of receipt of the employee handbook specifically referenced the arbitration policy and the employee handbook contained defendant's policy on alternative dispute resolution. The employment application that plaintiff signed explained employment with defendant was conditioned on an agreement to arbitrate disputes. "Arbitration itself is a fairly common means of dispute resolution and would not be

beyond the reasonable expectation of the weaker party." (*Parada*, *supra*, 176 Cal.App.4th at p. 1571.)

The arbitration provisions, however, required that final and binding arbitration occur in accordance with "the applicable rules of the American Arbitration Association" in the state where plaintiff was employed or last employed by defendant. Defendant did not provide plaintiff a copy of the "applicable rules" or advise plaintiff how he could access that information.

In *Trivedi, supra*, 189 Cal.App.4th at page 393, the appellate court stated: "Numerous cases have held that the failure to provide a copy of the arbitration rules to which the employee would be bound supported a finding of procedural unconscionability. (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 721 . . . [NCR's 'employee-dispute resolution policy, known as Addressing Concerns Together (ACT),' incorporated 'arbitration rules that were not attached and require[d] the other party to go to another source in order to learn the full ramifications of the arbitration agreement']; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406-1407 . . . ['inability to receive full relief is artfully hidden by merely referencing the Better Business Bureau arbitration rules, and not attaching those rules to the contract for the customer to review,' which forced the customer to go to another source to learn that the arbitration agreement curtailed his ability to receive full relief]; *Gutierrez v. Autowest, Inc.* [(2003)] 114 Cal.App.4th [77,] 84, 89 [Gutierrez 'never given or shown a copy of the arbitration rules of the American Arbitration Association (AAA), the designated arbitration provider' nor required to initial arbitration clause]; *Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1665 . . . [at signing, 'borrowers were not given a copy of the procedural rules of the National Arbitration Forum (NAF)—the rules were sent to the borrowers only once ITT had initiated a claim against them'].)" The appellate court in *Trivedi, supra*, 189 Cal.App.4th at page 393, concluded that an employment arbitration provision was procedurally unconscionable because "'the agreement was prepared by [the employer], it

was a mandatory part of the agreement and [the employee] was not given a copy of the AAA Rules.'" (*Ibid.*)

In *Trivedi, supra,* 189 Cal.App.4th at pages 390-391, the arbitration provision at issue required that disputes be arbitrated "'pursuant to the AAA's National Rules for the Resolution of Employment Disputes.'" Here, unlike the arbitration provision in *Trivedi*, the arbitration provisions do not identify the particular set of AAA rules that would apply to the final and binding arbitration of plaintiff's claims. Instead, the arbitration provisions vaguely refer to "the applicable rules of the American Arbitration Association" in the state where plaintiff was last employed by defendant. (See *Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 485-486 & fn. 3 [noting the failure to provide the applicable AAA rules added to the procedural unconscionability of the arbitration agreement and "[i]f . . . the AAA does not publish rules under the title to which the arbitration agreement refers, the discrepancy would add to the oppressive nature of the agreement"].)

By failing to even identify the set of arbitration rules that would apply to the parties' final and binding arbitration of employment disputes, the arbitration provisions subjected plaintiff to unreasonable surprise and oppression. This aspect of the arbitration provisions is directly at odds with the purpose of the FAA. As explained by the United States Supreme Court, the FAA principally seeks to ensure "'that private arbitration agreements are enforced according to their terms'" (*AT&T Mobility, supra,* 563 U.S. at p. __ [131 S.Ct. at p. 1748]), and yet, here, defendant has failed to disclose all the terms of such an agreement.

We conclude the arbitration provisions suffer from a high degree of procedural unconscionability because they constituted contracts of adhesion, were offered to plaintiff on a take-it-or-leave-it basis, and, most importantly, required plaintiff to submit claims to final and binding arbitration pursuant to an unspecified (and undetermined) set of rules promulgated by the AAA.

V.

THE ARBITRATION PROVISIONS HAVE A HIGH DEGREE OF SUBSTANTIVE UNCONSCIONABILITY.

As we discussed *ante*, an arbitration agreement must be found to be both procedurally and substantively unconscionable for it to be deemed unenforceable on unconscionability grounds. "[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." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).)

Plaintiff argues that the arbitration provisions are substantively unconscionable not only because they are generally harsh and one-sided in favoring defendant, but also because they empower the arbitrator to award prevailing party attorney fees as to FEHA claims, thereby placing plaintiff at a greater risk in pursuing such claims in arbitration than if he had pursued those claims in court. "A provision is substantively unconscionable if it 'involves contract terms that are so one-sided as to "shock the conscience," or that impose harsh or oppressive terms.'" (*Morris*, *supra*, 128 Cal.App.4th at p. 1322.)

In *Trivedi*, *supra*, 189 Cal.App.4th at page 395, the appellate court concluded that the arbitration clause before it was substantively unconscionable because it placed the plaintiff "'at greater risk than if he brought his FEHA claims in court.'" The *Trivedi* court reasoned as follows: "Government Code section 12965, subdivision (b) (section 12965(b)) allows for the discretionary recovery of attorney fees and costs, including expert fees, by a prevailing party to a claim brought under the FEHA. Recently, our Supreme Court had the opportunity to discuss the issue of attorney fees and cost recovery in FEHA litigation in *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970 . . . . As to the purpose of enacting section 12965(b), the court noted: 'In enacting the FEHA, the Legislature sought to safeguard the rights of all persons to seek, obtain, and

hold employment without discrimination on account of various characteristics, which now include race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, and sexual orientation. [Citations.] . . . In FEHA actions, attorney fee awards, which make it easier for plaintiffs of limited means to pursue meritorious claims [citation], "are intended to provide 'fair compensation to the attorneys involved in the litigation at hand and encourage[] litigation of claims that in the public interest merit litigation.'" [Citation.]' [Citation.]" (*Id.* at p. 394.)

The *Trivedi* court stated: "For these reasons, the high court went on to observe that 'the United States Supreme Court has held that, in a Title VII case, a prevailing plaintiff should ordinarily recover attorney fees unless special circumstances would render the award unjust, whereas a prevailing defendant may recover attorney fees only when the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith. [Citation.] California courts have adopted this rule for attorney fee awards under the FEHA. [Citations.]' [Citation.] [¶] The arbitration clause in the parties' employment contract, to the contrary, allows for the recovery of attorney fees and costs by the prevailing party in an arbitration. In contrast to case law under FEHA, the agreement does not limit [the defendant]'s right to recover to instances where [the plaintiff]'s claims are found to be 'frivolous, unreasonable, without foundation, or brought in bad faith.' Thus, enforcing the arbitration clause and compelling [the plaintiff] to arbitrate his FEHA claims lessens his incentive to pursue claims deemed important to the public interest, and weakens the legal protection provided to plaintiffs who bring nonfrivolous actions from being assessed fees and costs." (*Trivedi, supra,* 189 Cal.App.4th at pp. 394-395.)

Quoting *Armendariz, supra,* 24 Cal.4th at page 101, the *Trivedi* court further stated: "'[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA.'" (*Trivedi, supra,* 189 Cal.App.4th at

p. 395.) The court concluded: "For this reason, we agree with the trial court that the arbitration clause is substantively unconscionable, because it places [the plaintiff] 'at greater risk than if he brought his FEHA claims in court.'" (*Ibid.*)

Here, the arbitration provisions unambiguously state, without explanation or qualification, that the "arbitrator shall be entitled to award reasonable attorney[] fees and costs to the prevailing party." The only reasonable interpretation of this statement is that the arbitrator is empowered to award reasonable attorney fees and costs to the prevailing party as to any and all claims, including claims brought under the FEHA.

We conclude the prevailing party attorney fees term therefore injects a high degree of substantive unconscionability into the arbitration provisions defendant seeks to enforce.

At oral argument and in his appellate brief, plaintiff argued the employment agreement is also substantively unconscionable because it contains a "one-sided" injunctive relief provision that was "virtually identical" to the injunctive relief provision deemed to be substantively unconscionable in *Trivedi*, *supra*, 189 Cal.App.4th at page 396. Plaintiff did not make this argument in his opposition to the motion to compel arbitration, and the record does not show the trial court relied on the injunctive relief provision in the employment agreement in denying the motion to compel arbitration. The injunctive relief provision in the employment agreement is not included or referred to in the employment application or the acknowledgment of receipt of the employment handbook including the alternative dispute resolution policy.

In any event, the injunctive relief provision contained in the employment agreement here is not virtually identical to the injunctive relief provision at issue in *Trivedi*. In *Trivedi*, *supra*, 189 Cal.App.4th at page 396, the arbitration agreement contained an injunctive relief provision which stated in part: "'[P]rovisional injunctive relief may, but need not, be *sought in a court of law* while arbitration proceedings are pending, and any provisional injunctive relief granted by such court shall remain

effective until the matter is finally determined by the Arbitrator.'" (Italics added.) The appellate court concluded this provision was unconscionable because "allowing the parties access to the courts only for injunctive relief favors [the employer], because it is 'more likely that [the defendant], as the employer, would seek injunctive relief.'" (*Id.* at p. 397.)

The injunctive relief provision in the employment agreement in the instant case does not expressly allow any party the right to seek injunctive relief in court. The injunctive relief provision states in full: "The parties hereto recognize that irreparable damage will result to [defendant], its business and properties if Employee fails or refuses to perform Employee's obligations under this Agreement, and that the remedy at law for any such failure o[r] refusal will be inadequate. Accordingly, in addition to any other remedies and damages available, including the provision contained in Paragraph 7 for arbitration (none of which remedies or damages is hereby waived), [defendant] shall be entitled to injunctive relief and Employee may be specifically compelled to perform Employee's obligations under this Agreement. The institution of an arbitration proceeding shall not bar injunctive relief pending the final determination of the arbitration proceedings hereunder."

We do not need to decide whether the injunctive relief provision impliedly authorizes a party to seek injunctive relief in court, or the degree to which it might be unconscionable, in light of the high degree of both procedural and substantive unconscionability otherwise present in the arbitration provisions, for the reasons discussed *ante*.

VI.

THE TRIAL COURT DID NOT ERR BY DENYING THE MOTION TO COMPEL ARBITRATION.

For the reasons we have explained, the arbitration provisions contain a high degree of procedural unconscionability and a high degree of substantive

unconscionability. Defendant argues we should sever any parts of the arbitration provisions that we conclude are unenforceable, and compel arbitration.

Civil Code section 1670.5, subdivision (a) authorizes a trial court to refuse to enforce an entire agreement it finds "'permeated'" by unconscionability because, inter alia, it "contains more than one unlawful provision." (*Armendariz, supra*, 24 Cal.4th at p. 124.) The California Supreme Court in *Armendariz, supra*, 24 Cal.4th at page 124, explained that "multiple defects indicate a systematic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party]'s advantage." The Supreme Court further stated: "The overarching inquiry is whether '"the interests of justice . . . would be furthered"' by severance. [Citation.]" (*Ibid.*)

We conclude the trial court did not abuse its discretion by declining to sever unconscionable portions of the arbitration provisions and refusing to compel arbitration. The requirement that plaintiff abide by a set of rules promulgated by the AAA, which were not provided to him, much less identified with any clarity, is a significant defect that permeates the agreement with unconscionability. Under the circumstances presented in this case, the terms of the arbitration provisions were not clear and thus cannot be enforced. (See *AT&T Mobility, supra*, 563 U.S. at p. __ [131 S.Ct. at p. 1748].) In light of "the importance of attorney fee and cost recovery in wrongful employment termination litigation" (*Trivedi, supra*, 189 Cal.App.4th at p. 398), the prevailing party attorney fees component of the arbitration provisions adds support to the trial court's decision to deny the motion to compel arbitration in its entirety. We find no error.

DISPOSITION

The order is affirmed. Respondent shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.

Filed 2/27/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STEPHEN MICHAEL MAYERS, Plaintiff and Respondent, v. VOLT MANAGEMENT CORP. et al., Defendants and Appellants.	G045036 (Super. Ct. No. 30-2010-00430432) ORDER MODIFYING OPINION, DENYING PETITION FOR REHEARING AND GRANTING REQUESTS FOR PUBLICATION; NO CHANGE IN JUDGMENT

It is ordered the opinion filed herein on February 2, 2012, be modified as follows:

On page 20, after the second full paragraph beginning "We conclude the trial court," add the following new part under the Discussion section:

VII.

PETITION FOR REHEARING

Defendant filed a petition for rehearing in which it argues we failed to address certain issues raised in this appeal. For the following reasons, defendant's petition is without merit.

Defendant argues we failed to address FAA preemption and the FAA's "mandate that rules related to the formation of ordinary contracts be applied to the formation of arbitration agreements."

(Initial capitalization omitted.) As quoted in the Background section *ante*, both the employment application and the employment agreement state that any dispute "shall be resolved by final and binding arbitration, pursuant to the Federal Arbitration Act." The parties expressly agreed to the applicability of the FAA and we apply the FAA; as a result, we do not need to address FAA preemption. Defendant ignores our recognition of the parties' stipulation to the applicability of the FAA.

In part II. of the Discussion section *ante*, we summarize and apply the United States Supreme Court's interpretation of the FAA in *AT&T Mobility*, *supra*, 563 U.S. __ [131 S.Ct. 1740]. For reasons we explain in detail, the Supreme Court expressly recognized that certain agreements to arbitrate may be invalidated by "'generally applicable contract defenses, such as . . . unconscionability.'" (*Id.* at p. __ [131 S.Ct. at p. 1746].) In accordance with *AT&T Mobility*, we explain in detail the reasons for and our analysis of the application of the general principles of unconscionability to the specific arbitration provisions at issue in this case. Our analysis does not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*Id.* at p. __ [131 S.Ct. at p. 1748].) Quite simply, we scrupulously apply the FAA, as interpreted by the United States Supreme Court in *AT&T Mobility*, in this case.

Defendant next argues we ignore *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1 (*Asmus*) and *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665. Neither case is applicable.

In *Asmus*, *supra*, 23 Cal.4th at page 6, the California Supreme Court held that "[a]n employer may unilaterally terminate a policy

that contains a specified condition, if the condition is one of indefinite duration, and the employer effects the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits." The Supreme Court concluded that "the employees accepted the company's modified policy by continuing to work in light of the modification." (*Id.* at p. 18.) *Asmus* does not bar consideration whether employment arbitration agreements constitute adhesion contracts or contain unconscionable elements. *Asmus* did not even address the enforceability of arbitration agreements or the doctrine of unconscionability—the very issues in this case.

In *Pearson Dental Supplies, Inc. v. Superior Court*, *supra*, 48 Cal.4th at page 682, the California Supreme Court held: "When an arbitration provision is ambiguous, we will interpret that provision, if reasonable, in a manner that renders it lawful, both because of our public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution, and because of the general principle that we interpret a contractual provision in a manner that renders it enforceable rather than void." We explain in detail, *ante*, how the arbitration provisions here suffer from high levels of procedural and substantive unconscionability. Among several other things, they not only fail to include, attach, or explain how to access the rules that would govern final and binding arbitration, they also fail to identify the applicable set of AAA rules. Because the arbitration provisions are so pervasively unconscionable, they are unlawful and thus unenforceable; we cannot reasonably interpret them otherwise.

> Defendant also argues we fail to address the trial court's grant of defendant's request for judicial notice of a certain set of AAA rules in ruling on the motion to compel arbitration, which included a rule limiting the arbitrator's authority to award attorney fees and costs "in accordance with applicable law." The grant of judicial notice of a particular set of AAA rules is irrelevant to our determination whether the arbitration provisions contain elements of substantive unconscionability because that set of rules was not included with, attached to, or identified in the arbitration provisions themselves.

This modification does not effect a change in the judgment. The petition for rehearing is DENIED.

We have received three requests (filed February 7, 22, and 23, 2012) that our opinion, filed on February 2, 2012, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c). The requests for publication are GRANTED. The opinion is ordered published in the Official Reports.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.