XI. APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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King County

KING COUNTY

Signature Report

1200 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Resolution

Proposed No. 20-08.2 **Sponsors**

A RESOLUTION declaring racism a public health crisis.

WHEREAS, racism has deep and harmful impacts that unfairly disadvantages Black, Indigenous and People of Color ("BIPOC") and unfairly advantages people who identify as white, and

WHEREAS, racism harms every person in our society and is the root cause of poverty and economic inequality, and

WHEREAS, "injustice anywhere is a threat to justice everywhere," as King County's namesake, the Reverend Dr. Martin Luther King, Jr., said, and

WHEREAS, whether intended or not, racism becomes ingrained in institutional policies and practices, creating differential access to opportunities and resources, and causes disparate outcomes in all aspects of life affecting health, and

WHEREAS, by maintaining the status quo and existing systems of power and privilege based on our country's long history of and continued persistence of white supremacy, institutional policies and practices do not need to be explicitly racist in order to have racist impacts on residents, and

WHEREAS, culture across institutions and systems is critical, and the legacy of racist policies and practices continues to exist even once the policies and practices have been changed, and

WHEREAS, reversing the legacy of institutional racism calls for an

understanding of the intersectional nature of power and oppression that amplify adverse effects on people who experience more than one form of marginalization, such as race, gender and disability, and a commitment to anti-racist policies and practices, and

WHEREAS, decades of data collected by Public Health - Seattle & King County have demonstrated how BIPOC communities are affected by both acute impacts, such as gun violence, and chronic impacts such as higher rates of cardiovascular disease and diabetes, maternal and infant mortality, underweight babies and shorter, less-healthy lives overall, and

WHEREAS, King County residents of color have deep wells of resilience and strength, and BIPOC communities are less likely to experience other health conditions, such as suicide, Alzheimer's disease and drug and alcohol-related conditions than their white counterparts, and

WHEREAS, King County residents of color are more likely to experience inequities in education, access to jobs, earning power, adequate and safe housing, higher rates of policing and involvement in the criminal legal system, and overall quality of life, and

WHEREAS, the disproportionate impact of the COVID-19 on our BIPOC communities is a present-day demonstration of the systemic racism in institutions and systems that have not valued and supported human life equitably, and

WHEREAS, we recognize that historically and currently King County has been complicit in maintaining and perpetuating structural racism, and that as an institution the Board of Health must stand in support of dismantling oppressive systems grounded in white supremacy, and

WHEREAS, King County government and Public Health - Seattle & King County have expressed a commitment to developing stronger and better resourced partnerships with community organizations and leaders to disrupt and dismantle racism and protect the health and well-being of our BIPOC residents, using quantitative data, including data about racial inequities, along with voices and knowledge of community leaders and residents to get to solutions that work and that are sustainable, and

WHEREAS, in 2008 the King County Executive joined with Public Health - Seattle & King County to launch the Equity and Social Justice Initiative, and later in 2010 the King County Council passed equity and social justice ordinance, and now the current Equity and Social Justice Strategic Plan leads with racial justice, and

WHEREAS, across the country local governments have taken action to declare racism a public health crisis including the cities of Boston, Cleveland and Columbus, Ohio, Franklin County, Ohio, the Indianapolis City-County Council in Indiana, and the Tacoma-Pierce County Board of Health, and

WHEREAS, the Board of Health is committed to addressing racial equity and health disparities in all forms and at all levels, which are the individual, institutional and systemic levels, across the county;

NOW, THEREFORE, BE IT RESOLVED by the Board of Health of King County:

A. The Board declares racism a public health crisis;

B. The Board supports King County and Public Health - Seattle & King County immediately in the work to advance a public health approach in addressing institutional and systemic racism;

C. The Board commits to assessing, revising, and writing its guiding documents and its policies with a racial justice and equity lens including the Board of Health Code and annual workplan; and

D. The Board members commit to ongoing work around race and equity such as participating in racial equity training, engaging and being responsive to communities and residents impacted by racism, especially Black and Indigenous communities, as partners in identifying and implementing solutions, establishing an agreed upon understanding of

racial equity principles to work towards antiracist policies and practices and to serve as ambassadors of racial equity work.

Resolution 20-08 was introduced on and passed as amended by the Board of Health on 6/18/2020, by the following vote:

Yes: 13 - Dr. Daniell, Dr. Delecki, Ms. Honda, Ms. Kohl-Welles, Ms. Lambert, Mr. McDermott, Ms. Mosqueda, Mr. Lewis, Ms. Morales and Ms. Zahn
Excused: 1 - Mr. Baker

BOARD OF HEALTH
KING COUNTY, WASHINGTON

DocuSigned by:
6D0E6E444F08459...

Joe McDermott, Chair

ATTEST:

DocuSigned by:
8DE1BB375AD3422...

Melani Pedroza, Clerk of the Board

Attachments: None

NELSEN v. LEGACY PARTNERS RESIDENTIAL, INC.

No. A132927.

207 Cal.App.4th 1115 (2012)

144 Cal. Rptr. 3d 198

LORENA NELSEN, Plaintiff and Appellant, v. LEGACY PARTNERS RESIDENTIAL, INC., Defendant and Respondent.

Court of Appeals of California, First District, Division One.

July 18, 2012.

Attorney(s) appearing for the Case

R. Rex Parris Law Firm, R. Rex Parris , Alexander R. Wheeler , Jason P. Fowler , Kitty Szeto , Douglas Han ; Lawyers for Justice and Edwin Aiwazian for Plaintiff and Appellant.

Rutan & Tucker, Mark J. Payne and Brandon L. Sylvia for Defendant and Respondent.

OPINION

MARGULIES, J. —

Lorena Nelsen filed a putative class action lawsuit against her former employer, Legacy Partners Residential, Inc. (LPI), alleging multiple violations of the Labor Code. Based on an arbitration agreement she signed when LPI hired her, LPI moved to compel Nelsen to submit her individual claims to arbitration. Nelsen purports to appeal from the ensuing order granting LPI's motion. Although Nelsen fails to meet her burden to show the court's order is appealable, we exercise our discretion to treat the appeal as a petition for writ of mandate. We find (1) the arbitration agreement is not unconscionable and (2) notwithstanding that the agreement precludes class arbitration by its own terms, Nelsen fails to show that compelling her to individual arbitration violates state or federal law or public policy. Accordingly, we deny Nelsen's petition and affirm the correctness of the trial court's order.

[207 Cal.App.4th 1120]

I. BACKGROUND

Nelsen was employed by LPI as a property manager in California from approximately July 2006 until June 2009. At the inception of her employment, Nelsen was provided with multiple employment forms to read and sign, including a 43-page "Team Member Handbook." The last two pages of the handbook contained a section entitled, "TEAM MEMBER ACKNOWLEDGEMENT AND AGREEMENT" (Agreement), followed by signature lines for the "TEAM MEMBER" and a "LEGACY PARTNERS REPRESENTATIVE." The signature line was preceded by a sentence in bold print, stating, "My signature below attests to the fact that I have read, understand, and agree to be legally bound to all of the above terms." Nelsen and a representative of LPI both signed the Agreement in July 2006.

The first four numbered paragraphs of the preprinted form Agreement recited Nelsen's acknowledgments that she (1) had received the handbook, (2) understood and

the first four paragraphs of the preprinted form agreement recited Nelsen's acknowledgments that (1) she received the handbook, (2) understood and agreed to all terms and conditions of employment outlined in the handbook, (3) agreed LPI could modify any of the policies or benefits set forth in the handbook at any time and for any reason, and (4) understood and agreed she was an "at will" employee. The fifth paragraph contained the following relevant arbitration language: "I agree that any claim, dispute, or controversy ... which would otherwise require or resort [*sic*] to any court ... between myself and Legacy Partners (or its owners, partners, directors, officers, managers, team members, agents, related companies, and parties affiliated with its team member benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with, the Legacy Partners, ... shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act [(9 U.S.C. § 1 et seq.;)], in conformity with the procedures of the California Arbitration Act ...." [1], [2]

On July 26, 2010, Nelsen filed the present suit against LPI alleging causes of action arising under provisions of the Labor Code for failure to (1) pay

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overtime, (2) provide meal periods, (3) provide rest breaks, (4) timely pay wages, (5) pay wages upon termination, (6) provide accurate itemized wage statements, (7) maintain payroll records, or (8) reimburse for necessary business expenses. The complaint also included a cause of action for violation of the unfair competition law (UCL), Business and Professions Code section 17200 et seq., based on the aforementioned statutory wage claims, and seeking injunctive and other relief under that statute. The complaint was styled as a class action by Nelsen on behalf of all current and former California-based property managers who worked for LPI at any time from four years preceding the filing of the complaint until final judgment in the suit. In addition to consequential damages, restitution, and injunctive relief on behalf of the class, the complaint sought statutory penalties and attorney fees.

LPI sent Nelsen a letter advising her of the arbitration agreement and requesting she stipulate to the dismissal of her action and submit her individual claims to arbitration. After receiving no response from Nelsen, LPI moved two weeks later to compel Nelsen to arbitrate her claims. Nelsen opposed the motion on the grounds the arbitration agreement was unconscionable and violated California public policy favoring class actions and wage and hour lawsuits.

The trial court granted LPI's motion and entered an order requiring Nelsen to submit her individual claims to arbitration and staying the action in its entirety. Nelsen timely appealed from the order, citing *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277 [90 Cal.Rptr.3d 539] (*Franco*) in her notice of appeal as the basis for her right to appeal.

II. DISCUSSION

Nelsen contends (1) the order compelling arbitration is appealable, (2) the arbitration clause is unconscionable and unenforceable, (3) enforcement of the arbitration clause to preclude class arbitration would violate California and federal law and public policy in the employment field, and (4) her injunctive relief claim under the UCL is not subject to arbitration.

A. *Appealability*

(1) Orders granting motions to compel arbitration are generally not immediately appealable. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648-649 [9 Cal.Rptr.3d 422]; *Gordon v. G.R.O.U.P., Inc.* (1996) 49 Cal.App.4th 998, 1004, fn. 8 [56 Cal.Rptr.2d 914].) Such orders

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are normally subject to review only on appeal from the final judgment. (Code Civ. Proc., §§ 906, 1294.2; see *Muao v. Grosvenor Properties, Ltd.* (2002) 99 Cal.App.4th 1085, 1088-1089 [122 Cal.Rptr.2d 131].) Nelsen claims this case comes within an exception to the general rule recognized in *Franco* based on the so-called "death knell" doctrine. *Franco* permitted an immediate appeal from an order made in a putative class action requiring arbitration of individual claims and waiving class arbitration because such an order is effectively the "death knell" of the class litigation. (See *Franco, supra,* 171 Cal.App.4th at p. 1288.)

(2) As an initial matter, LPI points out Nelsen failed to cite *Franco* or any other authority supporting the appealability of the trial court's order anywhere in her opening brief, in violation of California Rules of Court, rule 8.204(a)(2)(B). On that basis, LPI asks this court to (1) strike Nelsen's opening brief, and (2) find Nelsen waived any argument for appealability based on *Franco.* (See *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 557 [101 Cal.Rptr.2d 86] [holding Court of Appeal has discretion to strike opening brief that fails to include an adequate statement of appealability]; *Baugh v. Garl* (2006) 137 Cal.App.4th 737, 746 [40 Cal.Rptr.3d 539] [contentions not raised in appellant's opening brief deemed waived].) We decline to grant either remedy in this case. Nelsen's citation to *Franco* in her notice of appeal put LPI on notice of her position regarding appealability and LPI took advantage of the opportunity in its respondent's brief to address that case and cite authority arguably contrary to it. LPI cannot reasonably claim prejudice from our consideration of Nelsen's argument based on *Franco.*

Franco involved a lawsuit filed by an employee against his employer seeking relief on behalf of himself and other employees for alleged state statutory wage and hour violations. (*Franco, supra,* 171 Cal.App.4th at p. 1282.) Franco's employer filed a petition to compel arbitration based on an arbitration agreement containing provisions waiving class arbitrations, and precluding Franco from bringing claims in arbitration on behalf of other employees. (*Id.* at pp. 1283-1284.) The trial court granted the petition, directed Franco to submit his individual claims to arbitration, denied class arbitration, and ordered the civil action to be dismissed for all purposes except enforcement of the arbitration order or to confirm, modify or vacate any arbitration award. (*Id.* at pp. 1285, 1287.) The employer contended Franco's ensuing appeal from the order was improper. Without further elaboration, the Court of Appeal found the order was appealable: "The [trial court's] order found that the class arbitration waiver was enforceable and instructed Franco to arbitrate his claims individually. That was the `death knell' of class litigation through arbitration." (*Id.* at p. 1288.)

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(3) The "death knell" doctrine was explained as follows in *General Motors Corp. v. Superior Court* (1988) 199 Cal.App.3d 247 at page 251 [244 Cal.Rptr. 776]: "Our Supreme Court ... has held that where an order has the `death knell' effect of making further proceedings in the action impractical, the order is appealable. In *Daar v. Yellow Cab Co.* [(1967)] 67 Cal.2d 695 [63 Cal.Rptr. 724, 433 P.2d 732], the court held that an order sustaining a demurrer to class action allegations and transferring the action from superior court to municipal court was an appealable order. The court stated: `[H]ere the order under examination not only sustains the demurrer, but also directs the transfer of the cause from the superior court, where it was commenced as a class action, to the municipal court. We must assay the total substance of the order. It determines the legal insufficiency of the complaint as a class suit and

preserves for the plaintiff alone his cause of action for damages. In "its legal effect" the order is tantamount to a dismissal of the action as to all members of the class other than plaintiff. It has virtually demolished the action as a class action. If the propriety of such disposition could not now be reviewed, it can never be reviewed.'"

Thus, "[t]he death knell doctrine [applies] *when it is unlikely the case will proceed as an individual action.*" (*Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1098 [118 Cal.Rptr.2d 862] (*Szetela*), italics added [finding an order sharply limiting the scope of class arbitration was not a "death knell" order].) Here, Nelsen fails to explain or demonstrate how the trial court's order makes it impossible or impracticable for her to proceed with the action at all. [3] However, despite Nelsen's default, we need not decide whether her appeal comes within the death knell doctrine. As the Court of Appeal did in *Szetela,* we exercise our discretion to treat Nelsen's appeal as a petition for a writ of mandate. (*Szetela,* at p. 1098; *Olson v. Cory* (1983) 35 Cal.3d 390, 401 [197 Cal.Rptr. 843, 673 P.2d 720].) This will ensure appellate review of the court's arbitration order in the event there is no future appellate proceeding in which the order will be reviewable.

B. *Unconscionability*

(4) Section 2 of the FAA provides in relevant part as follows: "A written provision in any ... 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, italics added.) Section 2 is a "congressional declaration of a

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liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24 [74 L.Ed.2d 765, 103 S.Ct. 927].) The italicized portion of section 2 — known as its "savings clause" — provides an exception to the enforceability of arbitration agreements for "`generally applicable contract defenses, such as fraud, duress, or unconscionability.'" (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ____, ____ [179 L.Ed.2d 742, 131 S.Ct. 1740, 1746] (*Concepcion*).)

(5) Invalidating an arbitration agreement for unconscionability under California law requires a two-part showing: "[T]he party opposing arbitration... ha[s] the burden of proving that the arbitration provision [is] unconscionable. [Citation.] ... [¶] Unconscionability requires a showing of both procedural unconscionability and substantive unconscionability. [Citations.] Both components must be present, but not in the same degree; by the use of a sliding scale, a greater showing of procedural or substantive unconscionability will require less of a showing of the other to invalidate the claim." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 795 [137 Cal.Rptr.3d 773].) Where the relevant extrinsic evidence is undisputed, as it appears to be here, the appellate court reviews the arbitration contract de novo to determine whether it is legally enforceable. (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174 [116 Cal.Rptr.2d 671].)

Several factors support a finding LPI's arbitration agreement is procedurally unconscionable. It was part of a preprinted form agreement drafted by LPI that all of LPI's California property managers were required to sign on a take-it-or-leave-it basis. The arbitration clause was located on the last two pages of a 43-page handbook. While the top of page 42 contains a highlighted prominent title "TEAM MEMBER ACKNOWLEDGMENT AND AGREEMENT," the title makes no reference to arbitration and the arbitration language itself appears in a small font not set off in any way to stand out from the rest of the agreement or handbook. Moreover, unless Nelsen happened to be conversant with the rules of pleading in the Code of Civil Procedure, the law and procedure applicable to appellate review, and the rules for the disqualification of superior court judges, the terms and rules of the arbitration referenced in the clause would have been beyond her comprehension. (Cf. *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393 [116 Cal.Rptr.3d 804] [employment arbitration provision was procedurally unconscionable because it was prepared by the employer, mandatory, and no copy of the applicable arbitration rules was provided].)

(6) Substantive unconscionability depends on the terms of the arbitration clause itself. In this case, the issue of whether the clause in question is

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substantively unconscionable has already been addressed by the California Supreme Court in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 [130 Cal.Rptr.2d 892, 63 P.3d 979] (*Little*). (See *Marshall v. Pontiac* (S.D.Cal. 2003) 287 F.Supp.2d 1229 [identical language, outcome controlled by *Little*].) The employment arbitration agreement in issue in *Little* was, for all practical purposes, identical to Nelsen's. [4] There is just one substantive difference between the two arbitration agreements: the agreement in issue in *Little* provided that only awards exceeding $50,000 required the arbitrator's "`written reasoned opinion'" or triggered the right to appeal to a second arbitrator. (29 Cal.4th at p. 1070.) The Supreme Court found this one provision substantively unconscionable because, as a practical matter, the $50,000 appeal minimum operated in a lopsided way — it was much more likely to give the employer a right to appeal an unfavorable award than the employee. (*Id.* at pp. 1071-1074.) However, the Supreme Court did not toss out the arbitration provision as a whole on that basis. It ordered the $50,000 appeal threshold severed from the rest of the arbitration agreement, and found the rest of the arbitration agreement valid and enforceable. (*Id.* at pp. 1074-1076, 1085.) The provision severed by the court in *Little* does not appear in the arbitration agreement before this court.

Relying on *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 at page 113 [99 Cal.Rptr.2d 745, 6 P.3d 669]

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(*Armendariz*), Nelsen claims the arbitration agreement is substantively unconscionable because it lacks bilaterality. Citing language identical to that found in Nelsen's arbitration agreement, the *Little* court rejected the same bilaterality argument Nelsen makes here: "[U]nlike the agreement in *Armendariz,* which explicitly limited the scope of the arbitration agreement to wrongful termination claims and therefore implicitly excluded the employer's claims against the employee [citation], the arbitration agreement in the present case contained no such limitation, instead applying to `any claim, dispute, or controversy ... between [the employee] and the Company.'" (*Little, supra,* 29 Cal.4th at p. 1075, fn. 1.) *Little* is controlling on that issue. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].) [5]

We therefore reject Nelsen's argument that her arbitration agreement with LPI is substantively unconscionable. Because she had the burden of demonstrating both procedural and substantive unconscionability (*Ajamian v. CantorCO2e, L.P., supra,* 203 Cal.App.4th at p. 795), we find the arbitration agreement was not unenforceable due to unconscionability.

C. *Violation of California Public Policy*

1. *Overview of* Gentry

In her opposition to LPI's motion to compel arbitration in the trial court, Nelsen sought classwide arbitration of her claims in the alternative, if the arbitration clause as a whole was not found to be unconscionable. Relying on *Gentry v. Superior Court* (2007) 42 Cal.4th 443 [64 Cal.Rptr.3d 773, 165 P.3d 556] (*Gentry*), Nelsen contends requiring individual arbitration of her wage and hour claims would violate California public policy even if the arbitration agreement is otherwise found to be valid and enforceable. As explained in *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825 [109 Cal.Rptr.3d 289] (*Arguelles-Romero*), "*Gentry* is concerned with the effect of a class action waiver on unwaivable statutory rights *regardless of unconscionability.*" (*Id.* at p. 836.)

"*Gentry* involved a class of employees who alleged that their employer had improperly characterized them as exempt and therefore did not pay them

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overtime. [Citation.] The statutory right to recover overtime is unwaivable. [Citation.] The Supreme Court then concluded that, in wage and hour cases, a class action waiver would frequently have an exculpatory effect and would undermine the enforcement of the statutory right to overtime pay. [Citation.] The court identified several factors which, if present, could establish a situation in which a class action waiver would undermine the enforcement of the unwaivable statutory right. These factors included: (1) individual awards `tend to be modest' [citation]; (2) an employee suing his or her current employer is at risk of retaliation [citation]; (3) some employees may not bring individual claims because they are unaware that their legal rights have been violated [citation]; and (4) even if some individual claims are sizeable enough to provide an incentive for individual action, it may be cost effective for an employer to pay those judgments and continue to not pay overtime — only a class action can compel the employer to properly comply with the overtime law [citation]." (*Arguelles-Romero, supra,* 184 Cal.App.4th at p. 840.)

(7) Thus, *Gentry* holds that when a class action is requested in a wage and hour case notwithstanding an arbitration agreement expressly precluding class or representative actions, the court must decide whether individual arbitration is so impractical as a means of vindicating employee rights that requiring it would undermine California's public policy promoting enforcement of its overtime laws. (*Arguelles-Romero, supra,* 184 Cal.App.4th at pp. 840-841.) If the court makes that determination, *Gentry* requires that it invalidate the class arbitration waiver and require class arbitration. (*Arguelles-Romero,* at pp. 840-841.) *Gentry* further held that refusing to enforce class arbitration waivers on such public policy grounds would not violate the FAA. (*Gentry, supra,* 42 Cal.4th at p. 465.)

As noted, *Gentry* applies when the arbitration agreement expressly waives class arbitration. Here, the agreement includes no express waiver of classwide arbitration, and the parties come to opposite conclusions about what inferences are to be drawn from that fact. LPI takes the position that silence cannot be construed as a waiver of class arbitration and, therefore, *Gentry* has no application. Nelsen on the other hand invites us to construe the arbitration agreement's silence as a de facto waiver of class arbitration. She correctly points out that LPI wants to have it both ways — class arbitration is precluded because the agreement does not expressly authorize it, yet *Gentry* is inapplicable because the agreement does not expressly waive such arbitration. In our view, *Gentry*'s application should not turn on whether an arbitration agreement bars class arbitration expressly or only impliedly. In either case, enforcement of the arbitration agreement according to its terms in a wage and hour case raises the identical policy issues. On the other hand, if the agreement *allows* class arbitration, Nelsen is entitled to such arbitration

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without regard to *Gentry.* We must therefore determine as a threshold matter whether the arbitration agreement in this case impliedly either precludes or allows class arbitration.

2. *Does the Agreement Permit Class Arbitration?*

(8) The starting point for our analysis is the U.S. Supreme Court's holding in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. ____ [176 L.Ed.2d 605, 130 S.Ct. 1758] (*Stolt-Nielsen*). *Stolt-Nielsen* held "a party may not be compelled under the FAA to submit to class arbitration *unless there is a contractual basis* for concluding that the party *agreed* to do so." (559 U.S. at p. ____ [130 S.Ct. at p. 1775], first italics added.) The court did not specify what is affirmatively required in order to show there is a "contractual basis" for finding an agreement to class arbitration. At the same time, it did not hold that the intent to agree to class arbitrations must be expressly stated in the arbitration agreement. The court stated: "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here ... the parties stipulated that there was `no agreement' on the issue of class-action arbitration." (*Id.* at p. ____, fn. 10 [130 S.Ct. at p. 1776, fn. 10].) *Stolt-Nielsen* did hold that the agreement's "silence on the question of class arbitration" *cannot* be taken as dispositive evidence of an intent to *allow* class arbitration. (*Id.* at p. ____ [130 S.Ct. at p. 1775].) Thus, "[a]n implicit agreement to authorize class-action arbitration ... is not a term that the arbitrator *may infer solely from the fact of the parties' agreement to arbitrate.*" (*Ibid.,* italics added.) *Stolt-Nielsen* recognizes that "the interpretation of an arbitration agreement is generally a matter of state law ...." (*Id.* at p. ____ [130 S.Ct. at p. 1773] citing *Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624, 630-631 [173 L.Ed.2d 832, 129 S.Ct. 1896, 1901-1902].) The question of whether there is a contractual basis for concluding the parties intended to allow class arbitration must therefore be based on state law principles of contract interpretation to the extent they are consistent with the parameters of the FAA as described in *Stolt-Nielsen.* (See *Jock v. Sterling Jewelers* (2d Cir. 2011) 646 F.3d 113, 126.) Thus, whatever other state law principles apply, consent to class arbitration cannot be inferred solely from the agreement to arbitrate, and the decision cannot be based on the court's view of sound policy regarding class arbitration but must be discernible in the contract itself. (*Stolt-Nielsen,* at pp. ____-____ [130 S.Ct. at pp. 1767-1768].)

We recognize some federal courts have decided issues of class arbitration are generally for the arbitrator to decide, at least when the arbitration agreement does not provide otherwise. (See, e.g., *Guida v. Home Savings of America, Inc.* (E.D.N.Y. 2011) 793 F.Supp.2d 611, 617-618, and cases

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collected therein.) [6] Here, however, neither party has proposed we leave the question of class arbitration for the arbitrator. Both parties invite *this court* to decide the issue. LPI asks that we find the arbitration agreement does not reflect its consent to class arbitration, while Nelsen requests we either find the arbitration agreement unenforceable or interpret it to allow class arbitration. In any event, for the reasons we will discuss, we believe it is clear the agreement precludes class arbitration and do not think any reasonable arbitrator applying California law could find otherwise.

(9) "The fundamental rule is that interpretation of ... any contract ... is governed by the mutual intent of the parties at the time they form the contract. [Citation.] The parties' intent is found, if possible, solely in the contract's written provisions. [Citation.] `The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by

usage" [citation], controls judicial interpretation.' [Citation.] If a layperson would give the contract language an unambiguous meaning, we apply that meaning." (*Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187, 196 [35 Cal.Rptr.3d 799], disapproved on another point in *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1036, fn. 11 [90 Cal.Rptr.3d 1, 201 P.3d 1147].)

As an initial matter, the record does not disclose any admissible extrinsic evidence reflecting on the parties' intent with respect to class arbitration. Neither party has suggested there was any preagreement communication about whether the arbitration agreement covered class arbitration or any prelitigation conduct contradicting the positions the parties are taking on that subject now. We accordingly confine ourselves to construing the parties' intent based solely on the language of their arbitration agreement.

While the arbitration agreement in issue broadly encompasses any employment-related "claim, dispute, or controversy ... which would otherwise require or [allow] resort to any court," it contains one very significant limitation. The agreement only covers claims, disputes, and controversies

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"between myself and Legacy Partners," that is, between Nelsen and LPI. A class action by its very nature is not a dispute or controversy "between [Nelsen] and Legacy Partners." In this case (assuming a class was certified) it would be a dispute between LPI and numerous different individuals, one of whom is Nelsen. Although LPI agreed with Nelsen to arbitrate all kinds of disputes that might arise between *them,* this choice of contractual language, by its ordinary meaning, unambiguously negates any intention by LPI to arbitrate claims or disputes to which Nelsen was not a party. [7]

The Court of Appeal in *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506 [140 Cal.Rptr.3d 347] (*Kinecta*) was faced with a nearly identical question in a putative wage and hour class action brought by a credit union employee against her former employer. The employee arbitration agreement in that case covered "`any claim, dispute, and/or controversy that either *I* may have against the Credit Union (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) or the Credit Union may have against *me,* arising from, related to, or having any relationship or connection whatsoever with *my* seeking employment with, employment by, or other association with the Credit Union ....'" (*Kinecta,* at p. 511, fn. 1, italics added.) The trial court had ordered the parties to class arbitration. (*Id.* at p. 509.) The Court of Appeal granted the employer's petition for writ of mandate overturning the trial court's order, holding the language of the arbitration agreement was inconsistent with an intent to allow class arbitration: "The arbitration provision identifies only two parties to the agreement, `I, Kim Malone' and `Kinecta Federal Credit Union and its wholly owned subsidiaries' (referred to ... as `the Credit Union'). It makes no reference to employee groups or to other employees of Kinecta, and instead refers exclusively to `I,' `me,' and `my' (designating Malone)." (*Id.* at p. 517.) Applying *Stolt-Nielsen,* the court found there was no contractual basis for finding the agreement authorized class arbitration. (*Kinecta,* at p. 517.)

(10) As in *Kinecta,* the arbitration contemplated by Nelsen's arbitration agreement in this case involves only disputes between two parties — Nelsen ("myself") and LPI. It does not encompass disputes between other employees or groups of employees and LPI. Other portions of the agreement reinforce the two-party intent of the agreement. The agreement provides for an appeal of the arbitrator's award "at *either party's* written request." (Italics added.) In bold letters, the agreement states, "I understand by agreeing to this binding

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arbitration provision, both *Legacy Partners and I* give up *our* rights to trial by jury." (Italics added.) All of the relevant contractual language thus contemplates a two-party arbitration. No language evinces an intent to allow class arbitration. [8]

We therefore conclude the agreement does *not* permit class arbitrations. We turn now to the question of whether the agreement is enforceable in that respect, notwithstanding *Gentry.*

3. *Enforceability under* Gentry

As the parties recognize, the continuing vitality of *Gentry* has been called into serious question by a recent decision of the United States Supreme Court holding that a state law rule requiring classwide arbitrations based on public policy grounds rather than the parties' arbitration agreement itself *does* violate the FAA. (See *Concepcion, supra,* 563 U.S. at pp. ____-____ [131 S.Ct. at pp. 1748-1753].) *Concepcion* expressly overruled *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 [30 Cal.Rptr.3d 76, 113 P.3d 1100] (*Discover Bank*), which had adopted a rule permitting the plaintiffs in certain consumer class action cases to demand classwide arbitration notwithstanding express class arbitration waivers in their arbitration agreements. (*Concepcion,* at pp. ____-____, ____ [131 S.Ct. at pp. 1750-1751, 1753].) *Concepcion* held the so-called *Discover Bank* rule was preempted by the FAA because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Concepcion,* at pp. ____, ____ [131 S.Ct. at pp. 1748, 1753].) Under the FAA, classwide arbitration cannot be imposed on a party who never agreed to it, as the *Discover Bank* rule requires. (*Concepcion,* at pp. ____-____ [131 S.Ct. at pp. 1750-1751].)

One California appellate court and a number of federal district courts have found *Concepcion* applies equally to *Gentry* and the FAA therefore precludes California courts from ordering classwide arbitration of wage and hour claims unless the parties have agreed to it. (See *Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949, 959-961 [142 Cal.Rptr.3d 372] (*Iskanian*); *Jasso v. Money Mart Express, Inc.* (N.D.Cal. 2012) ____ F.Supp.2d ____-____ [2012 WL 1309171, pp. *4-*7] (*Jasso*); *Sanders v. Swift Transportation Co. of Arizona, LLC* (N.D.Cal. 2012) ____ F.Supp.2d ____, ____

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[2012 WL 523527, p. *3]; *Lewis v. UBS Financial Services Inc.* (N.D.Cal. 2011) 818 F.Supp.2d 1161 (*Lewis*); *Murphy v. DIRECTV, Inc.* (C.D.Cal., Aug. 2, 2011, No. 2:07-cv-06465-JHN-VBKx) 2011 WL 3319574, p. *4.) The reasoning of a Ninth Circuit decision in *Coneff v. AT & T Corp.* (9th Cir. 2012) 673 F.3d 1155 — finding a Washington State rule deeming class arbitration waivers unconscionable was preempted by the FAA in light of *Concepcion* — would also seem to apply equally to *Gentry,* as the federal district court held in *Jasso.* (*Jasso,* ____ F.Supp.2d at p. ____ [2012 WL 523527 at p. *7].) [9]

(11) But we need not decide here whether *Concepcion* abrogates the rule in *Gentry.* By its own terms, *Gentry* creates no categorical rule applicable to the enforcement of class arbitration waivers in all wage and hour cases. (*Gentry, supra,* 42 Cal.4th at p. 462.) As discussed earlier, before such waivers can be held unenforceable, *Gentry* requires a predicate showing that (1) potential individual recoveries are small; (2) there is a risk of employer retaliation; (3) absent class members are unaware of their rights; and (4) as a practical matter, only a class action can effectively compel employer overtime law compliance. (*Id.* at p. 463.) The trial court was in no position in this case to make a determination that *any* of the *Gentry* factors applied. Nelsen supported her opposition to LPI's motion to compel with a one and a half page declaration solely addressing facts relevant to procedural unconscionability. She submitted no evidence as to any of the factors discussed in *Gentry.* The record is thus wholly insufficient to apply *Gentry* even assuming for the sake of analysis *Gentry* has not been vitiated by *Concepcion.* (*Kinecta, supra,* 205 Cal.App.4th at p. 518.) Having relied on *Gentry* in her

opposition to the motion to compel in the trial court, it was Nelsen's burden to come forward there with factual evidence supporting her position classwide arbitration was required. (*Kinecta*, at p. 510.) She is not entitled to a remand for the purpose of affording her a second opportunity to produce such evidence, as she now requests.

D. *Violation of Federal Law*

Finally, Nelsen cites a recent administrative decision of the National Labor Relations Board (the Board), *D. R. Horton, Inc.* (Jan. 3, 2012) 357 NLRB

No. 184 (*Horton*). [10] In *Horton*, the Board determined it was a violation of the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.) to require employees as a condition of employment to waive the filing of class action or other joint or collective claims regarding wages, hours, or working conditions in any forum, arbitral or judicial. [11] (*Horton*, at p. 1.) According to the Board, such a requirement violates the substantive rights vested in employees by section 7 of the NLRA to "engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 157.) Such mutual aid or protection, the Board asserted, had long been held — with judicial approval — to encompass "employees' ability to join together to pursue workplace grievances, including through litigation." (*Horton*, at p. 2.)

The Board further found in *Horton* that its interpretation of the NLRA to bar mandatory waivers of class arbitration over wages, hours, and working conditions did not conflict with the FAA or with the Supreme Court's decisions in *Concepcion* and *Stolt-Nielsen*. *Concepcion* involved a conflict between the FAA and *state law* which, under the supremacy clause, had to be resolved in favor of the FAA. (*Horton, supra*, 357 NLRB No. 184, at p. 12.) By contrast, the NLRA reflected federal substantive law, removing supremacy clause considerations from the equation. The Board reasoned that the strong federal policy embodied in the NLRA to protect the right of employees to engage in collective action trumped the FAA. (*Horton*, at pp. 8-12.) Further, the Board opined it was not in fact mandating class arbitration, contrary to *Concepcion* and *Stolt-Nielsen*, but holding employers may not, consistent with the NLRA, require individual arbitration without leaving a *judicial* forum open for class and collective claims. (*Horton*, at pp. 8-12.)

(12) For a number of reasons, we decline to follow *Horton* here. Since we are not bound by the decisions of lower federal courts on questions of federal law, it follows we are also not bound by federal administrative interpretations. (See *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320-321 [93 Cal.Rptr.2d 36, 993 P.2d 366], overruled in part by *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431 [161 L.Ed.2d 687, 125 S.Ct. 1788]; *Debtor Reorganizers, Inc. v. State Bd. of Equalization* (1976) 58 Cal.App.3d 691, 696 [130 Cal.Rptr. 64].) Although we may nonetheless consider the *Horton* decision for whatever persuasive value it has, several factors counsel caution in doing so. Only two Board members subscribed to it, and the subscribing members therefore lacked the benefit of dialogue with a full board or dissenting colleagues. The subject matter of the decision — the

interplay of class action litigation, the FAA, and section 7 of the NLRA — falls well outside the Board's core expertise in collective bargaining and unfair labor practices. The Board's decision reflects a novel interpretation of section 7 and the FAA. It cites no prior legislative expression, or judicial or administrative precedent suggesting class action litigation constitutes a "concerted activit[y] for the purpose of ... other mutual aid or protection" (29 U.S.C. § 157), or that the policy of the FAA favoring arbitration must yield to the NLRA in the manner it proposes. In fact, before *Horton* was decided, two federal district courts had specifically rejected arguments that class action waivers in the labor context violated section 7 of the NLRA. (*Grabowski v. C.H. Robinson* (S.D.Cal. 2011) 817 F.Supp.2d 1159, 1168-1169 [class action waiver]; *Slawienski v. Nephron Pharmaceutical Corp.* (N.D.Ga., Dec. 9, 2010, No. 1:10-CV-0460-JEC) 2010 WL 5186622, p. *2 [class arbitration waiver].)

At least two federal district court cases rejected *Horton* after it was decided. (See *Jasso, supra*, ____ F.Supp.2d at pp. ____-____ [2012 WL 1309171 at pp. *7-*10] ["Because Congress did not expressly provide [in the NLRA] that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA and is constrained by *Concepcion* to enforce the instant agreement according to its terms."]; *LaVoice v. UBS Financial Services, Inc.* (S.D.N.Y., Jan. 13, 2012, No. 11 Civ. 2308(BSJ) (JLC)) 2012 WL 124590, p. *6 [*Concepcion* precludes any argument, such as that made in *Horton*, that an absolute right to collective action can be reconciled with the FAA's "'overarching purpose' of 'ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings'"].) Another district court found *Horton* inapposite where, as in this case, the plaintiff's putative class action complaint and opposition to arbitration made no allegation his claims alleging violations of California wage and hour laws were covered by the NLRA. (*Sanders v. Swift Transp. Co. of Arizona, LLC, supra*, ____ F.Supp.2d at p. ____, fn. 1 [2012 WL 523527 at p. *4, fn. 1].)

(13) As illustrated in the United States Supreme Court's decision in *CompuCredit Corp. v. Greenwood* (2012) 565 U.S. ____ [181 L.Ed.2d 586, 132 S.Ct. 665] (*CompuCredit*), a federal statute will not be found to override an arbitration agreement under the FAA unless such a congressional intent can be shown with clarity in the statute's language or legislative history. (565 U.S. at pp. ____-____ [132 S.Ct. at pp. 672-673]; see *Jasso, supra*, ____ F.Supp.2d at p. ____ [2012 WL 1309171 at p. *8].) As the district court found in *Jasso*, "there is no language in the NLRA (or in the related Norris-LaGuardia Act) demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA." (*Jasso*, at p. ____ [2012 WL 1309171 at p. *8].)

The Second District Court of Appeal in *Iskanian* has rejected *Horton* based on the *CompuCredit* analysis and because the decision goes well beyond the scope of the Board's administrative expertise by interpreting a statute — the FAA — that the agency is not charged with enforcing. (*Iskanian, supra*, 206 Cal.App.4th at pp. 962-963.)

(14) Even if we ignored all of these authorities and found *Horton* persuasive, it would be inapplicable to this case in any event. Section 7 of the NLRA concerns the rights of covered "[e]mployees." (29 U.S.C. § 157.) Under the NLRA, "[t]he term 'employee' ... shall *not* include ... any individual employed as a supervisor ...." (29 U.S.C. § 152(3), italics added.) A "supervisor" includes anyone who exercises independent judgment in, inter alia, hiring, assigning, directing, rewarding, promoting, disciplining, or discharging other employees, or in making recommendations in those areas. (29 U.S.C. § 152(11).) There is no evidence in the record as to the nature of Nelsen's duties at LPI. Her title as "Property Manager" suggests she would not even be covered by the NLRA. Decisional law generally excludes "managerial employees" from the coverage of the NLRA. (See *NLRB v. Bell Aerospace Co.* (1974) 416 U.S. 267 [40 L.Ed.2d 134, 94 S.Ct. 1757].) Thus, we have no basis to conclude the NLRA or *Horton* have any relevance to the arbitration agreement before this court.

E. *Injunctive Relief Claim*

In her complaint, Nelsen requested injunctive relief for LPI's alleged violations of the UCL. She contends this claim is nonarbitrable under the *Broughton-Cruz* doctrine. [12] LPI maintains (1) Nelsen waived her *Broughton-Cruz* argument by failing to raise it in the trial court, and (2) *Broughton-Cruz* has, in any event, been abrogated in the wake of *Concepcion.* We agree with LPI on both counts.

(15) Nelsen asserts she is entitled to raise her *Broughton-Cruz* argument for the first time on appeal because it is based on "new authority," namely, the Supreme Court's opinion in *Concepcion* which, according to Nelsen "drastically changed the legal landscape in regards to arbitration." While it is

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true *Concepcion* did change the legal landscape regarding arbitration, nothing in *Concepcion*'s reasoning or analysis strengthens Nelsen's *Broughton-Cruz* argument. To the contrary, as discussed *post, Concepcion* may have destroyed the underpinnings of *Broughton-Cruz.* That doctrine predated the proceedings in the trial court, and nothing prevented Nelsen from raising it there. In our view, she has forfeited the issue. (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1344 [119 Cal.Rptr.3d 253] [as a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal].) Since the application of *Broughton-Cruz* depends upon a disputed factual assertion — that the injunctive relief Nelsen seeks would more than incidentally benefit the public — the forfeiture rule must be stringently applied. (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780 [97 Cal.Rptr. 657, 489 P.2d 537].)

(16) In any event, a recent decision of the Ninth Circuit Court of Appeals in *Kilgore v. KeyBank, National Assn.* (9th Cir. 2012) 673 F.3d 947 (*Kilgore*) casts grave doubt on whether *Broughton-Cruz* survives in the wake of *Concepcion.* We agree with *Kilgore* that *Concepcion* adopts a sweeping rule of FAA preemption. Under *Concepcion,* the FAA preempts any rule or policy rooted in state law that subjects agreements to arbitrate particular kinds of claims to more stringent standards of enforceability than contracts generally. Absolute prohibitions on the arbitration of particular kinds of claims such as that reflected in *Broughton-Cruz* are the clearest example of such policies: "Although the *Broughton-Cruz* rule may be based upon the sound public policy judgment of the California legislature, we are not free to ignore *Concepcion*'s holding that state public policy cannot trump the FAA when that policy prohibits the arbitration of a `particular type of claim.' Therefore, we hold that `the analysis is simple: The conflicting [*Broughton-Cruz*] rule is displaced by the FAA.' *Concepcion,* 131 S.Ct. 1747. *Concepcion* allows for no other conclusion." (*Kilgore,* at p. 963.) Since *Broughton-Cruz* prohibits outright the arbitration of claims for public injunctive relief, it is in conflict with the FAA. Nelsen's argument for exempting that claim from arbitration would have to be rejected on the merits if she had not forfeited it.

Hoover v. American Income Life Ins. Co. (2012) 206 Cal.App.4th 1193 [142 Cal.Rptr.3d 312], cited by Nelsen following oral argument, does not convince us otherwise. *Hoover* does not mention *Kilgore* or analyze *Concepcion*'s potential relevance to the continued application of *Broughton-Cruz.* Moreover, the court in *Hoover* found the arbitration agreement in issue was not subject to the FAA and did not encompass state statutory claims. (*Hoover,* at pp. 1208-1209.) That is not our case.

Nelsen's injunctive relief claim must be arbitrated.

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III. DISPOSITION

We deny Nelsen's petition for writ of mandate and affirm the correctness of the trial court's order compelling Nelsen to individual arbitration with LPI.

Marchiano, P. J., and Dondero, J., concurred.

FootNotes

1. The arbitration clause further provided for (1) the arbitrator to be a retired superior court judge, subject to disqualification "on the same grounds as would apply to a judge of such court"; (2) all rules of pleading and evidence to be applicable, "including the right of demurrer ... [,] summary judgment, judgment on the pleadings, and judgment under California Code of Civil Procedure Section 631"; (3) the arbitration award to include a "written reasoned opinion"; and (4) a right of appeal "at either party's written request" to a second arbitrator who would review the award "according to the law and procedures applicable to appellate review by the California Court of Appeal ... of a civil judgment following court trials."

2. There is no dispute the Federal Arbitration Act (FAA) governs the arbitration agreement. (See *Perry v. Thomas* (1987) 482 U.S. 483, 489 [96 L.Ed.2d 426, 107 S.Ct. 2520] [FAA applies to all arbitration agreements in contracts evidencing interstate commerce, and preempts Cal. statute exempting Lab. Code wage claims from arbitration].)

3. As noted, Nelsen made no mention whatsoever of *Franco* or the death knell doctrine in her opening brief. In her reply brief she argues the court's order effectively ended the class litigation, but she makes no contention and cites to no evidence in the record showing it is impracticable for her to proceed with individual arbitration.

4. The agreement read in relevant part as follows: "`I agree that any claim, dispute, or controversy ... which would otherwise require or allow resort to any court ... between myself and the Company ... arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with, the Company ... shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (... including [Code of Civil Procedure] section 1283.05 and all of the act's other mandatory and permissive rights to discovery); provided, however, that: In addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis other than such controlling law, including but not limited to, notions of "just

cause." As reasonably required to allow full use and benefit of this agreement's modifications to the act's procedures, the arbitration shall extend the times set by the act for the giving of notices and setting of hearings. Awards exceeding $50,000.00 shall include the arbitrator's written reasoned opinion and, at either party's written request within 20 days after issuance of the award, shall be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial. I understand by agreeing to this binding arbitration provision, both I and the Company give up our rights to trial by jury.'" (*Little, supra,* 29 Cal.4th at pp. 1069-1070.)

5. Nelsen's arbitration agreement, like that in *Little,* is silent with respect to costs unique to the arbitration forum, such as arbitrator fees. (See *Little, supra,* 29 Cal.4th at pp. 1076-1085.) Because the employee's claim in *Little* involved nonwaivable statutory rights, the Supreme Court construed the arbitration agreement to require the employer to pay all types of costs unique to arbitration without regard to which party prevailed in the arbitration. (*Id.* at pp. 1076-1077, 1085, following *Armendariz, supra,* 24 Cal.4th at p. 113.) Since Nelsen's claims are also based on nonwaivable statutory rights, her arbitration agreement with LPI must be construed in the same fashion.

6. In reliance on *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444 [156 L.Ed.2d 414, 123 S.Ct. 2402] (*Bazzle*), the Court of Appeal in *Garcia v. DIRECTV, Inc.* (2004) 115 Cal.App.4th 297 [9 Cal.Rptr.3d 190] also held the arbitrator, not the court, must determine whether class arbitration was permitted by the arbitration agreement. As *Stolt-Nielsen* reminds us, however, *Bazzle* was only a plurality decision on that point and is not binding. (*Stolt-Nielsen, supra,* 559 U.S. at p. _____ [130 S.Ct. at p. 1772].) *Stolt-Nielsen* itself expressly declined to decide whether the court or the arbitrator must determine if there is a contractual basis for finding an intent to allow class arbitration. (*Ibid.*)

7. The agreement encompasses employment-related disputes between Nelsen and LPI or its "owners, partners, directors, officers, managers, team members, agents, related companies, and parties affiliated with its team member benefit and health plans." The common thread in all such potential disputes is that they involve the adjudication of *Nelsen's* rights or obligations, not those of other employees or groups of employees.

8. The agreement provides that all "rules of pleading" shall apply in the arbitration to the extent applicable to civil actions in California courts. The authorization for class actions, Code of Civil Procedure section 382, is not in the rules of pleading, which are found in part 2, title 6, chapter 1 of the Code of Civil Procedure, section 420 et seq. (See *Kinecta, supra,* 205 Cal.App.4th at p. 519, fn. 3 [rejecting the argument that a similar reference to the rules of pleading evidenced an intent to allow class arbitrations].)

9. The analysis in *Lewis* is representative: "Though acknowledging that *Concepcion* abrogated *Discover Bank,* Plaintiff nonetheless contends that *Gentry* remains viable because it addresses arbitration agreements contained in employment contracts, while *Concepcion* pertains to consumer contracts. *Concepcion* cannot be read so narrowly.... Like *Discover Bank, Gentry* advances a rule of enforceability that applies specifically to arbitration provisions, as opposed to a general rule of contract interpretation. As such, *Concepcion* effectively overrules *Gentry.*" (*Lewis, supra,* 818 F.Supp.2d at p. 1167.)

10. *Horton* was decided after Nelsen filed her opening brief. She cited it for the first time in her reply brief. At our request, LPI responded by letter brief to the new issues raised by Nelsen based on *Horton.*

11. The decision was rendered by two members of the Board. The third member was recused (*Horton, supra,* 357 NLRB No. 184, at p. 1, fn. 1), and two of the five positions on the Board were vacant at the time.

12. *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1082-1084 [90 Cal.Rptr.2d 334, 988 P.2d 67] (*Broughton*) held claims for injunctive relief under the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.; CLRA) designed to protect the public from deceptive business practices were not subject to arbitration. *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 [133 Cal.Rptr.2d 58, 66 P.3d 1157] (*Cruz*) extended *Broughton* to include claims to enjoin unfair competition under the UCL if relief is sought to prevent further harm to the public at large rather than merely to redress or prevent injury to a plaintiff. (*Cruz,* at pp. 315-316.)

RICHARD D. JOHNSON,
Court Administrator/Clerk

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January 31, 2020

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CASE #: 80780-3-I
Syhadley, LLC, Respondent v. Addie Smith, Appellants

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on January 31, 2020:

Before me are several motions and requests for relief, including Addie Smith's motion to allow her to proceed in forma pauperis, Smith's motion for an extension of time to perfect the record, Smith's objection to the trial court's supersedeas decision, Smith's motion to expedite her motion to modify and for clarification, Smith's renewed motion for stay, Smith's motion to consolidate, and Syhadley's motion to lift the stay. This ruling is intended to address all the currently pending motions (other than Smith's pending motion to modify). To put the motions in context, some background is helpful.

In September/October 2019, Hadley Land Owner, LLC (Syhadley, LLC) filed a complaint for unlawful detainer (King Co. No. 19-2-28674-1) alleging that tenant Addie Smith had failed to pay monthly rent of $3,011.00 or $100.37 per day and owed past-due rent of $5,066.29. On November 30, 2019, the trial court issued findings of fact that Smith owed $11,088.29, plus $100.37 per day after November 30, 2019 until possession was restored. The trial court found Smith guilty of unlawful detainer, entered judgment for Syhadley, and ordered the clerk to issue a writ of restitution. On November 22, 2019, the trial court denied reconsideration. Absent a stay, Smith was to be evicted on November 25, 2019.

On November 22, 2019, Smith filed a notice of appeal and an emergency motion to stay. On November 25, 2019, I granted a temporary stay to maintain the status quo and allow time for briefing. The parties filed briefing. On December 19, 2019, I issued a ruling that included the following:

> Under the Residential Landlord-Tenant Act, chapter 59.18 RCW, if a tenant breaches a rental agreement by failing to make timely rental payments, a landlord may commence an unlawful detainer action under chapter 59.12 RCW, which is a statutorily created proceeding that provides an expedited method of resolving the right to possession. Christensen v. Ellsworth, 162 Wn.2d 365, 370-71, 392 P.2d 827 (1964).
>
> The scope of an unlawful detainer action is narrow, limited to the question of possession and related issues such as restitution of the premises and rent. Other claims and counterclaims are generally not allowed, Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985), but the court may resolve issues necessarily related to the parties' dispute over possession. Excelsior Mort. Equity Fund, II, LLC v. Schroeder, 171 Wn. App. 333, 344, 287 P.3d 21 (2012).
>
> In her emergency motion for stay, Smith has raised issues that appear to go beyond the dispute over possession. She argues that the unlawful detainer statutes do not apply here because her occupancy of the apartment was part of her employment, citing RCW 59.18.040(8) (the following living arrangements are not intended to be governed by the provisions of this chapter: occupancy of an employee of a landlord whose right to occupy is conditioned upon employment in or about the premises). Smith previously was employed by Syhadley, but apparently was terminated. In the materials before me it is unclear when the termination occurred. At this point Syhadley has not addressed Smith's argument that the unlawful detainer procedure is unavailable. Smith also argues that as part of her employment she signed an arbitration agreement and that the dispute must go to arbitration. Again Syhadley has not yet addressed this argument.
>
> The narrow issue before me is whether the temporary stay should continue pending appeal. RCW 59.12.200 provides:
>
> > A party aggrieved by the judgment may seek appellate review of the judgment as in other civil actions: PROVIDED, That if the defendant appealing desires a stay of proceedings pending review, the defendant shall execute and file a bond, with two or more sureties to be approved by the judge, conditioned to abide by the order of the court, and to pay all rents and other damages justly accruing to the plaintiff during the pendency of the proceeding.
>
> RCW 59.12.210 further provides:
>
> > When the defendant shall appeal, and shall file a bond as provided in RCW 59.12.200, all further proceedings in the case shall be stayed until the determination of said appeal and the same has been remanded to the superior court for further proceedings therein.

> These statutes are not superseded by the RAPS. See RAP 18.22, Comment (RCW 59.12.200 affects relief available under Rules 8.1 and 8.3, and is retained). The posting of a bond entitles the tenant to be restored to and remain in the premises until the appeal is determined. Housing Authority of Pasco v. Pleasant, 126 Wn. App. 382, 390, 109 P.3d 422 (2005). A bond is required only if the tenant wants to continue to occupy the premises and the tenant seeks a stay pending review. Id.
>
> If the trial court order is to be stayed during the appeal, the statutes require that Smith post a bond. The amount of the bond is more properly addressed by the trial court in the first instance. A party may object to the trial court's decision by motion in this court under RAP 8.1(h). The temporary stay, which prevents Smith's immediate eviction, will remain in place to allow time for the parties to address the issue of the amount of the bond in the trial court.

On January 3, 2020, Smith filed a motion to modify, on January 21, 2020, Smith filed a supplement to her mmd, and on January 27, 2010, Syhadley filed an answer.

Meanwhile, on January 16, 2020, the trial court entered a supersedeas decision that required Smith to post a supersedeas bond or alternate security of cash or a certified check in the court registry in the amount of $53,631.85 by January 30, 2020.

Also on January 16, 2020, Syhadley filed a new complaint for unlawful detainer (King County No. 20-2-01335-8). The complaint alleges that Smith assaulted another tenant on November 26, 2019 and has been charged with fourth degree assault in Mercer Island; that Smith's actions violated RCW 59.18.130(8); and that Syhadley can proceed with an unlawful detainer action without serving a prelitigation notice. See RCW 59.18.180(4).

On January 27, 2020, Smith filed an objection to the trial court's supersedeas decision (see RAP 8.1(h)), along with an emergency motion for stay and other relief. On January 27, 2020, I issued a ruling that included the following:

> Late today appellant Addie Smith filed an objection to the trial court's supersedeas decision, emergency motion for stay, and for other relief. Time does not permit me to address the requests other than the following:
>
> The trial court's supersedeas decision (Judge Bowman) gives Smith until January 30, 2020 to post the supersedeas cash or bond to keep the stay pending appeal in place.
>
> In the trial court Syhadley filed a motion for an order to show cause why a writ of restitution and other relief should not be issued/awarded. This proceeding is under a new cause number. The trial court (Judge Shafer) has signed the order, and the hearing is set for tomorrow, January 28, 2020 at 9:00 a.m.
>
> The temporary stay of the earlier writ of restitution was to remain in place to allow time for the trial court to rule on the supersedeas issue and either party to file an objection in

this court. As noted above, the court gave Smith until January 30, 2020 to post the supersedeas. Smith's current motion includes her objection to the supersedeas decision.

I do not have sufficient information before me to address the hearing set for tomorrow other than to note the stay of the earlier writ of restitution and pending supersedeas issue.

Syhadley's answer to the current motion is due January 30, 2020.

On January 28, 2020, the trial court entered judgment for Syhadley on the new unlawful detainer action and ordered the clerk to issue a writ of restitution to restore possession of the apartment to Syhadley.

On January 29, 2020, Smith filed a lengthy supplement to her objection to the supersedeas decision.

On January 30, 2020, the parties filed several motions/answers:

Smith filed a "Supplement to Appellant's Notice of Appeal and Motion for Stay."

Smith filed a motion to extend the time to perfect the record.

Syhadley filed an answer to Smith's motions.

Smith filed a motion for expedited consideration of her motion to modify and for clarification.

Lastly, today, January 31, 2020, Syhadley filed a motion to lift the stay, noting that Smith had not posted the supersedeas required to stay the writ of execution pending appeal.

Smith continues to argue that this proceeding is not properly an unlawful detainer action because living in the apartment was part of her compensation. She argues, accordingly, that the statute for setting a bond in an unlawful detainer proceeding does not apply and that the trial court's supersedeas decision is in error. Smith also argues that her employment dispute (and her right to live in the apartment) are subject to binding arbitration. Smith further asserts that she has been the subject of harassment by Syhadley and other tenants, which has resulted in her developing PTSD, that opposing counsel has committed perjury, and the trial court is biased and has acted improperly. Smith asserts that she has been unemployed since August 2019, is destitute, cannot afford to post the bond, and cannot afford to move. Smith also seeks to consolidate her challenge to the second unlawful detainer proceeding with the appeal of the first one.

Syhadley argues that the proceeding is properly an unlawful detainer action, reasoning that Smith's tenancy was not conditioned on her employment; rather under the rental agreement her rent was reduced as a benefit while she was employed; that Syhadley could have fired

Smith and collected rent as agreed, but it elected to fire Smith and terminate her tenancy; and that just because its two actions occurred within a few weeks of each other does not change the fact that Smith was properly evicted. Syhadley also asserts that the two unlawful detainer proceedings are separate actions, and only the first one is on appeal so there is nothing to consolidate.

Given this history, I conclude:

Consolidation – Smith has not filed a notice of appeal challenging the second unlawful detainer proceeding, so at this point there is nothing to consolidate.

Indigency and preparation of the record – In a civil case, public funds will be expended for an appeal only if the Supreme Court orders it, and it rarely does so. If Smith wants to pursue this, she must file a motion for findings of indigency in the trial court. If the court finds her indigent, the superior court shall transmit the findings to the Supreme Court. See RAP 15.2(b), (c), (d). I will extend the time for Smith to file the designation of clerk's papers and statement of arrangements for preparation of a report of proceedings until March 6, 2020.

Supersedeas – Smith's objection to the trial court's supersedeas decision is not well taken. The amount of the supersedeas is proper under the applicable statutes. And even if there were merit to Smith's argument that the proceeding is not properly brought as an unlawful detainer under chapter 58.18, under RAP 8.1(b)(2) and 8.1(c)(2), Smith would be required to post a supersedeas cash or bond and the amount would be similar, if not more.

Stay – Smith seeks a continuation of the stay pending appeal; Syhadley seeks to have the stay lifted. As I previously ruled, the posting of a bond entitles a tenant to be restored to and remain in the premises until the appeal is determined. Housing Authority, 126 Wn. App. at 390. Under this authority, if Smith chooses to remain in the property pending appeal, she must post the supersedeas; if she does not, she cannot continue to occupy the apartment. Id.

Expedite motion to modify and clarification – Smith is entitled to a have a panel of judges consider her motion to modify my prior ruling and this ruling. The temporary stay of the writ of execution will remain in place to allow time for this. Any motion to modify this ruling is due February 5, 2020, any answer is due 5 days after service of the motion, and any reply is due 3 days after service of the answer. The motion or motions to modify will be promptly submitted to a panel of judges once the applicable dates pass.

Therefore, it is

ORDERED that the time to file the designation of clerk's papers and statement of arrangements is extended to March 6, 2020; and it is

ORDERED that Smith's objection to the trial court's supersedeas decision is denied; and it is

ORDERED that the temporary stay of the writ of execution will remain in place until further order of this court; and it is

ORDERED that any motion to modify this ruling is due February 5, 2020, any answer is due 5 days after service of the motion, and any reply is due 3 days after service of the answer.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

HCL

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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February 5, 2020

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CASE #: 80780-3-I
Syhadley, LLC, Respondent v. Addie Smith, Appellant

CASE #: 81080-4-I
Syhadley, LLC, Respondent v. Addie Smith, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on February 5, 2020, regarding Appellant's Emergency Motion for Stay:

> Both of these appeals involve unlawful detainer. In No. 80780-3-I, Addie Smith appeals a writ of restitution to remove her from the apartment she lives in on Mercer Island. The basis of the order is Smith's failure to pay rent. The trial court has entered an order requiring Smith to post a bond of $53,631.85 to stay execution of the writ pending appeal. I have issued several rulings, including denying Smith's objection to the trial court supersedeas decision. A temporary stay is in place to allow Smith to file a motion to modify, which is currently due today, February 5, 2020.
>
> Syhadley also brought a second unlawful detainer action based on Smith's recent arrest for fourth degree assault. The trial court has issued a writ of restitution to remove Smith from the apartment. The sheriff intended to execute the writ this morning. Late yesterday Smith filed a notice of appeal and an emergency motion for stay. She seeks a stay pending the upcoming hearing on the criminal proceeding. The appeal is assigned No. 81080-4-I. I granted a temporary stay to allow time to further review of the motion.
>
> I now rule as follows:
>
> In both matters, Syhadley seeks to remove Smith from the apartment, albeit on alternative bases. To simplify the appeals moving forward, review will be

consolidated. Smith's emergency motion to stay the writ of execution in No. 81080-4-I is denied.

The temporary stay of both actions will remain in place to allow Smith to file and a panel of judges to rule on the motions to modify. Smith has already filed a motion to modify my December 19, 2019 ruling, and Syhadley has filed an answer. I will extend the date for Smith's motion to modify so that all motions to modify can be considered together. Accordingly, any motion to modify my January 31, 2020 ruling and this ruling is due February 7, 2020, any answer is due 5 days after service of the motion, and any reply is due 3 days after service of the answer. The motions to modify will be submitted to a panel of judges for consideration.

Therefore, it is

ORDERED that review in No. 81080-4-I is consolidated under No. 80780-3-I; and it is

ORDERED that the temporary stays of the writs of execution will remain in place until further order of this court; and it is

ORDERED that any motion to modify my January 31, 2020 ruling and this ruling is due February 7, 2020, any answer is due 5 days after service of the motion, and any reply is due 3 days after service of the answer.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

HCL

Cc: Hon. Julie Spector
Hon. Brad Moore

RICHARD D. JOHNSON
Court Administrator/Clerk

The Court of Appeals
of the
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February 20, 2020

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CASE #: 80780-3-I
Sybadley, LLC, Respondent v. Addie Smith, Appellants

Counsel:

Please find enclosed a copy of the Order Denying Motions to Modify and to Compel Arbitration, and Lifting Temporary Stays entered in the above case today.

The order will become final unless counsel files a motion for discretionary review within thirty days from the date of this order. RAP 13.5(a).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

enclosure

HCL

Cc: Hon. Julie Spector
Hon. Brad Moore

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SYHADLEY, LLC, Respondent,	)	No. 80780-3-I consolidated with No. 81080-4-I
v.	)	ORDER DENYING MOTIONS TO MODIFY AND TO COMPEL ARBITRATION, AND LIFTING TEMPORARY STAYS
ADDIE SMITH, Appellant.	)	

Appellant Addie Smith has filed motions to modify Commissioner Neel's December 19, 2019, January 31, 2020, and February 5, 2020 rulings and has also moved to compel arbitration. We have considered the motions to modify under RAP 17.7 and have determined that they should be denied. Smith's motion to compel arbitration goes to the merits of her appeals and is denied as premature. In accordance with the commissioner's February 5, 2020 ruling leaving the temporary stays in place pending resolution of the motions to modify, the temporary stays are hereby lifted.

Now, therefore, it is hereby

ORDERED that the motions to modify and to compel arbitration are denied; and it is further

ORDERED that the temporary stays in both unlawful detainer actions are lifted.

Chun, J.

Andrus, J.

Mann, ACT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SYHADLEY, L.L.C., Respondent, v. ADDIE SMITH, Petitioner.	No. 98196-5 Court of Appeals No. 80780-3-I RULING DENYING REVIEW

Pro se petitioner Addie Smith seeks discretionary review of a decision by Division One of the Court of Appeals denying her motion to compel arbitration and lifting previously imposed stays of writs of restitution issued by the King County Superior Court in two unlawful detainer actions filed by Ms. Smith's landlord and former employer, respondent Syhadley, L.L.C., while Ms. Smith's consolidated appeals are pending. The primary disputed issue here is whether Ms. Smith should be required to post a supersedeas bond pending appeal. *See* RCW 59.12.200. On Ms. Smith's emergency motion, I stayed the writs of restitution pending expedited consideration of Ms. Smith's motion for discretionary review. The matter proceeded to oral argument by teleconference on March 26, 2020. As for Ms. Smith's pending appeal, she moved for an expenditure of public funds for purposes of pursuing that appeal, which Department One of this court denied on March 31, 2020. The instant motion for discretionary is now denied, as explained below.

Ms. Smith was employed by respondent to manage its apartment complex. She was also a resident of the complex, but her lease was not conditioned on her employment by respondent. Her compensation for managing the complex included a rent credit. Ms. Smith was an at-will employee, but her employment agreement included an arbitration clause for employee-employer disputes.

Respondent subsequently terminated Ms. Smith's employment. After her termination, Ms. Smith defaulted on her rent payments. Respondent filed an unlawful detainer action. The superior court granted a writ of restitution, concluding that Ms. Smith owed over $11,000 in unpaid rent, and awarded respondent reasonable costs and attorney fees. Ms. Smith then appealed. While the appeal was pending, Ms. Smith was arrested and charged with assaulting another tenant, which led to a second unlawful detainer action resulting in judgment in favor of respondent. Ms. Smith appealed the second unlawful detainer judgment, and the Court of Appeals consolidated the cases.

Ms. Smith now has two writs of restitution entered against her. The superior court set a supersedeas bond amount of $53,631.85 to stay execution of the writs pending appeal. Ms. Smith challenged the supersedeas decision by way of a motion for discretionary review. Ms. Smith also moved to compel arbitration.

Commissioner Mary Neel entered multiple rulings denying relief on the supersedeas issue but maintaining a temporary stay of the writs of restitution pending Ms. Smith's motions to modify her rulings. A panel of judges denied Ms. Smith's motion to compel arbitration as premature, denied her motions to modify the commissioner's rulings, and lifted the temporary stays. RAP 17.7. Ms. Smith now seeks discretionary review in this court. RAP 13.3(a)(2), (c), (e); RAP 13.5(a). She also moved for accelerated consideration and an emergency stay. As indicated, I stayed the writs of restitution pending resolution of the instant matter in this court. I further

directed that the motion for discretionary review be placed on my earliest available motion calendar, but Ms. Smith's motion for oral argument caused some delay.

As a preliminary matter, a few days before oral argument, Ms. Smith, who had asked for accelerated consideration, filed a motion to continue oral argument pending further development of her appeal. I denied that motion, and Ms. Smith has moved to modify that ruling. Ms. Smith also moved for me to recuse myself, claiming I am prejudiced against her. There is no persuasive basis for my recusal or disqualification. I have never participated in a previous proceeding involving Ms. Smith, and I have never met her, apart from a fleeting but cordial telephone conversation a few weeks ago, where I merely directed Ms. Smith to the clerk's office to answer her questions about setting up a telephonic hearing. As I explained to Ms. Smith at oral argument, I denied the motion to continue the hearing because I believed it was very important to hear her views on this matter. I further assured her that it was my determination to decide this matter solely on the briefing, the applicable legal authorities, and the record, and that I would not rule on the matter immediately in light of her then pending motion for an expenditure of public funds, which this court has since denied. I denied the recusal motion orally at the teleconference hearing and do so again in this ruling.

Moving on, to obtain discretionary review in this court, Ms. Smith must demonstrate that the Court of Appeals committed obvious error that renders further proceedings useless; or that it committed probable error that substantially alters the status quo or that substantially limited a party's freedom to act; or that the Court of Appeals departed so far from the accepted and usual course of judicial proceedings, or so sanctioned such a departure by the superior court, as to justify this court exercising its revisory jurisdiction over this matter. RAP 13.5(b). Ms. Smith contends that the Court of Appeals committed probable error within the meaning of RAP 13.5(b)(2) and

that it departed from the accepted and usual course of judicial proceedings under RAP 13.5(b)(3).

Ms. Smith first contends that the Court of Appeals erred in declining to consider her motion to compel arbitration as premature. She relatedly argues that the superior court did not rule on her motion to compel arbitration. The Court of Appeals stated that the motion to compel arbitration went to the merits of her appeal. The issue properly before the Court of Appeals at that moment was Ms. Smith's motion to modify the commissioner's rulings as they pertained to Ms. Smith's requirement to file a supersedeas bond. RAP 17.7. The Court of Appeals committed no error, either obviously or probably, in declining to consider a matter not properly before it in relation to a motion to modify.

Ms. Smith further asserts that the Court of Appeals erroneously denied her challenges to the supersedeas amounts set by the superior court and claims that she was exempt from supersedeas as respondent's employee. It seems one of Ms. Smith's primary theories is that she is not subject to an unlawful detainer action because this is essentially an employee-employer dispute. In other words, it is Ms. Smith's position that she's not a tenant but rather an employee who seeks to arbitrate her termination. But the employment related documents in the record show that Ms. Smith's apartment lease was not conditioned on her employment by respondent. *See* RCW 59.18.040(8) (unlawful detainer statute does not apply where tenant's right to occupy premises conditioned on tenant's employment by landlord). Her rent was covered as part of her compensation package while she was employed as apartment manager, but once that relationship ended, she had to start paying rent directly out of her own pocket. This is a relatively straightforward unlawful detainer case. Ms. Smith was the losing party in that matter and is now subject to two writs of restitution. She was required to post a supersedeas bond to stay execution of the writs pending appeal. RCW 59.12.200, .210.

Ms. Smith alleges she is the victim of racially motivated violence, particularly by other apartment tenants. This claim causes me concern; however, other claims and counterclaims are generally not allowed in unlawful detainer proceedings unless they are necessarily related to the right of possession of the premises. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); *Excelsior Mortg. Equity Fund, II, LLC v. Schroeder*, 171 Wn. App. 333, 344, 287 P.3d 21 (2012). Ms. Smith has not made that showing. She must seek some other way to obtain relief from the alleged racially motivated acts against her.

Ms. Smith contends that the Court of Appeals erred in lifting the stay of the writs of restitution. That issue alone does not warrant review. Besides, the stay has been maintained while the instant motion for discretionary review was considered.

But even if the Court of Appeals committed probable error (which need not be decided), Ms. Smith cannot show a substantial change in the status quo or a substantial limitation on her freedom to act for purposes of that rule. The rule does not apply if the decision merely alters the status quo of litigation or affects a party's freedom to act in relation to that litigation. *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014), *review denied*, 182 Wn.2d 1008 (2015). The Court of Appeals decision affects the status of the unlawful detainer action only pending Ms. Smith's appeal.

Ms. Smith also complains that the Court of Appeals departed from the accepted and usual course of judicial proceeding by failing to sanction opposing counsel for perjury. RAP 13.5(b)(3). This appears to be part of Ms. Smith's unfortunate tendency to make personal attacks on judges and lawyers who displease her. There is no apparent factual basis for these assertions. There is no indication of a reviewable departure from the accepted and usual course of judicial proceedings.

In sum, Ms. Smith fails to show the existence of grounds justifying this court's interlocutory review under RAP 13.5(b). The motion for discretionary review is

therefore denied. The current stay of the writs of restitution will be maintained until expiration of the time for filing a motion to modify this ruling, or if such motion is filed, until further order of this court. The parties are also reminded that further action to effectuate Ms. Smith's eviction may be subject to restrictions imposed in light of the ongoing COVID-19 emergency.

Michael E. Johnston
COMMISSIONER

April 9, 2020

THE SUPREME COURT OF WASHINGTON

SYHADLEY, LLC,	)	No. 98196-5
Respondent,	)	**ORDER**
v.	)	Court of Appeals No. 80780-3-I
ADDIE SMITH,	)	(consolidated with No. 81080-4-I)
Petitioner.	)	

Department I of the Court, composed of Chief Justice Stephens and Justices Johnson, Owens, Gordon McCloud and Montoya-Lewis (Justice González sat for Justice Johnson), considered this matter at its July 7, 2020, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's motion to modify the Commissioner's ruling is denied. The Respondent's motion for an order requiring the Appellant to provide a transcript of the oral argument before the Commissioner is also denied. Further, the stay imposed in the Supreme Court Commissioner's April 9, 2020, ruling is now lifted.

DATED at Olympia, Washington, this 8th day of July, 2020.

For the Court

Stephens, C. J.
CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STEVEN BURNETT, individually and on behalf of all others similarly situated, Respondents, v. PAGLIACCI PIZZA, INC., a Washington corporation, Petitioner.	No. 97429-2 En Banc Filed August 20, 2020

MADSEN, J.—This case has its genesis in a putative class action alleging wage and hour claims by delivery drivers against their employer, Pagliacci Pizza Inc. At issue on interlocutory review is whether the trial court sustainably denied the employer's motion to compel arbitration. The Court of Appeals affirmed, determining that the mandatory arbitration policy contained in the employee handbook, which was provided to the named plaintiff after he signed the employment relationship agreement, was procedurally and substantively unconscionable and, thus, unenforceable. For the reasons discussed below, we affirm the denial of the motion to compel arbitration.

FACTS

After two interviews, Pagliacci Pizza hired Steven Burnett as a delivery driver. Burnett attended a mandatory new employee orientation at a local Pagliacci Pizza location on October 16, 2015 that lasted between 40 minutes and an hour. During the orientation, Pagliacci gave Burnett multiple forms and told him to sign them so that he could start working. One of the forms that Burnett signed was a one-page "Employee Relationship Agreement" (ERA).

The ERA does not mention arbitration. Instead, it contains a section entitled "Inconsistencies in Hours/Pay/Breaks" that instructs employees to "promptly inform Human Resources" if they have concerns about breaks, pay, hours, or benefits. Clerk's Papers (CP) at 58. It says nothing about arbitration of disputes.

A section of the ERA, entitled "Accountability," addresses employee till shortages and employee failure to return "non-cash property of Pagliacci Pizza." *Id.* It authorizes Pagliacci to deduct directly from an employee's pay the amount of any till shortage, money the employee otherwise owes to Pagliacci, or the cost of any noncash property.

Pagliacci's "Mandatory Arbitration Policy" (MAP) is printed in Pagliacci's employee handbook, "Little Book of Answers." CP at 60-73. Little Book of Answers is a 23-page booklet in which Pagliacci's MAP appears on page 18. The MAP is not listed in the handbook's table of contents, and page 18 falls within the "Mutual Fairness Benefits" section. CP at 62.

Burnett was given a copy of Little Book of Answers during his orientation and told to read it at home. Consistent with that instruction, the ERA contains a section

entitled "Rules and Policies." CP at 58. It provides, "On your own initiative you will learn and comply with the rules and policies outlined in our Little Book of Answers, including those that relate to positive attitude, public safety, company funds, tips and FAIR policy." *Id.* It also says that Pagliacci "will on occasion" change the policies and procedures contained in Little Book of Answers. *Id.*

The MAP contained in the handbook states, in full:

> The company has a mandatory arbitration policy with which *you* must comply for the binding resolution of disputes without lawsuits. If *you* believe *you* have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of *your* employment was wrongful, *you* submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, *you* then submit the dispute to binding arbitration before a neutral arbitrator pursuant the Washington Arbitration Act.

CP at 71 (emphasis added). As can be seen, the MAP provides that the employee must submit disputes "to resolution in accordance with the F.A.I.R. Policy" before commencing arbitration. *Id.*

The "F.A.I.R. Policy," which is also contained in the handbook, is an informal multistep process that utilizes "supervisor review" and "conciliation." CP at 70. The opening paragraph of the F.A.I.R. Policy states:

> F.A.I.R. stands for Fair and Amicable Internal Resolution. If you believe you have been treated unfairly in any way in your employment at Pagliacci Pizza (i.e., in the application of its rules and policies to you, not in the content of the rules and policies themselves), or if you believe the content of any of the rules or policies to be unlawful, or if you believe any of your rights have been violated, or if you believe you have been harassed, discriminated against or wrongfully terminated as described in the Pagliacci Pizza Arbitration Policy or the Pagliacci Pizza Unlawful Harassment Policy, you will use the steps and procedures of the F.A.I.R. Policy to

> attempt in good faith to resolve the dispute to the mutual satisfaction of you and Pagliacci Pizza without arbitration.

Id. The F.A.I.R. Policy then directs:

> 1ST STEP – SUPERVISOR REVIEW
>
> Informally report the matter and all details to your supervisor who will discuss the matter with you.
>
> 2ND STEP – CONCILIATION
>
> If Supervisor Review does not resolve the matter to your satisfaction, you may initiate non-binding Conciliation. The F.A.I.R. Administrator will designate a responsible person at Pagliacci Pizza (who may be its owner) to meet face-to-face with you in a non-binding Conciliation.

Id. The F.A.I.R. Policy then provides a "Limitations on Actions" section, stating:

> You may not commence an arbitration of a claim that is covered by the Pagliacci Pizza Arbitration Policy or commence a lawsuit on a claim that is not covered by the Pagliacci Pizza Arbitration Policy unless you have first submitted the claim for resolution in conformity with the F.A.I.R. Policy and fully complied with the steps and procedures in the F.A.I.R. Policy. If you do not comply with a step, rule, or procedure in the F.A.I.R. Policy with respect to a claim, you waive any right to raise the claim in any court or other forum, including arbitration. The limitations set forth in this paragraph shall not be subject to tolling, equitable or otherwise.

Id.

Pagliacci terminated Burnett on June 22, 2017. On October 20, 2017, Burnett filed a putative class action complaint alleging various wage related claims. Pagliacci moved to compel arbitration under its MAP contained in Little Book of Answers.

Burnett opposed Pagliacci's motion to compel arbitration, arguing that the MAP was both procedurally and substantively unconscionable. The trial court denied Pagliacci's motion to compel arbitration. In its oral ruling, the court expressed its concerns regarding both procedural and substantive unconscionability but declined to

reach those issues and instead ruled that the arbitration provision contained in the handbook was not incorporated into the ERA. Pagliacci moved for reconsideration, which the trial court denied.

Pagliacci appealed, and the Court of Appeals affirmed. *Burnett v. Pagliacci Pizza, Inc.*, 9 Wn. App. 2d 192, 442 P.3d 1267 (2019). The Court of Appeals agreed with Pagliacci that the trial court erred in concluding the MAP was not incorporated into the ERA and consequently there was no agreement to arbitrate. Nevertheless, the Court of Appeals ruled that because Burnett did not have a reasonable opportunity to review the arbitration policy before he was required to sign the ERA, the circumstances surrounding the formation of the parties' agreement to arbitrate were procedurally unconscionable. The court further held that the MAP is substantively unconscionable because certain prerequisites to arbitration required by the policy unreasonably favor Pagliacci by limiting employees' access to substantive remedies and discouraging them from pursuing valid claims. Pagliacci petitioned for and was granted this court's review. *Burnett v. Pagliacci Pizza, Inc.*, 194 Wn.2d 1001 (2019).

ANALYSIS

Standard of Review

Washington policy favors arbitration. RCW 7.04A.060; *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d 773 (2004). This policy does not, however, lessen the court's responsibility to determine whether the arbitration contract is valid. *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 53, 308 P.3d 635 (2013). The agreement to arbitrate is a contract, the validity of which courts review absent a clear agreement to not do so.

Id. Whether or not a contract is unconscionable is a preliminary question for judicial consideration. *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 740, 349 P.3d 32 (2015).

A reviewing court reviews de novo a trial court's decision to compel or deny arbitration. *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 602, 293 P.3d 1197 (2013); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009). The burden of demonstrating that an arbitration agreement is not enforceable is on the party opposing the arbitration. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004).

Assent to Arbitration

As a threshold matter, Burnett argues that because he had no notice of the MAP when he signed the ERA, he never assented to the MAP and "[t]his alone is a basis for affirming the trial court." Resp't's Suppl. Br. at 9. We agree.

Pagliacci's MAP contains a choice of law provision that expressly selects "the Washington Arbitration Act."[1] CP at 71. The Washington arbitration act requires courts to determine whether there is an agreement to arbitrate and, if so, whether it is enforceable. *See Saleemi v. Doctor's Assocs.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013) (courts "determine the threshold matter of whether an arbitration clause is valid and

[1] Although the Washington arbitration act "does not apply to any arbitration agreement between employers and employees," RCW 7.04A.030(4), an employer and employee may select the Washington arbitration act as the governing law in an agreement to arbitrate. *See Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wn. App. 778, 783, 812 P.2d 500 (1991) (so holding, addressing the equivalent provision under the prior act).

enforceable"). "If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate."[2] RCW 7.04A.070(2).

Arbitration agreements stand on equal footing with other contracts and may be invalidated by "[g]eneral contract defenses such as unconscionability." *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008); *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, ___ U.S. ___, 137 S. Ct. 1421, 1426, 197 L. Ed. 2d 806 (2017) (court may invalidate arbitration clause based on generally applicable contract defenses like fraud or unconscionability); *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (same).

"Mutual assent is required for the formation of a valid contract. 'It is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time.'" *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993) (quoting *Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 555-56, 608 P.2d 266 (1980)). This rule applies to the formation of an arbitration agreement just as it does to the formation of any other contract. "While a strong public policy favoring arbitration is recognized under both federal and Washington law, 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'"

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[2] The same would be true if the Federal Arbitration Act, 9 U.S.C. §§ 1-16, were applicable. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) ("a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute,*" and the court must resolve any issues over "whether the clause was agreed to").

Satomi Owners Ass'n, 167 Wn.2d at 810 (internal quotation marks and citations omitted) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)); *Woodall v. Avalon Care Ctr.–Federal Way, LLC*, 155 Wn. App. 919, 934-35, 231 P.3d 1252 (2010) ("As an important policy of contract, one who has not agreed to arbitrate cannot generally be required to do so."); *Lamps Plus, Inc. v. Varela*, ___ U.S. ___, 139 S. Ct. 1407, 1415, 203 L. Ed. 2d 636 (2019) ("'[T]he first principle that underscores all of our arbitration decisions' is that '[a]rbitration is strictly a matter of consent.'" (alterations in original) (quoting *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010))).

Here, the trial court found "there is no agreement to arbitrate" between Burnett and Pagliacci. CP at 227. The trial court explained in part that a reasonable person could not find that Burnett had agreed to arbitration by signing the ERA, given the ERA's failure to mention arbitration and because the terms of the handbook directly contradict the ERA's language about hours, pay, and breaks, as to what an employee is supposed to do and is agreeing to do. The trial court correctly determined that if an arbitration clause is not agreed to by both sides, "then it's not binding." Verbatim Transcript of Proceedings at 24.

The Court of Appeals acknowledged the trial court's concerns, expressing skepticism that "under the circumstances presented here, Burnett [had] effectively waived any statutorily conferred right to maintain a civil action." *Burnett*, 9 Wn. App. 2d at 212. The Court of Appeals explained, "Burnett did not have a reasonable opportunity to understand that he was agreeing to arbitrate—much less to understand the types of claims

he was agreeing to arbitrate or to intentionally and voluntarily relinquish his right to pursue those claims in court." *Id.* Nevertheless, the Court of Appeals concluded "that an agreement to arbitrate exists here" because Little Book of Answers was incorporated by reference into the ERA. *Id.* at 201.

Burnett effectively argues that this conclusion is error. The Court of Appeals recognized that incorporation by reference does not, in itself, establish mutual assent to the terms being incorporated. *Id.* at 200. "'[I]t must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.'" *Id.* (alteration in original) (internal quotation marks omitted) (quoting *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494-95, 7 P.3d 861 (2000)). Even if the Court of Appeals is correct that the mention of the handbook in the ERA effectively incorporates the handbook by reference into the ERA, that does not mean there was an effective arbitration *agreement* between Burnett and Pagliacci. Burnett still had no knowledge of the arbitration provision terms when he signed the ERA. While the arbitration provision existed in the handbook when Burnett signed the ERA, Burnett still had no knowledge of it as he was expected to read the handbook later, on his own time. *See Weiss v. Lonnquist*, 153 Wn. App. 502, 511, 224 P.3d 787 (2009) (under Washington law, for a contract to exist there must be mutual assent to its essential terms).

Mutual assent is gleaned from outward manifestations and circumstances surrounding the transaction. *Id.* The Court of Appeals held, "[T]here is no evidence in the record that Burnett had a reasonable opportunity to understand the terms contained in the Little Book—and specifically the mandatory arbitration policy—before he signed the

ERA." *Burnett*, 9 Wn. App. 2d at 204. "Instead, the record reflects that Burnett was not afforded an opportunity to review the Little Book before signing the ERA." *Id.* Because Burnett lacked knowledge of the incorporated terms, he never assented to the MAP.

As Amicus Washington Employment Lawyers Association (WELA) notes, an arbitration provision included in an employee handbook is enforceable only if the employee is given explicit notice about such provision. *See* Amicus Br. of WELA at 12 (citing *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013), for the proposition that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that he has not agreed so to submit). WELA points to *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997), in which the Ninth Circuit addressed the efficacy of an arbitration clause contained in a handbook under circumstances similar to this case. The court noted that when the employee was given a copy of the revised employee handbook, he "signed an acknowledgment of receipt," but "[n]othing in that acknowledgment notified Nelson either that the Handbook contained an arbitration clause or that his acceptance of the Handbook constituted a waiver of his right to a judicial forum in which to resolve claims covered by the ADA [(Americans with Disabilities Act)]." *Id.* at 761. "Merely signing the form did not in any way constitute a 'knowing agreement to arbitrate,' and thereby to surrender his statutory right to a judicial forum." *Id.*

The Ninth Circuit further concluded that "Nelson's continued employment after he received the Handbook, and after he read it (and we assume he did), did not amount to [a] 'knowing agreement.'" *Id.* at 762. That was so because "[n]othing in either the

acknowledgment form or the Handbook itself put Nelson on notice that by not quitting his job he was somehow entering into an agreement to waive a specific statutory remedy afforded him by a civil rights statute." *Id.* "Any bargain to waive the right to a judicial forum for civil rights claims, including those covered by the ADA, in exchange for employment or continued employment *must at the least be express*: the choice *must be explicitly presented to the employee* and the *employee must explicitly agree* to waive the specific right in question." *Id.* (emphasis added).

In answer to WELA, Pagliacci Pizza summarily dismisses *Nelson* as an "old" and "inapposite" case, relying instead on *Adler* for the proposition that a person who knowingly and voluntarily agrees to arbitration implicitly waives the right to a jury trial by agreeing to the alternate forum of arbitration. *See* Pet'r's Resp. to Amicus Br. of WELA at 8-9 (citing *Adler*, 153 Wn.2d at 337). But that is precisely the point, Burnett, like the employee in *Nelson*, did not agree to arbitrate. In such circumstance, the *Nelson* court concluded that "the unilateral promulgation by an employer of arbitration provisions in an Employee Handbook does not constitute a 'knowing agreement' on the part of an employee to waive a statutory remedy." 119 F.3d at 762. "[T]he right to a judicial forum is not waived even though the Handbook is furnished to the employee and the employee acknowledges its receipt and agrees to read and understand its contents." *Id.* "[T]he right is not waived even when the employee performs his obligations by

commencing or continuing to do his assigned work and accepting a paycheck in return." *Id.*[3]

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[3] Under *Nelson*, the fact that Burnett delivered pizzas after signing the ERA, and was paid for doing so, did not render the arbitration provision contained in Little Book of Answers a "knowing agreement." *Nelson*, 119 F.3d at 762. As noted, the waiver of a judicial forum via an arbitration provision "must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question." *Id.*; *see also id.* 762 n.12 (noting that "the 'knowing waiver' standard" is the "controlling law" in the Ninth Circuit). "'[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Granite Rock*, 561 U.S. at 301 n.8 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)). While "contract law defines formation as acceptance of an offer on specified terms," *id.* at 304 n.11, "[t]he test for arbitrability remains whether the parties consented to arbitrate the dispute in question." *Id.*; *see also Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1156 (9th Cir. 1998) (where employer did not explicitly present the arbitration agreement to the new employee, and the employee did not explicitly accept the agreement, employee did not knowingly enter into an agreement to arbitrate; that is, no arbitration agreement was formed); *Trumbull v. Century Mktg. Corp.*, 12 F. Supp. 2d 683, 687 (N.D. Ohio 1998) (relying on *Nelson* in denying motion to compel arbitration because "there is no reference to the [arbitration] clause or its significance in the acknowledgment plaintiff was asked to sign" and "[a]ccordingly, it cannot be concluded that there was a knowing waiver of the right to a judicial forum, nor can it be concluded that plaintiff, or any ordinary person, would contemplate that such an important legal right was at issue"); *cf. Bailey v. Fed. Nat'l Mortg. Ass'n*, 341 U.S. App. D.C. 112, 209 F.3d 740, 741 (2000) (where new arbitration provision was unilaterally imposed on existing employee who continued to work, there was no meeting of minds and, thus, no arbitration agreement to enforce). In *Ramirez-De-Arellano v. Am. Airlines, Inc.*, 133 F.3d 89 (1st Cir. 1997), the First Circuit Court of Appeals noted "the existence of a strong federal policy favoring arbitration," but nevertheless acknowledged that "the threshold question for review must always be whether the agreement to arbitrate was, indeed, voluntary and intentional." *Id.* at 90 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). The First Circuit quoted *Nelson* with approval for the proposition that "'[a]ny bargain to waive the right to a judicial forum . . . in exchange for employment or continued employment, must at least be express: the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question.'" *Id.* at 91 n.2 (quoting *Nelson*, 119 F.3d at 762).

Further, performance of job duties by Burnett here could not substitute for the required consent and agreement to arbitrate, *see Granite Rock*, 561 U.S. at 301 n.8, 304 n.11; *Nelson*, 119 F.3d at 762, particularly where, as the trial court found, the ERA that Burnett signed did not mention arbitration and the terms of Little Book of Answers contradicted the ERA's language about hours, pay, and breaks as to what an employee was supposed to do concerning disputes. *See P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 207, 289 P.3d 638 (2012) (contract formation requires an objective manifestation of mutual assent of both parties and the terms assented to

Pagliacci's asserts, based on *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991), that an employer can impose an arbitration agreement by unilaterally including it in an employee handbook. But *Gaglidari* does not support that notion. In *Gaglidari*, this court acknowledged that "[a]n employer may unilaterally amend or revoke policies and procedures established in an employee handbook." *Id.* at 434. "However, an employer's unilateral change in policy will not be effective until employees receive reasonable notice of the change." *Id.* This court explained that this "reasonable notice rule" is warranted "because it is unfair to place the burden of discovering policy changes on the employee. While the employee is bound by unilateral acts of the employer, it is incumbent upon the employer to inform employees of its actions." *Id.* at 435. *Gaglidari* did not address arbitration, it concerned alteration of the at-will employment relationship based on the employer's policy of progressive discipline as stated in the employee handbook. That is, the case addressed the employer's obligations that were voluntarily undertaken concerning progressive discipline as expressed in the handbook. That has nothing to do with arbitration. *See Satomi Owners Ass'n*, 167 Wn.2d at 810-11 (arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he has not agreed so to submit). As the Court of Appeals noted, "Pagliacci cites no Washington authority holding that an employer can foist an arbitration agreement on an employee simply by including an

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must be sufficiently definite); *id.* at 209 (a valid contract requires the parties to objectively manifest their mutual assent to all material terms of the agreement).

arbitration clause in an employee handbook that is provided to the employee." *Burnett*, 9 Wn. App. 2d at 208.[4]

Procedural Unconscionability

Burnett argues that even if he is deemed to have agreed to arbitration by virtue of being given the company handbook, the arbitration agreement is both procedurally and substantively unconscionable and, thus, unenforceable in any event.

Washington recognizes two types of unconscionability for invalidating arbitration agreements, procedural and substantive. *McKee*, 164 Wn.2d at 396. Procedural unconscionability applies to impropriety during the formation of the contract; substantive unconscionability applies to cases where a term in the contract is alleged to be one-sided or overly harsh. *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995). Either is sufficient to void the agreement. *Hill*, 179 Wn.2d at 55.

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[4] Amicus Washington State Association for Justice Foundation (WAJF) adds that Pagliacci's arbitration clause was likely also unenforceable because it constituted an illusory promise. *See* Br. of Amicus WAJF at 14 n.5. This is so because in the ERA, Pagliacci expressly reserved the right to unilaterally modify all terms in Little Book of Answers, stating, "We will on occasion change the policies and procedures contained in this employee handbook." CP at 58. Generally, courts have refused to enforce arbitration clauses as illusory promises to arbitrate where the agreement allows one party to unilaterally modify the arbitration agreement. *See, e.g.*, *Salazar v. Citadel Commc'ns Corp.*, 2004-NMSC-013, ¶ 11, 135 N.M. 447, 450-51, 90 P.3d 466, 469-70 (holding that where the employer "retained the authority to unilaterally modify both the arbitration section of the Handbook and the annexed Agreement to Arbitrate," the arbitration agreement was "illusory and unenforceable"); *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205-06 (5th Cir. 2012) (where employer reserved the "'right to revise, delete, and add to the employee handbook,'" arbitration clause was an unenforceable illusory promise); *Canales v. Univ. of Phoenix, Inc.*, 854 F. Supp. 2d 119, 124-25 (D. Me. 2012) (collecting cases so noting). While we do not disagree with WAJF, we need not reach this issue to resolve this case. This court need not decide every issue raised, but only those that are dispositive of the case. *See Cazzanigi v. Gen. Elec. Credit Corp.*, 132 Wn.2d 433, 435, 938 P.2d 819 (1997) ("Although numerous issues are raised, we find that two issues are dispositive of Plaintiffs' claims and, accordingly, do not reach the remaining issues.").

To determine whether an agreement is procedurally unconscionable, we examine the circumstances surrounding the transaction, including (1) the manner in which the contract was entered, (2) whether Burnett had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print, to determine whether a party lacked a meaningful choice. *See Nelson*, 127 Wn.2d at 131; *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975); *Zuver*, 153 Wn.2d at 304.

A contract is "procedurally unconscionable" when a party with unequal bargaining power lacks a meaningful opportunity to bargain, thus making the end result an adhesion contract. *Adler*, 153 Wn.2d at 348. The fact that a contract is an adhesion contract is relevant but not determinative. *Zuver*, 153 Wn.2d at 306-07. An adhesion contract is not necessarily procedurally unconscionable. *Adler*, 153 Wn.2d at 348. The key inquiry is whether the party lacked meaningful choice. *Zuver*, 153 Wn.2d at 305.

Here, the Court of Appeals held that the circumstances surrounding the formation of the parties' arbitration agreement were procedurally unconscionable. *Burnett*, 9 Wn. App. 2d at 202. The Court of Appeals relied on *Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 238 P.3d 505 (2010). *See Burnett*, 9 Wn. App. 2d at 203-05. But that case did not concern arbitration, it concerned a home buyer's additional warranty, which Division Two of the Court of Appeals found procedurally unconscionable. *Mattingly*, 157 Wn. App. at 392. *Mattingly* is distinguishable on the key point that the homebuyer acknowledged the warranty, signed an application for it at closing, and expressly acknowledged that he had read and understood it (even though he had not). In *Mattingly*,

the homebuyer overtly entered into the warranty contract. The problem in *Mattingly* was that the homebuyer did not actually know the terms contained in the warranty, which he had applied for and received, believing that it would provide additional protection when it actually limited his remedies. *Id.* at 383. By contrast, as discussed above, Burnett had no notice and was unaware of the existence of the MAP when he signed the ERA. While there are some similarities in the cases, i.e., neither the homebuyer nor Burnett received and read relevant documents before signing contracts, the key distinction is that the homebuyer in *Mattingly* overtly embraced the warranty, while Burnett was unaware of the arbitration provision in the handbook when he signed the ERA.

Division Two in *Mattingly* held that the "circumstances surrounding the . . . warranty agreement's formation" rendered the warranty procedurally unconscionable and unenforceable. *Id.* at 392. The court noted that the homebuyer did not receive a copy of the warranty booklet before closing and when he did receive the booklet (after moving into the house), the warranty's limiting provisions appeared on page 7 of the 32-page booklet. *Id.* at 391-92.

Relying on *Mattingly*, the Court of Appeals here stated:

> [A]s in *Mattingly*, the circumstances surrounding the formation of the parties' arbitration agreement are suspect. As in *Mattingly*, there is no evidence in the record that Burnett had a reasonable opportunity to understand the terms contained in the Little Book—and specifically the mandatory arbitration policy—before he signed the ERA. Instead, the record reflects that Burnett was not afforded an opportunity to review the Little Book before signing the ERA: Burnett testified that he was told to sign the ERA to begin work and instructed to read the Little Book at home. Furthermore, like the warranty limitations in *Mattingly*, Pagliacci's mandatory arbitration policy is buried in a booklet: although it is written in plain English, it appears on page 18 of the 23-page Little Book, in the same

> font size and with the same formatting as surrounding sections. For these reasons, we conclude that Burnett lacked meaningful choice in *agreeing* to arbitrate and thus the circumstances surrounding the formation of *the parties' arbitration agreement* were procedurally unconscionable.

Burnett, 9 Wn. App. 2d at 204-205 (emphasis added). Here, while some of the listed facts appear to meet the procedural unconscionability circumstances noted above, such as hidden terms and lack of reasonable opportunity to review terms, *see Zuver*, 152 Wn.2d at 304, the material difference in the two cases is that in Burnett's case he had no knowledge or notice that Pagliacci's MAP even existed when he signed the ERA. Thus, he *never agreed* to arbitrate. In this circumstance, the fact that "Burnett was not afforded an opportunity to review the Little Book before signing the ERA," *Burnett*, 9 Wn. App. 2d at 204, speaks primarily to the issue of contract formation rather than to unconscionability of an existing arbitration contract.

Nevertheless, even assuming a valid agreement was formed, the facts here show that Burnett "lacked meaningful choice," which is the key inquiry for finding procedural unconscionability. *Zuver*, 153 Wn.2d at 305. As noted, the employment agreement that Burnett signed did not mention arbitration, Pagliacci's arbitration policy appeared on page 18 of the 23-page handbook that Burnett received *after* he signed the employment agreement, and the arbitration policy was not identified in the handbook's table of contents. Because essential terms were hidden and Burnett had no reasonable opportunity to understand the arbitration policy before signing the employment contract, the manner in which the contract was entered demonstrated that Burnett lacked a meaningful choice regarding the arbitration policy. Because these facts satisfy the

criteria articulated in *Zuver*, *see* 153 Wn.2d at 304, we hold that even *if* an arbitration agreement was indeed established, it was procedurally unconscionable and unenforceable.

Substantive Unconscionability

The Court of Appeals determined that "the effect of Pagliacci's two-step mandatory arbitration policy is 'so one-sided and harsh that it is substantively unconscionable.'" *Burnett*, 9 Wn. App. 2d at 218 (quoting *Zuver*, 153 Wn.2d at 318). We agree.

Substantive unconscionability exists when a provision in the contract is one-sided. *Adler*, 153 Wn.2d at 344. In determining if a contractual provision is one-sided or overly harsh, courts have considered whether the provision is shocking to the conscience, monstrously harsh, and exceedingly calloused. *Id.* at 344-45; *see Nelson*, 127 Wn.2d at 131.

Here, Pagliacci's handbook required employees to submit their claims to arbitration. The handbook also provided that employees were required to first submit any such claims to Pagliacci's F.A.I.R. Policy before pursuing arbitration. F.A.I.R. Policy required employees to first report the matter to a supervisor, and if that did not resolve the matter, the "F.A.I.R. Administrator" would designate a person at Pagliacci to meet with the employee. CP at 70. If the employee did not follow the F.A.I.R. procedure, the employee "waive[d] any right to raise the claim in any court or other forum, including arbitration." *Id.* Compliance with the noted F.A.I.R. Policy procedures and limitations "shall not be subject to tolling, equitable or otherwise." *Id.* The Court of Appeals found

these procedures substantively unconscionable because they (1) operate as a complete bar as to terminated employees because they have no way to report the matter to a supervisor, (2) shorten the statute of limitations for any employee because the procedures do not toll the statute of limitations (and the time for completing the procedures is completely within the Pagliacci's control), and (3) provide no exception to the requirement for supervisor review where a supervisor is the person subjecting the employee to unfair treatment. *See Burnett*, 9 Wn. App. 2d at 214-17. Because the F.A.I.R. Policy provided unfair advantages to Pagliacci and because full compliance with F.A.I.R Policy procedures is a prerequisite to arbitration, the Court of Appeals correctly held that the limitations provision in the F.A.I.R. Policy renders the MAP substantively unconscionable. *Id.* at 217.

Pagliacci cites *Zuver*, 153 Wn.2d at 312, for the proposition that the F.A.I.R. procedures cannot void the arbitration agreement "based on hypothetical outcomes that did not occur." *See* Suppl. Br. of Pet'r at 13, 16. But Pagliacci misconstrues *Zuver*. There, the plaintiff brought a discrimination claim that entitled her to an award of fees if she prevailed. The arbitration clause provided the prevailing party "may be entitled to receive reasonable attorney fees." *Zuver*, 153 Wn.2d at 310 (emphasis and internal quotation marks omitted). This court held the attorney fee provision was not substantively unconscionable because it would be speculative to assume the arbitrator would ignore controlling law and fail to award the plaintiff fees if she prevailed in arbitration. *See id.* at 312.

Here, there is nothing speculative about the effect of Pagliacci's requirement that its employees follow the F.A.I.R. Policy procedures prior to pursuing arbitration and that the statute of limitations would not toll during the time that it takes to pursue the F.A.I.R. procedures. F.A.I.R. provides that it is mandatory that Pagliacci's employees follow the F A.I.R. procedures, and failure to comply results in a waiver of the right to raise their claims in any court or in arbitration.

Further, Pagliacci argues, "The only reasonable interpretation here is that the F.A.I.R. Policy applies to current employees for whom they have a supervisor to report." Suppl. Br. of Pet'r at 16. But that contention is belied by the plain language of the F.A.I.R Policy, which by its express terms applies to persons who believe they have been "wrongfully terminated." CP at 70.

Amicus Public Justice P.C. argues in support of Burnett's view that by effectively requiring Burnett to bring his claims in arbitration and not so limiting Pagliacci Pizza, the MAP is excessively one-sided and thus unconscionable. Br. of Pub. Justice in Supp. of Resp't at 5. Amicus notes that this comports with the prevailing view of a majority of jurisdictions, citing *Taylor v. Butler*, 142 S.W.3d 277, 286 and n.4 (Tenn. 2004), in which the Tennessee Supreme Court identifies the "majority view" of jurisdictions to be that a one-sided arbitration clause that allows the corporation's claims to remain in court while requiring the individual's claims to go to arbitration is unconscionable. *See also Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 290, 737 S.E.2d 550 (2012) ("In a majority of jurisdictions, it is well-settled that a contract which requires the weaker party

to arbitrate any claims he or she may have, but permits the stronger party to seek redress through the courts, may be found to be substantively unconscionable.").

Pagliacci answers that *Taylor* is distinguishable because the arbitration clause in that case contained express language preserving the drafter's right to "'pursue recovery . . . by state court action,'" but no such express language preserving court action for Pagliacci appears in its MAP. *See* Pet'r's Resp. to Amicus Pub. Justice at 6 (emphasis omitted) (quoting *Taylor*, 142 S.W.3d at 284). Nevertheless, the effect of the plain language of the MAP achieves the same end, it requires Burnett to arbitrate but does not so limit Pagliacci. The MAP language remains so one-sided as to be unconscionable. As the California Supreme Court has explained, "Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope, . . . the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 118, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000). "[I]n the context of an arbitration agreement imposed by the employer on the employee, such a one-sided term is unconscionable." *Id.*

Severence

Pagliacci argues that if its arbitration agreement provisions are deemed substantively unconscionable, the appropriate remedy is severance. *See* Suppl. Br. of Pet'r at 14-15. However, where unconscionable provisions pervade an arbitration agreement, the entire agreement should be invalidated. *See Gandee*, 176 Wn.2d at 607-09; *McKee*, 164 Wn.2d at 402-03. Here, Pagliacci's F.A.I.R. Policy procedures are

intertwined with the arbitration provision. As noted, Pagliacci's employees are not permitted to pursue arbitration until proceeding through the F.A.I.R. procedures, and the statute of limitations continues to run while the employees comply with every step and procedure. "Permitting severability . . . in the face of a contract that is permeated with unconscionability only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions." *McKee*, 164 Wn.2d at 403. In *Zuver*, this court severed the unconscionable provisions because the remainder of the agreement could be preserved and because the parties had "explicitly assented to a severability provision in their agreement and thus intended that courts sever any unconscionable provisions." 153 Wn.2d at 320 n.20. Here, no severance clause is included in the ERA, the MAP, or the F.A.I.R. Policy. Accordingly, we hold that severance is not appropriate here, and we find the arbitration clause invalid.

The Court of Appeals Did Not Misapply *Zuver*

Burnett has raised a contingent issue, asserting that the Court of Appeals misread and misapplied *Zuver*. *See* Resp't's Resp. to Pet. for Review at 15-17. Here, the Court of Appeals stated, "[T]he *Zuver* court's analysis demonstrates that arbitration agreements are not substantively unconscionable merely because they are not mutual. Therefore, we reject Burnett's argument that Pagliacci's mandatory arbitration policy is substantively unconscionable merely because it requires Burnett, but not Pagliacci, to arbitrate certain claims." *Burnett*, 9 Wn. App. 2d at 214. The Court of Appeals explained,

In a footnote, this court further noted, "[W]e are not concerned here with whether the parties have mirror obligations under the agreement, but rather whether the effect of the provision is so 'one-sided' as to render it patently 'overly harsh' in this case." *Id.* at 317 n.16 (citing *Schroeder*, 86 Wn.2d at 260). Accordingly, the core of *Zuver*'s holding as identified above is that a provision is substantively unconscionable where its *effect* is so one-sided as to render it overly harsh. The Court of Appeals here properly applied that standard. *See Burnett*, 9 Wn. App. 2d at 212-14.

In his supplemental brief, Burnett urges this court to clearly "adopt the California Supreme Court's rule that 'an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party' is substantively unconscionable." Resp't's Suppl. Br. at 10-20 (quoting *Armendariz*, 24 Cal. 4th at 119). While this court cited *Armendariz* with approval in *Zuver*, it also made clear in its concluding footnote in the same section that "future litigants must show, as was done in this circumstance, that the disputed provision is so 'one-sided' and 'overly harsh' as to render it unconscionable." *Zuver*, 153 Wn.2d at 319 n.18.

As discussed above, on this issue the Court of Appeals properly applied *Zuver*. Burnett does not effectively argue that this court should alter or expand the rules stated in that case.

CONCLUSION

We hold that the MAP at issue in this case is unenforceable because no arbitration agreement was formed when the employee signed the employment agreement when he had no notice of the arbitration provision contained in the employee handbook. We also

hold that in light of the noted circumstances, even if an arbitration contract exists, it is procedurally unconscionable and unenforceable. We also hold that the same arbitration provision is substantively unconscionable because its one-sided terms and limitation provisions would bar any claim by the terminated employee here, an overly harsh result. Accordingly, we affirm the trial court's order denying the employer's motion to compel arbitration and remand for further proceedings.

Madsen, J.

WE CONCUR:

Stephens, C.J.

Johnson, J.

Owens, J.

Gonzalez, J.

Fairhurst, J.

Yu, J.

Montoya-Lewis, J.

Wiggins, J.P.T.