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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PAIGE MCCRAY et al.,

Plaintiffs and Respondents,

v.

BIG LEAGUE DREAMS JURUPA, LLC
et al.,

Defendants and Appellants.

E055397

(Super.Ct.No. CIVDS1108485)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. John P. Vander Feer, Judge. Reversed.

Littler Mendelson, Benjamin E. Goldman, Alaya B. Meyers, and Maria R. Harrington for Defendants and Appellants.

Gresham Savage Nolan & Tilden, Richard D. Marca, Jamie E. Wrage, and Stefanie Field for Plaintiffs and Respondents.

I. INTRODUCTION

Plaintiffs Paige McCray and Christine Ferguson sued their former employer, Big League Dreams Jurupa, LLC (BLD), a sports park operator, and other defendants¹ for sexual discrimination, sexual harassment, and other claims arising out of plaintiffs' employment. Defendants jointly moved to compel arbitration based on arbitration clauses in plaintiffs' employment agreements with BLD, which required plaintiffs and BLD to arbitrate all employment-related claims in accordance with the Employment Dispute Resolution Rules of the American Arbitration Association (AAA).

The trial court denied the motion solely on the ground the arbitration clauses were procedurally unconscionable and therefore unenforceable because plaintiffs were not given copies of the Employment Dispute Resolution Rules when they signed the agreements. Defendants appeal and we reverse. In order to be unenforceable based on unconscionability, an arbitration clause must be both procedurally and substantively unconscionable, and the party resisting arbitration has the burden of proof. Though the arbitration clauses in plaintiffs' employment agreements are procedurally unconscionable, plaintiffs did not meet their burden of demonstrating they were also substantively unconscionable and therefore unenforceable. The order denying the motion

¹ In addition to BLD, the complaint names a second alleged employer, Big League Dreams USA, LLC (BLD USA), as a defendant, along with four individual supervisory employees of BLD or BLD USA, namely, Osvaldo Arias, Michael Brun, Alejandro Sanchez, Jr., and Marvin Hernandez.

to compel arbitration must therefore be reversed and plaintiffs must be compelled to arbitrate their employment-related claims against defendants.

II. FACTS AND PROCEDURAL BACKGROUND²

A. *The Arbitration Clauses*

Ferguson began working for BLD in 2007; McCray in 2009. At the times they were hired and as conditions of their employment, plaintiffs were required to sign identical preprinted, two-page employment agreements. An arbitration clause appears on page 2 of the agreements:

“Arbitration. Any claim by you or BLD relating to, or any controversy arising from, your employment with BLD or the termination thereof shall, on the written request of you or BLD, be submitted to arbitration and be governed by the Employment Dispute Resolution Rules of the [AAA]. The arbitration shall be conducted at the AAA office nearest the BLD Sports Park at which you were last working unless we mutually agree on an alternate location. Such arbitration shall be the exclusive remedy of you and BLD and the award of the arbitrator shall be final and binding.”

B. *The Allegations of the Complaint*

Ferguson and McCray eventually became “pro-shop/front office” employees. Arias was plaintiffs’ direct supervisor and supervised “numerous other young female

² All of the facts and allegations are taken from the complaint and the declarations and exhibits submitted on the motion to compel arbitration. Defendants generally denied the allegations of the unverified complaint, and in recounting those allegations we express no opinion on their veracity.

employees.” Brun, Sanchez, and Hernandez also had supervisory authority over plaintiffs and other young female employees.

Arias, Sanchez, and Brun made sexually suggestive comments to plaintiffs and other young female employees on a regular basis. Arias was “one of the worst offenders,” and often gave plaintiffs unwanted and lengthy hugs. One day, in a back room after the pro shop closed, Arias pressured plaintiffs and another young female employee to expose their breasts to him. Arias then assigned the women nicknames based on the sizes of their breasts, and pressured Ferguson to show him her breasts on at least four more occasions. Brun later asked Ferguson why she had shown her breasts to Arias and not Brun.

Plaintiffs feared Arias “both because of his personality and because he had control over their jobs and schedules.” Arias made it known he would give his “friends” more hours and favorable work schedules. Arias was friends with other supervisors, including Brun, Sanchez, and Hernandez, and the other supervisors made it clear they considered Arias their close friend.

Brun also made “regular denigrating comments” to McCray, including, “I can look at that ass all day,” and “Why are you so slutty?” Hernandez supported Brun’s harassing conduct toward McCray and encouraged McCray to date Brun. Sanchez once humiliated McCray in the presence of other employees by telling her he could see her thong underwear through the dress she was wearing, and she should wear nude-colored or no underwear the next time she wore the dress.

Brun later “ramped up” his harassment of McCray by texting her a naked photograph of himself, with only a book covering his genitals, and the message, “Cum on down.” Hernandez took the photograph of Brun in the office of BLD’s general manager, Jim Munson. McCray responded by texting Brun she was shocked and upset by his photograph and text message. Hernandez then called McCray and told her she was “overreacting,” that it was a joke, and tried to convince McCray not to be upset or report Brun’s conduct.

Thereafter, plaintiffs reported the sexually harassing incidents to BLD’s director of human resources, Charlotte Odette. Odette expressed surprise that Arias was involved because, she said, he was such a “good guy” and he and his wife were her personal friends. Odette asked McCray whether she was still willing to work with Arias and Brun and offered her the alternative of transferring to another work location. McCray refused the transfer offer, viewing it as punitive because it meant she would have to travel farther to work.

Munson and Odette later called Ferguson into a meeting, asked her to explain what happened, insinuated she was lying, and told her “if she was not telling the truth, she could get into a lot of trouble.” Odette then called McCray into a meeting and told her she, too, could get into a lot of trouble if she was not telling the truth about the sexual harassment. Odette also told McCray she should be willing to work with Arias and Brun because other women were.

After plaintiffs reported the harassment, Brun was terminated but Arias continued to work in a supervisory capacity. Plaintiffs' work hours were reduced; they were given "the worst assignments"; and Sanchez and Hernandez (Arias's cousin), "began a concerted effort to retaliate" against plaintiffs. McCray was falsely accused of being \$20 to \$50 short when her "drawer" was counted, and both plaintiffs received written reprimands and threats of suspension or termination. As a result, plaintiffs became physically ill and resigned. They filed the present complaint in July 2011, after filing complaints with the California Department of Fair Employment and Housing (DFEH) and obtaining right-to-sue letters.

The complaint alleges causes of action against BLD and BLD USA for (1) sexual discrimination, (2) sexual harassment, (3) retaliation, (4) failure to prevent sexual discrimination, harassment and retaliation, (5) wrongful termination in violation of public policy, (6) intentional infliction of emotional distress, and (7) negligent infliction of emotional distress. Arias, Brun, Sanchez, and Hernandez are named as defendants to the sexual harassment and emotional distress claims. Brun was dismissed without prejudice after the complaint was filed.

C. The Motion to Compel Arbitration

With the exception of Brun, the named defendants filed a joint answer to the complaint in August 2011. Before that, defendants propounded written discovery and scheduled depositions. Plaintiffs also propounded written discovery. In reviewing documents to produce in response to plaintiffs' request for production, counsel for

defendants discovered the employment agreements and asked counsel for plaintiffs to stipulate to binding arbitration. Counsel for plaintiffs refused, claiming the arbitration clauses were both procedurally and substantively unconscionable. Defendants obtained leave of court to amend their answer to allege plaintiffs' claims were subject to binding arbitration, and moved to compel arbitration and stay the court proceedings pending the arbitration.

Plaintiffs opposed the motion on three grounds: (1) the arbitration clauses were procedurally and substantively unconscionable and therefore unenforceable; (2) the clauses were binding only against plaintiffs and BLD, not the other defendants, and arbitration with BLD should therefore be denied in order to prevent contradictory court and arbitration rulings on common questions of law and fact (Code Civ. Proc., § 1281.2, subd. (c)(1)); and (3) BLD waived its right to compel arbitration by propounding discovery and participating in litigation before demanding arbitration. Plaintiffs were not given copies of their employment agreements when they signed them; they were not told they could modify the agreements; and they were neither shown nor given copies of the AAA Employment Dispute Resolution Rules referenced in the arbitration clauses of the agreements.

D. The Trial Court's Order

Citing *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387 (*Trivedi*), the trial court denied the motion to compel arbitration solely on the ground the arbitration clauses were procedurally unconscionable and therefore unenforceable—because

plaintiffs were neither shown nor given copies of the AAA Employment Dispute Resolution Rules referenced in the arbitration clauses when they signed the employment agreements. The court expressly declined to address whether the arbitration clauses were also substantively unconscionable, finding no need to do so in light of *Trivedi*. Defendants timely appealed.

III. DISCUSSION

A. *Standard of Review*

“““Whether an arbitration provision is unconscionable is ultimately a question of law.” . . . “On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability.” [Citations.]” (*Leos v. Darden Restaurants, Inc.* (2013) 217 Cal.App.4th 473, 481.) “In keeping with California’s strong public policy in favor of arbitration, any doubts regarding the validity of an arbitration agreement are resolved in favor of arbitration.” (*Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1144.)

B. *Applicable Law*

Section 1281 of the California Arbitration Act (CAA) (Code Civ. Proc., §§ 1280-1294.2) states: “A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.” Unconscionability is a ground for

revoking any contract, including an arbitration agreement. (Civ. Code, § 1670.5;³ *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*.) Thus, the CAA allows courts to refuse to enforce an unconscionable arbitration agreement. (*Armendariz, supra*, at p. 114; *Leos v. Darden Restaurants, Inc., supra*, 217 Cal.App.4th at p. 483.) The party resisting arbitration bears the burden of proving unconscionability. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247.)⁴

Under California law, an arbitration clause cannot be deemed unenforceable based on unconscionability unless it is procedurally and substantively unconscionable. (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1471; see *Armendariz, supra*, 24 Cal.4th at p. 114.)

³ Civil Code section 1670.5 provides: “(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. [¶] (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.”

⁴ The Federal Arbitration Act (FAA; Feb. 12, 1925, ch. 213, 43 Stat. 883), allows an arbitration provision to be invalidated based on “generally applicable contract defenses” including “unconscionability,” but not does not allow an arbitration clause to be invalidated based on defenses, including unconscionability, “that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” (*AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___ [131 S.Ct. 1740, 1746]; see 9 U.S.C. 2; see *Samaniego v. Empire Today, LLC, supra*, 205 Cal.App.4th at p. 1146.) Defendants do not claim, however, that any of the reasons plaintiffs advance for declaring the arbitration clauses unconscionable apply only in the arbitration context or derive their meaning from the fact an arbitration agreement is at issue.

Procedural unconscionability requires oppression or surprise. (*Pinnacle Museum Towers Assn. v. Pinnacle Market Development (US), LLC, supra*, 55 Cal.4th at p. 247.) “Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. [Citation.]” (*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 821.) “Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create “‘overly harsh’” or “‘one-sided’” results’ [citations], that is, whether contractual provisions reallocate risk in an objectively unreasonable or unexpected manner. [Citation.] Substantive unconscionability . . . typically is found in the employment context when the arbitration agreement is ‘one-sided’ in favor of the employer without sufficient justification” (*Roman v. Superior Court, supra*, 172 Cal.App.4th at pp. 1469-1470; *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071-1072.)

Though a contract or term must be both procedurally and substantively unconscionable to be unenforceable, procedural and substantive unconscionability need not be present in the same degree. (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317.) “A sliding scale is applied so that “the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” [Citations.]” (*Lhotka v. Geographic Expeditions, Inc., supra*, 181 Cal.App.4th at p. 821.) Still, a procedurally unconscionable contract provision must also be substantively

unconscionable, at least to some degree, in order to be unenforceable. (*Roman v. Superior Court, supra*, 172 Cal.App.4th at p. 1471.)

C. Analysis

Plaintiffs claim the arbitration clauses in their employment agreements are both procedurally and substantively unconscionable and therefore unenforceable. We agree the clauses are procedurally unconscionable but not to the “high degree” plaintiffs claim. Moreover, plaintiffs have not met their burden of showing the arbitration clauses are in any way substantively unconscionable or unfairly one-sided. Plaintiffs must therefore be compelled to arbitrate their employment-related claims against defendants.

1. The Arbitration Clauses are Procedurally Unconscionable

Plaintiffs argue the trial court correctly concluded that BLD’s failure to give or show plaintiffs copies of the AAA Employment Dispute Resolution Rules, referenced in the arbitration clauses, when they signed the employment agreements is “by itself” sufficient to render the arbitration clauses procedurally unconscionable. They point to a “long line of cases” they claim supports this proposition, including *Trivedi*, the case the trial court relied on in concluding the arbitration clauses were procedurally unconscionable and *therefore* unenforceable. In *Trivedi*, the court observed that: “Numerous cases have held that the failure to provide a copy of the arbitration rules to which the employee would be bound *supported* a finding of procedural unconscionability.” (*Trivedi, supra*, 189 Cal.App.4th at p. 393, italics added; *Sparks v. Vista Del Mar Child & Family Services* (2012) 207 Cal.App.4th 1511, 1523 [same].)

Trivedi upheld the trial court’s finding that an employment agreement arbitration clause was procedurally unconscionable for “each and all” of three reasons: it was drafted by the employer; it was a mandatory part of the employment agreement; and the employee was never given a copy of the arbitration rules referenced in the arbitration clause. (*Trivedi, supra*, 189 Cal.App.4th at pp. 392-393.) The same three procedural unconscionability factors present in *Trivedi* are present here: the employment agreements were drafted by BLD; they were non-negotiable conditions of plaintiffs’ employment; and plaintiffs were not shown or given copies of the AAA Employment Dispute Resolution Rules when they signed the agreements. Thus we agree that plaintiffs’ arbitration clauses are procedurally unconscionable. (*Ibid.*; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 704 [non-negotiable, adhesive, i.e., “take-it-or-leave-it,” arbitration clauses typically contain some aspects of procedural unconscionability]; *Armendariz, supra*, 24 Cal.4th at p. 115.)

Still, the degree of procedural unconscionability in this case is limited. Even though the employment agreements were presented to plaintiffs on a “take-it-or-leave-it” basis with no opportunity to negotiate, and are therefore contracts of adhesion (see *Roman v. Superior Court, supra*, 172 Cal.App.4th at pp. 1470-1471), the arbitration clauses were not buried in lengthy or “prolix” employment agreements; they appeared on the second page of two-page, easy-to-read employment agreements (cf. *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1252-1253 [degree of procedural unconscionability high when arbitration provision was buried in 24-page, single-spaced

document, and plaintiffs were required to initial six paragraphs but not the arbitration provision]).

Further, and regardless of the degree of procedural unconscionability present in this case, *Trivedi* is distinguishable because the arbitration provision there was not only procedurally unconscionable, it was also substantively unconscionable and therefore unenforceable for two reasons: (1) it included a “prevailing party” attorney fee and cost provision potentially less favorable to the employee than the fee and costs provisions of Title VII of the Civil Rights Act of 1964 and the FEHA,⁵ and (2) it also included an injunctive relief provision potentially more favorable to the employer than the employee. (*Trivedi, supra*, 189 Cal.App.4th at p. 394.) Neither of these two factors is present here.

Like *Trivedi*, the other cases plaintiffs rely upon involved both procedurally and substantively unconscionable—that is, unfairly one-sided—arbitration provisions. (*Samaniego v. Empire Today, LLC, supra*, 205 Cal.App.4th at pp. 1147-1148 [arbitration provision had shortened limitations period on employee wage claims, attorney fee provision in favor of employer, and exempted injunctive relief from arbitration]; *Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 486-487 [employee but not employer required to arbitrate employment-related claims and employee had 10-day period to respond to communications regarding arbitration or forfeit claims]; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 719-720, 723-726 [employee’s discovery rights severely

⁵ “[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA.” (*Trivedi, supra*, 189 Cal.App.4th at p. 395, citing *Armendariz, supra*, 24 Cal.4th at p. 101.)

limited; injunctive relief exempted from arbitration]; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 88-90 [automobile lessee required to pay high arbitration fees]; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1405-1407 [homeowner plaintiffs prohibited from recovering tort or punitive damages from contractor]; *Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1663-1666 [procedural hurdles to obtaining arbitration as applied to “unsophisticated borrowers of limited means in disputes over small claims” was substantively unconscionable].)

2. The Arbitration Clauses are Not Substantively Unconscionable

Plaintiffs argue the arbitration clauses are substantively unconscionable because the employment agreements barred them from pursuing any employment-related claims against persons other than BLD. A “Recourse” provision, appearing immediately before the “Arbitration” provision, provides: “You agree that a) no director, member, officer or employee of BLD or any BLD affiliate shall incur any financial responsibility or liability of any kind in connection with or arising out of this agreement or any amendment or attachment to it and b) you shall look solely to the assets of BLD for any recourse hereunder.”

Plaintiffs claim this Recourse provision is substantively unconscionable because it violates Civil Code section 1668, which provides that contracts exempting anyone from responsibility for their own fraud, injuries to persons or property, or violations of law are

against the policy of the law.⁶ We agree. To the extent the Recourse provisions purport to exempt the individual defendants, BLD USA, or anyone other than BLD from liability for plaintiffs’ FEHA and tort claims, it violates Civil Code section 1668 and is substantively unconscionable. (See *Armendariz, supra*, 24 Cal.4th at p. 120 [arbitration provision lacking mutuality in same transaction or occurrence is substantively unconscionable].)

The Recourse provisions may easily be severed from the other provisions of the employment agreements and declared invalid, however. (Civ. Code, § 1670.5 [courts may enforce contract without unconscionable clause].) To the extent the Recourse provisions purport to insulate anyone other than BLD for plaintiffs’ FEHA and tort claims, they are hereby severed from the employment agreements and declared invalid and unenforceable. (*Armendariz, supra*, 24 Cal.4th at pp. 121-127 [single unconscionable provision of arbitration agreement may be severed from other, nonunconscionable provisions]; *Roman v. Superior Court, supra*, 172 Cal.App.4th at pp. 1477-1478 [strong legislative and judicial preference is to sever offending term and refuse to enforce entire agreement only when it is permeated by unconscionability].)

We also reject plaintiffs’ additional claim that none of the defendants other than BLD—namely, BLD USA, Arias, Sanchez, and Hernandez, each of whom moved to

⁶ Civil Code section 1668 states: “All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.”

compel arbitration alone or with BLD—may enforce the arbitration clauses because they are not signatories to the employment agreements. Because all of plaintiffs’ claims arise out of their employment with BLD, and plaintiffs allege that each of the defendants are agents of the others and are in some manner responsible for plaintiffs’ claims, plaintiffs advance no persuasive reason why none of the defendants other than BLD should be allowed to enforce the arbitration clauses. (See *Valley Casework, Inc. v. Comfort Construction, Inc.* (1999) 76 Cal.App.4th 1013, 1021 [nonsignatories may enforce arbitration agreement where there is a sufficient identity of parties, e.g, where nonsignatories are agents of a party or are third party beneficiaries to the arbitration agreement]; *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1284 [nonsignatory alleged alter ego of corporation entitled to enforce corporation’s arbitration agreement].)

Plaintiffs next claim the arbitration clauses are substantively unconscionable because sections 39(d) and 48 of the AAA Employment Dispute Resolution Rules allow the arbitrator to improperly assess arbitration fees and expenses against them. They claim this is prohibited under *Armendariz*, which held that “the imposition of *substantial forum fees* is contrary to public policy” (*Armendariz, supra*, 24 Cal.4th at p. 110, italics added.) They also point out that the improper ability to shift expenses cannot be avoided by a promise not to enforce it or a promise that the employer will pay. (*Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 115-116.) We find no merit to this argument.

Section 39(d) allows the arbitrator to “grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney’s fees and costs, in accordance with applicable law.” Section 39(d) also requires the arbitrator to “assess arbitration fees, expenses, and compensation as provided in Rules 43 [Administrative Fees], 44 [Neutral Arbitrator’s Compensation] and 45 [Expenses] in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA, subject to the provisions contained in the Costs of Arbitration section.”

Section 48, the “Costs of Arbitration” section, requires the arbitrator to initially determine whether the dispute arises from “an employer-promulgated plan” or an “individually-negotiated employment agreement or contract.” For disputes arising out of employer-promulgated plans—as the present dispute plainly is—section 48 provides: “The employer shall pay the arbitrator’s compensation,” and “Arbitrator compensation, [hearing room] expenses . . . , and administrative fees are not subject to reallocation by the arbitrator(s) except upon the arbitrator’s determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.”

Plaintiffs do not explain how sections 39(d), 43, 44, 45 or 48 could subject them to “*substantial forum fees*” or shift costs to them in excess of what they would have to pay in a court proceeding—contrary to applicable law including the FEHA and Code of Civil Procedure section 128.5. To the contrary, the cost and fee provisions of the Employment

Dispute Resolution Rules appear to fully protect plaintiffs' statutory rights under the FEHA and other applicable law.

Plaintiffs next argue the arbitration clauses are substantively unconscionable because they provide that "the award of the arbitrator shall be final and binding," and accordingly preclude judicial review of any arbitration award. Plaintiffs are mistaken. The "final and binding" language of the arbitration clauses does not preclude judicial review of an arbitration award pursuant to Code of Civil Procedure sections 1286.2 and 1286.6. (*Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 705 [where parties expressly agree arbitration award will be "final" and "binding," they are deemed to agree to limited judicial review of award by implication].)

Lastly, plaintiffs claim defendants have waived their right to compel arbitration by propounding written discovery and otherwise participating in the litigation before they discovered the employment agreements and asked plaintiffs to stipulate to arbitration. There was no waiver. Defendants asked plaintiffs to stipulate to arbitration and stay the court proceedings barely two months after the complaint was filed. Moreover, plaintiffs have not shown they were prejudiced by defendants' failure to discover the employment agreements or demand arbitration sooner. (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1203 [Fourth Dist., Div. Two] [party seeking to prove waiver of arbitration right must show prejudice to the party opposing arbitration]; *Roman v. Superior Court, supra*, 172 Cal.App.4th at pp. 1478-1479 [merely participating in litigation, by itself, does not result in waiver of right to arbitration].)

In sum, because plaintiffs have not met their burden of demonstrating that the arbitration clauses are to any extent substantively unconscionable, and because the Recourse provisions of the employment agreements may easily be and hereby are severed and invalidated to the extent they purport to insulate persons other than BLD for liability for plaintiffs' claims, the order denying defendants' petition to compel arbitration and stay court proceedings pending arbitration must be reversed.

IV. DISPOSITION

The order denying defendants' motion to compel arbitration and stay the court proceedings pending arbitration is reversed. The "Recourse" provisions are severed from the employment agreements and declared void and invalid. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.