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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CORNELIS H. CLAUS et al.,

Plaintiffs and Respondents,

v.

PAYCHEX, INC.,

Defendant and Appellant.

G045296

(Super. Ct. No. 30-2010-00419742)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, B. Tam Nomoto Schumann, Judge. Reversed and remanded.

Michelman & Robinson, Dana A. Kravetz, Mona Z. Hanna and Robin James for Defendant and Appellant.

Genga & Associates, John Michael Genga, Don C. Moody, Jerl B. Leutz and Khurram A. Nizami for Plaintiffs and Respondents.

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Plaintiffs Cornelis H. Claus, et al. sued Paychex, Inc. and two individual defendants, alleging a conspiracy to embezzle money through payroll fraud. Paychex was in a contractual relationship with Pacific Polymers, Inc. (PPI), a closely held corporation owned by plaintiffs. The relevant contract between Paychex and PPI included an arbitration clause. PPI was then sold and later became a division of a larger corporation before plaintiffs sued Paychex in their individual capacities.

Paychex argues that defendants are bound by the arbitration clause because any rights they have are derivative of PPI's, which is and was bound by the contract, including the arbitration clause, or they are the assignees of whatever rights the current corporation has. They also argue the current dispute is within the scope of the arbitration clause, which is otherwise enforceable. We agree, and therefore conclude the trial court erred by denying Paychex's motion to compel arbitration.

## I

### FACTS

The plaintiffs are Cornelis H. Claus (suing in his capacity as trustee of the Claus Family Trust), and Michael E. Claus, Stephen A. Claus, and Kimberly K. Claus-Grosch, who sue in their individual capacities. (Plaintiffs are collectively referred to as the Clauses.) The defendants are Eric Helgemo, Maria Yarrish, and Paychex. Paychex is the only defendant before the court in this appeal.

The Clauses are the former owners of PPI, which was organized as an S

corporation.<sup>1</sup> PPI manufactured commercial coatings and sealants, among other things. Cornelis Claus was PPI's president. In 2000, PPI hired Yarrish as its controller. According to the complaint, "Yarrish acted as the internal accountant for PPI and was responsible for preparing the company's payroll" among other things. In 2002, PPI hired Helgemo as the company's chief financial officer, with the official title vice-president of operations and finance. In addition to other duties, Helgemo supervised and approved payroll disbursements.

In April 2003, Helgemo, on PPI's behalf, retained Paychex to perform certain payroll services for PPI. Helgemo signed a two-page agreement (the Agreement) between PPI and Paychex as an "authorized officer." Paragraph 9 of the agreement, entitled "Miscellaneous," states, in relevant part: "The Agreements shall be governed by the laws of the State of New York. Except as provided herein, any dispute arising out of or in connection with the Agreements, if not otherwise resolved, shall be determined by binding arbitration in Rochester, New York, in accordance with the commercial rules of the American Arbitration Association and any dispute arising out of or in connection with any other agreement between the parties may be consolidated in the same arbitration proceeding. However, Paychex may, in its sole discretion, commence an action in any court of competent jurisdiction within the County of Monroe, State of New York, for any monies due and owing from [PPI] to Paychex. [PPI] hereby waives any jurisdictional defense and submits to the exclusive jurisdiction

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<sup>1</sup> "Under federal income tax law, there are two distinct types of corporations, C and S corporations so named because of their governing subchapters under chapter 1, subtitle A of the Internal Revenue Code. The former constitutes a separate entity which pays corporate income taxes based upon its net income. [Citation.] The latter, however, generally does not pay taxes as an entity. [Citation.] 'Rather, the S corporation files only an informational return reporting for the taxable year its gross income (or loss) and deductions, its shareholders, and the shareholders' pro rata shares of each item. [Citation.] The items are then "passed through" on a pro rata basis to the shareholders, who report them on their personal income tax returns. [Citations.]'" (*Valentino v. Franchise Tax Bd.* (2001) 87 Cal.App.4th 1284, 1288-1289.)

of the New York courts. The parties agree that the prevailing party in arbitration or in any judicial proceedings be awarded costs and attorney fees . . . and that an Arbitration award may be entered as a judgment in any court having jurisdiction over either party to the Agreements. This Miscellaneous provision shall survive the termination of the Agreements.” Yarrish was responsible for preparing the payroll information and submitting it to Paychex after Helgemo’s approval.

In February 2008, the Clauses sold all of their stock in PPI to Illinois Tool Works (Illinois Tool), a publicly traded Delaware corporation. PPI became a subsidiary of Illinois Tool until December 31, 2009, when it became a division of that company.

According to the complaint, Helgemo and Yarrish remained with PPI until June 2008 and May 2009, respectively. The Clauses alleged that in November 2009, PPI discovered that Helgemo and Yarrish’s compensation for 2007 exceeded their stated salaries. While Helgemo’s 2007 salary was \$102,000, he received over \$691,000 that year. Yarrish, whose salary was listed at \$83,200 but had only been approved for \$63,500, received over \$219,000. The Clauses alleged that PPI discovered “multiple, duplicate disbursements representing gross payroll issued to both Helgemo and Yarrish from a PPI account . . . .” PPI brought this information to Illinois Tool, which conducted its own investigation. The complaint alleged that Helgemo and Yarrish embezzled a combined total exceeding \$1.5 million between 2003 and 2007. Helgemo and Yarrish were subsequently convicted of multiple felonies, sentenced to state prison, and ordered to pay more than \$3 million each in fines. Restitution hearings are pending.

In October 2010, the Clauses filed the instant suit against Paychex, Helgemo and Yarrish. The causes of action against Paychex included conspiracy to commit conversion, interference with contract, and negligence. A claim for breach of contract was included in the complaint, but named only Helgemo and Yarrish as defendants. The complaint alleged that if “any claims asserted herein against any of the Defendants otherwise would rest with PPI rather than Plaintiffs as its individual

shareholders, Plaintiffs have obtained an assignment of all such claims from [Illinois Tool] as successor to PPI.”

In February 2011, after a failed attempt to dismiss the complaint based on the choice of forum clause, Paychex filed the instant motion to compel arbitration. Paychex’s motion argued that the Clauses’ claims were derivative, arising from the relationship created between Paychex and PPI under the Agreement. The Clauses were thus bound by the terms of the Agreement under which their claims arose, which included the arbitration provision. In opposition, the Clauses asserted, among other things, that they had not alleged any claims against Paychex under the Agreement, and all of their claims would be viable if the Agreement had never existed.

The trial court denied the motion to compel arbitration, explaining it had relied upon California law in doing so. The court explained that this case did not appear to meet the definition of a derivative suit set forth in *Jones v. H. F. Ahmanson & Co.* (1969) 1 Ca1.3d 93, stating “[t]he corporation did not suffer the injury, the individual plaintiffs suffered. The individual plaintiffs suffered the injury, and the damages they seek to collect is not based on manipulation of stock prices. . . . [¶] . . . this action appears to be an individual action for the damages suffered by the plaintiffs.” The court rejected Paychex’s argument that the Clauses were PPI’s alter ego, and were not estopped from disclaiming the arbitration clause because they had not asserted any claims under the Agreement. The court also rejected Paychex’s assertion that the Clauses were mere assignees of Illinois Tool’s rights, stating that Paychex had failed to cite California law on this issue.

Paychex now appeals.

## II DISCUSSION

### *A. Choice of Law*

We briefly address the parties' choice of law arguments. The Clauses argue the trial court correctly applied California law, because the question of whether arbitration is required is primarily procedural. Paychex argues that New York law should apply, but concedes that "on the issues determinative of this appeal, the laws of California and New York do not differ; and choice of law will not be determinative." While we respect Paychex's statement that it does not intend to waive this issue, the admission that choice of law will not be determinative renders the trial court's decision, even if erroneous, not prejudicial. (See *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.)

### *B. Relevant Law and Standard of Review*

Code of Civil Procedure section 1281.2<sup>2</sup> requires a court to order arbitration "if it determines that an agreement to arbitrate . . . exists . . . ." (§ 1281.2.) The Clauses argue that deciding the motion "required resolving the factual issue of the [arbitration provision's] scope and applicability" as a factual issue, and we should therefore use the substantial evidence standard. We disagree. Where the evidence is undisputed, as the pertinent evidence is here, appellate review of the determination of the enforceability of an arbitration agreement is *de novo*. (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) "We review the scope of an arbitration provision *de novo* when, as here, that interpretation does not depend on conflicting extrinsic evidence. [Citation.]" (*RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1522 (*RN Solution*)); see also *Greenspan v. LADT*,

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<sup>2</sup> Subsequent statutory references are to the Code of Civil Procedure.

*LLC* (2010) 185 Cal.App.4th 1413, 1436-1437.)

We use general principles of California contract law to determine the enforceability of the arbitration agreement. (*Kleveland v. Chicago Title Ins. Co.* (2006) 141 Cal.App.4th 761, 764.) We review questions of contract interpretation independently. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.)

California has a strong public policy in favor of arbitration as an expeditious and cost-effective way of resolving disputes. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) Even so, parties can only be compelled to arbitrate when they have agreed to do so. (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.)

In *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, the California Supreme Court stated, “[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists . . . . Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence.” (*Id.* at p. 413; see also *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 761-762 [enforceability determined in manner provided by law for the hearing of motions].)

“Prima facie evidence is that degree of evidence which suffices for proof of a particular fact until contradicted and overcome, as it may be, by other evidence, direct or indirect.” (*People v. Van Gorden* (1964) 226 Cal.App.2d 634, 636-637, quoting 18 Cal.Jur.2d, Evidence, § 13, p. 435.) Once the moving party has established the existence of the arbitration agreement, the burden shifts to the party opposing arbitration to establish, by a preponderance of the evidence, the factual basis for any defense to enforcement. (*Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at p. 413.)

### *C. Paychex's Prima Facie Case*

Paychex presented evidence of an arbitration agreement in the form of the Agreement itself. The relevant provision states: “Except as provided herein, any dispute arising out of or in connection with the Agreements, if not otherwise resolved, shall be determined by binding arbitration in Rochester, New York, in accordance with the commercial rules of the American Arbitration Association . . . .” The Agreement was signed by Helgemo as PPI’s chief financial officer.

The trial court properly found this constituted an agreement to arbitrate between PPI and Paychex. The Clauses’ key arguments opposing arbitration were that they were not bound by the Agreement because they are not signatories and their claims are direct rather than derivative, the arbitration provision does not encompass the causes of action in the complaint, Helgemo had no authority to bind them to the Agreement, and inconsistent rulings may result from arbitration. We shall address each of these defenses to the enforcement of the arbitration agreement in turn.

### *D. The Clauses’ Defenses to Enforcement*

#### *1. Direct Claims, Derivative Claims, Assigned Claims*

Although this is not the typical derivative action where minority shareholders sue the majority, Paychex argues it is nonetheless a derivative action. It is undisputed that PPI was in a contractual relationship with Paychex, but the Clauses now sue Paychex in their personal capacities. They claim that because they were not signatories to the Agreement, they are not bound by its terms, including the arbitration provision. They argue they can pursue their claims directly against Paychex, as stockholders of PPI. Paychex argues that any rights the Clauses have are derivative of PPI’s, or rights assigned by Illinois Tool. If the Clauses have a direct action, as nonsignatories to the Agreement, they cannot be required to arbitrate. If their rights are derivative or assigned, however, they are bound by the Agreement, including its

arbitration provision.

We begin with some general points. It has long been established that a corporation is a separate legal entity from its owners. (*Maxwell Cafe v. Dept. Alcoholic Control* (1956) 142 Cal.App.2d 73, 78.) While the alter ego doctrine can be used to set aside the corporate entity and hold individual shareholders liable when the corporation uses its power in an abusive manner, the reverse does not hold — individuals who control a corporation cannot simply disregard the corporate form at their leisure. (*Capon v. Monopoly Game LLC* (2011) 193 Cal.App.4th 344, 356-357.) Those “‘who determine to avail themselves of the right to do business by means of the establishment of a corporate entity must assume the burdens thereof as well as the privileges.’” [Citation.]” (*Opp. v. St. Paul Fire & Marine Ins. Co.* (2007) 154 Cal.App.4th 71, 76.)

Further, it is the corporation, and not its individual shareholders, that is harmed when a third party breaches a contract or commits a tort against the corporation. Shareholders may not bring a direct action for indirect losses, such as decreases in stock value, caused by such harm. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 788.) Any other rule “‘would ‘authorize multitudinous litigation and ignore the corporate entity.’” [Citation.]” (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 312.)

A derivative action is one in which the shareholder seeks to enforce the rights of a corporation. One well-known type of derivative action is when minority shareholders sue majority shareholders on behalf of the corporation, because the majority refused to act or engaged in some malfeasance. (See, e.g., *Avikian v. WTC Financial Corp.* (2002) 98 Cal.App.4th 1108, 1114 [key allegations involved mismanagement of corporation and entering into self-serving agreements to sell corporate assets].) As the court stated in *Jones v. H. F. Ahmanson & Co.*, *supra*, 1 Cal.3d., an “‘action is [deemed] derivative, . . . if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation

or to prevent the dissipation of its assets.’ [Citations.]” (*Id.* at pp. 106-107.)

This case presents the type of derivative action contemplated by the second clause of this sentence in *Jones*, one which ““seeks to recover assets for the corporation. . . .”” (*Jones v. H. F. Ahmanson & Co.*, *supra*, 1 Cal.3d at p. 106.) While such claims are permitted as derivative actions, they are not permitted in the shareholder’s personal capacity. The shareholder’s rights are derivative only.

“Generally, a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of the other shareholders, for such an action would authorize multitudinous litigation and ignore the corporate entity. Under proper circumstances a stockholder may bring a representative action or derivative action on behalf of the corporation. [Citations.]” (*Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 530.)

The Clauses’ arguments that theirs are not derivative claims are unpersuasive. They claim that the definition of a derivative action set forth in *Jones* states there cannot be “any severance or distribution among individual holders.” They argue there were individual monetary distributions among the shareholders during each year the embezzlement occurred. First, that limitation does not apply to the type of derivative action at issue here, one which ““seeks to recover assets for the corporation. . . .”” (*Jones v. H. F. Ahmanson & Co.*, *supra*, 1 Cal.3d at p. 106.) The use of “or” before that clause supports the interpretation that it is a somewhat different type of derivative suit than the type contemplated by the first clause.

Second, we disagree with the Clauses’ reading of “severance or distribution among individual holders.” They interpret it to mean dividend or cash distributions, without citing any cases in support of such a theory. We interpret that language in *Jones* to refer to the *harm* the lawsuit is seeking to remedy as not severed or distributed among shareholders. There is no logical reason that an action would be

derivative if shareholders received dividends, and nonderivative if they did not, or the reverse. A derivative action is defined by the type of harm it seeks to remedy, specifically, harm to the corporation. Case law supports this view, focusing on the type of harm alleged, and not any requirement of income or dividend distribution. (See, e.g., *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1016.)

The Clauses argue that in some circumstances, shareholders may also maintain individual lawsuits against third parties, citing *Sutter v. General Petroleum Corp.*, *supra*, 28 Cal.2d at p. 530. In that case, however, the plaintiff alleged that as a result of the defendants' torts, he was induced to several things other than invest in the subject corporation, resulting in personal damages incurred only by him. (*Id.* at p. 531.) No such claims exist here. All of the alleged harm arose out of Paychex's relationship with PPI, not with the Clauses personally.

The Clauses' claim that corporate profits "passed through" directly to them as shareholders is equally unavailing. Again, the derivative nature of the action depends on the type of harm alleged. The injury here was to the corporation, by allegedly participating in the embezzlement of corporate funds. It arose out of a contract between PPI and Paychex. The only damages that the Clauses can claim are the diminution of the value of their stock or dividends, which is precisely the kind of claim that is not permitted in their direct capacity. It is, therefore, a derivative claim. As such, the Clauses' rights are the same as those of the corporation, and they are bound by the arbitration provision. (*Frederick v. First Union Securities, Inc.* (2002) 100 Cal.App.4th 694, 697.)

We are similarly unpersuaded that the sale of PPI stock from the Clauses to Illinois Tool somehow magically converts their derivative action into a direct one.<sup>3</sup> If this were true, all any shareholder would need to do to pursue a direct action would be

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<sup>3</sup> Both parties argue about whether the sale of PPI's stock vitiates the Clauses' claims altogether. This is a substantive issue for the arbitrator to determine.

to liquidate their stock. When the Clauses sold their shares in PPI to Illinois Tool, Illinois Tool acquired all of PPI's rights and liabilities. Those rights include the right to sue Paychex for any alleged damaged caused to PPI. Illinois Tool, according to the complaint, then assigned those rights to the Clauses. But the Clauses, as assignees, have only the rights that Illinois Tool had. They are obligated to arbitrate the dispute, if the arbitration provision is otherwise enforceable, just as Illinois Tool would be. “The assignment merely transfers the interest of the assignor. The assignee “stands in the shoes” of the assignor, taking his rights and remedies, subject to *any defenses* which the *obligor* has against the assignor prior to notice of the assignment.’ [Citation.]” (*Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1096.)

Under either theory, the Clauses have only the rights that PPI once had, and transferred to Illinois Tool. Therefore, if the scope of the arbitration agreement would require either PPI or Illinois Tool to arbitrate, the Clauses are equally required to arbitrate. We discuss this issue next.

## 2. *Scope of Arbitration Clause*

The Clauses argue that even as a derivative or assigned claim, they are not required to arbitrate, because the contemplated scope of the arbitration clause did not include the instant dispute. Paychex argues the Clauses' claims are well within its scope.

As noted above, the arbitration clause states: “Except as provided herein, any dispute arising out of or in connection with the Agreements, if not otherwise resolved, shall be determined by binding arbitration in Rochester, New York, in accordance with the commercial rules of the American Arbitration Association . . . .” The Clauses note their claims against Paychex do not stem directly from the Agreement, but instead sound in tort — their stated causes of action are conspiracy to commit conversion, interference with contract, and negligence.

“[C]laims framed in tort are subject to contractual arbitration provisions when they arise out of the contractual relationship between the parties. [Citation.] Thus, the phrase ‘all disputes arising in connection with this agreement’ has been construed to include ‘every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract,’ including antitrust, trade secrets, defamation, and misrepresentation claims. [Citation.]” (*RN Solution, supra*, (2008) 165 Cal.App.4th at pp. 1522-1523.) Seeking to avoid the rather obvious conclusion that the entire relationship between PPI and Paychex arose out of the Agreement, the Clauses argue that even a broad arbitration provision cannot include “claims arising out of conduct not anticipated by the parties’ contract.”

The Clauses cite *Victoria v. Superior Court* (1985) 40 Cal.3d 734. In that case, the plaintiff, a hospital patient, alleged she was sexually assaulted by a hospital orderly. (*Id.* at p. 737.) She had signed an agreement to arbitrate which applied to “‘Any claim arising from alleged violation of a legal duty incident to this Agreement shall be submitted to binding arbitration if the claim is asserted . . . . On account of death, mental disturbance or bodily injury arising from rendition or failure to render services under this Agreement, irrespective of the legal theory upon which the claim is asserted . . . .’” (*Id.* at p. 738, italics omitted.)

The court held: “Petitioner’s claims involve neither financial disputes nor medical malpractice. Instead, she alleges a breach of the common law duty of an employer to exercise due care in the employment and supervision of an employee who inflicted intentional harm on her. [Citation.] Furthermore, the employee’s alleged misconduct was entirely outside the scope of his employment. It had nothing to do with providing, or failing to provide, services. He is not accused of negligently failing to empty a bedpan. He is accused of the sexual assault and rape of petitioner. [¶] Surely it was not contemplated, let alone expected, by either party to the Agreement that this sort of attack would befall petitioner while she was hospitalized under Kaiser’s care. It is,

therefore, difficult to conclude that the parties intended and *agreed* that causes of action arising from such an attack would be within the scope of the arbitration clause.”

(*Victoria v. Superior Court, supra*, 40 Cal.3d at p. 745.)

While the Clauses argue this case is controlling without further analysis, indeed, it is readily distinguishable. It is apparent that a patient in a hospital would not reasonably expect to be sexually assaulted, and that any “claim” for such an assault would fall outside the scope of the expectations of the parties. But the dispute between Paychex and PPI is about the issuance and disbursement of paychecks and other funds—which were directly within the scope of the Agreement. While no company reasonably expects another corporation it does business with to participate in embezzlement, the same can be said for “antitrust, trade secrets, defamation, and misrepresentation claims” (*RN Solution, supra*, 165 Cal.App.4th at p. 1523) all of which have been held arbitrable. The relevant question is not simply expectation, but whether the alleged tort arises “out of the contractual relationship between the parties.” (*Id.* at p. 1522.) The relationship here does.

For similar reasons, *RN Solution* itself is unhelpful to the Clauses, because the pertinent claims involved the assault of an employee of one company against the other. “While the language of the arbitration provision might be broadly construed to cover every type of business dispute that might arise between the two signators, it cannot seriously be argued that the parties intended it to cover tort claims arising from an alleged violent physical assault by an employee of one company against an employee of the other in the context of an intimate domestic relationship between them.” (*RN Solution, supra*, 165 Cal.App.4th at p. 1523.)

Indeed, those are far from the facts here. This is not a tangential dispute unrelated to the purpose or nature of the Agreement. It arises directly from the relationship between the parties, and regardless of how it is framed in the complaint, it is essentially a dispute relating to how Paychex disbursed PPI payroll funds — the

explicit subject of the Agreement.

The Clauses next argue that ambiguity exists in the arbitration provision, which must be construed against Paychex as the drafter of the Agreement. They point to the language if “not otherwise resolved” in the arbitration provision, and claim this “must allow the parties to avail themselves of other methods to resolve *even* their disputes ‘arising under or in connection with’” the Agreement. The Clauses argue they have “turned to the courts to ‘otherwise resolve’ their quarrel with Paychex. To effectuate what it characterizes as an agreement applicable to Plaintiffs, Paychex cannot compel them to arbitrate since their claims will be ‘otherwise resolved’ by judicial action.”

This rather tortured bit of contractual interpretation is unavailing. Contractual language is subject to multiple interpretations only when both are reasonable. “When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is ‘reasonably susceptible’ to the interpretation urged by the party. If it is not, the case is over. [Citation.]” (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th, 839, 847-848.) The meaning advanced by the Clauses is not reasonably susceptible to their interpretation, because giving the clause the meaning the Clauses suggest would vitiate the entire arbitration provision. It would be permissive rather than mandatory, when the language is clearly mandatory (“any dispute . . . shall be determined by binding arbitration . . .”). We need not consider this argument further. In sum, we find the scope of the arbitration clause includes the Clauses’ tort claims.

### *3. Validity of Agreement*

The Clauses also argue that they are not bound to the terms of the Agreement because Helgemo induced PPI to retain Paychex for the benefit of himself and Yarrish, and immediately began embezzling money. Thus, they argue, they cannot

be burdened “with an obligation to arbitrate imposed by their own unfaithful alleged agent working in concert with Paychex as co-tortfeasors.” We agree with Paychex, however, that there is no evidence in the record to support this theory. The only actual evidence in the record is the Agreement itself, which was signed by Helgemo as “CFO.” This is consistent with the complaint’s allegation that Helgemo was, indeed, the CFO, and therefore had the apparent authority to bind PPI. Once Paychex established the existence of the arbitration agreement, the burden shifted to the Clauses to establish, by a preponderance of the evidence, the factual basis for any defense to enforcement. (*Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at p. 413.) They have failed to offer any evidence of the Agreement’s invalidity, rather than mere allegations.

Similarly, the allegation that Paychex, Helgemo and Yarrish were acting in concert or otherwise conspiring is just that — an allegation — and without evidence, it cannot defeat the enforceability of the Agreement. Without such evidence, which the Clauses could have developed and presented to the trial court, this argument is without merit.

#### *4. Potential Inconsistent Rulings*

The Clauses also argue the trial court had discretion to refuse to order the case to arbitration because inconsistent rulings might result. They argue we should review this question under an abuse of discretion standard, although they admit the trial court never reached this issue or ruled on it. Under any standard of review, however, we could not uphold a finding that any real risk of inconsistent rulings is present in this case.

We agree that in some cases, the possibility of inconsistent rulings is troubling, but it does not reasonably appear to be a threat here. Helgemo and Yarrish are, according to the Clauses, serving state prison sentences of ten and eight years, respectively. Little doubt exists as to their liability. The substantive disputes remaining

relate to Paychex's culpability, if any, and the amount of damages. Those facts can be established without the participation of Helgemo and Yarrish in the arbitration proceeding, and without regard to any future civil litigation between the Clauses, Helgemo and Yarrish. Given these facts, the risk of inconsistent rulings so low as to be nonexistent, and does not provide a sufficient basis for denying Paychex's motion to compel arbitration.

In sum, we find that none of the Clauses' defenses to the enforcement of the arbitration provision are valid. (In light of our other conclusions, it is not necessary to consider the parties' arguments concerning estoppel.) The only questions remaining relate to the manner in which the arbitration agreement should be implemented.

#### *E. Implementing the Arbitration Clause*

The parties disagree with respect to how the arbitration clause should be enforced, if this court determines it is valid. The Clauses argue that we should remand for discovery on a number of issues, including Helgemo's execution of the Agreement and the proper venue. Paychex asserts we should simply order the case to arbitration in New York, as specified by the Agreement.

With respect to the issues surrounding the execution of the Agreement, we disagree with the Clauses. If they wished to seek discovery relating to Helgemo's execution of the Agreement, the proper time to request it was when the motion to compel arbitration was pending. The Clauses essentially argue they should have another chance to challenge the arbitration clause for a reason they could have, but did not, raise the first time. This argument is without any legal merit.

With regard to venue, we agree that the trial court has not passed on this issue in light of the validity of the arbitration clause. Therefore, if the parties cannot reach an accord on this issue, the trial court may, upon remand, consider whether the venue provision is unconscionable before ordering the case to arbitration. Should the

provision be deemed unconscionable, it may be severed from the rest of the Agreement. Whether any discovery on the venue question is necessary is within the trial court's discretion.

### III

#### DISPOSITION

The order denying Paychex's motion to compel arbitration is reversed. The case is remanded for further proceedings consistent with this opinion. Paychex is entitled to its costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.