Filed 5/14/07 Massie v. Ralph's Grocery Store CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JAMES MASSIE, et al., Plaintiffs and Respondents, v. RALPHS GROCERY COMPANY, et al., Defendants and Appellants.	B187844 (Los Angeles County Super. Ct. No. BC321144)
DONALD N. MCLEOD, et al., Plaintiffs and Respondents, v. RALPHS GROCERY COMPANY, et al., Defendants and Appellants.	B187854 (Los Angeles County Super. Ct. No. BC321704)

APPEAL from orders of the Superior Court of Los Angeles County, Victoria G. Chaney, Judge. Affirmed.

Thelen Reid & Priest, Thomas E. Hill and Remy Kessler; Littler Mendelson, Henry D. Lederman and Lisa C. Chagala for Defendants and Appellants.

Law Offices of Ian Herzog and Ian Herzog; Daniels, Fine, Israel, Schonbuch & Lebovitz, Scott A. Brooks and Craig S. Momita; Law Offices of Stephen Glick and Stephen Glick for Plaintiffs and Respondents.

SUMMARY

An employer appeals from orders denying its petitions to compel arbitration of two class action lawsuits filed by its employees, alleging Labor Code and Unfair Competition Law violations. The employer unsuccessfully sought arbitration of these disputes in accordance with provisions in various agreements that subject such claims to individual binding arbitration and prohibit proceedings on a class or representative basis. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

Massie v. Ralphs Grocery Company (Super. Ct. Los Angeles County, 2004, No. BC321144)**:** On September 7, 2004, James Massie, Eddy Korkiat Prachasaisoradej, Teresa Lee, Jose Mendez and Jaime Rosales, **"**individually and on behalf of all others similarly situated, and on behalf of the California general public," filed a complaint against Ralphs Grocery Company and Food-4-Less Holdings, Inc. (hereinafter collectively "Ralphs") alleging causes of action for underpayment of overtime in violation of Labor Code section 510, violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and for penalties under Labor Code sections 203 and 558.

McLeod v. Ralphs Grocery Company (Super. Ct. Los Angeles County, 2004, No. BC321704): Ten days later, Donald McLeod, Benjamin Mock and Michael Miner, "individually and on behalf of all others similarly situated, and on behalf of the California general public," filed a complaint against Ralphs alleging causes of action for nonpayment of overtime compensation and violation of the Unfair Competition Law.

In November, the trial court ordered these two cases as well as *Swanson v. Ralphs Grocery Co*., (Super. Ct. Los Angeles County, 2002, No. BC284875), and

Prachasaisoradej v. Ralphs Grocery Co. (Super. Ct. Los Angeles County, 2001, No. BC254143) related, with the *Prachasaisorade*j case designated the lead case.[1]

In April 2005, the McLeod plaintiffs filed a first amended complaint adding plaintiff Bruce Pack. In August, they filed a second amended complaint adding plaintiff Peter Wang as well as a third cause of action for unlawful nonpayment of overtime in violation of the Labor Code and unfair business practices under the Unfair Competition Law.

In September 2005, Ralphs filed motions to compel arbitration and stay proceedings in both the Massie and McLeod actions.

There are three arbitration policies at issue: the 2001, 2003 and 2004 policies.[2] The 2001 arbitration policy was set forth in a four-page, single-spaced document, entitled "Ralphs Grocery Company Dispute Resolution Program Mediation & Binding Arbitration Policy." At paragraph 4, this arbitration policy states: "Arbitration . . . is the sole and exclusive remedy for any dispute(s) arising out of or related to the employer/employee relationship. . . . This includes, for example, disputes arising from alleged *unfair competition, unfair business practices, . . . unpaid wages or failure to pay*

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[1] In *Ralphs v. Superior Court* (*Swanson*) (2004) 112 Cal.App.4th 1090, 1094, we concluded that, to the extent Ralphs' bonus calculation includes expense items the Legislature or the Industrial Welfare Commission has declared may not be charged to an employee (deductions for any part of the cost of workers' compensation claims or cash shortages for nonexempt employees), such a bonus plan is unlawful. The same issue is now pending before our Supreme Court (and scheduled for oral argument on June 6, 2007) in *Prachasaisoradej v. Ralphs Grocery*, review granted Dec. 15, 2004, S128576 (review limited to addressing the following question: "Does an employee bonus plan based on a profit figure that is reduced by a store's expenses, including the cost of workers compensation insurance and cash and inventory losses, violate (a) Business and Professions Code section 17200, (b) Labor Code sections 221, 400 through 410, or 3751, or (c) California Code of Regulations, title 8, section 11070?").

[2] The parties apparently dispute whether *more* than one of these policies applies to certain plaintiffs (both the 2003 and 2004 policies state that the current policy "supersedes and replaces each prior version of the Company's Mediation & Binding Arbitration Policy"), but it is undisputed that at least one of these policies applies to each of the ten named plaintiffs.

overtime or other compensation or the computation thereof. . . . This Policy covers, for example, *any claims arising under . . . the California Labor Code [or] the California Business [and] Professions Code . . . .*" (Italics added.)

Paragraph 8 of the policy contains the following class action waiver provision: "[U]nless controlling legal authority requires otherwise, there will be no right or authority for any dispute to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving disputes brought in a representative capacity on behalf of the general public, of other Ralphs employees (or any of them), or of other persons similarly situated. The individual claim of any Employee bound by this Policy is subject to this Policy. Any action brought against Ralphs (or any of them) by any other person (whether an Employee bound by this Policy or not) in a representative capacity on behalf of or for the benefit of any Employee bound by this Policy will be designated as a 'Representative Action.' To the fullest extent permitted by law, any individual claim by an Employee for a remedy pursuant to or under the authority of a Representative Action is subject to this Policy. Thus, even though some of the Federal Rules of Civil Procedure apply as set forth above, **there shall be no judge or jury trials, and there shall be no class actions or Representative Actions permitted**, unless controlling legal authority requires otherwise." (Original emphasis.)

According to Ralphs, McLeod, Mock, Pack and Rosales agreed to the terms of the 2001 arbitration policy by signing an acknowledgement. (As to Miner and Wang, Ralphs presented declarations indicating that copies of the policy were delivered to Miner and "Chang P Wang" in September 2001, and they continued to work for Ralphs thereafter.)

The 2003 arbitration provision was incorporated by reference into a six-page, single-spaced document entitled "2003 Semi-Annual Bonus Plan."[3] Headings within the document included "Concepts Used in Determining the Bonus You May Be Eligible to Earn Under the Bonus Plan," "How to Calculate the Bonus You May Be Eligible To Earn Under the Bonus Plan," "Eligibility to Earn a Bonus Under the Bonus Plan," and "Other

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[3] This was one of the plans at issue in *Swanson*, *supra*, 112 Cal.App.4th 1090.

Terms and Conditions." At paragraph 3 under this last heading, the bonus plan provides: "All participants in this Bonus Plan are covered and bound by the most recent version of the Ralphs Grocery Company Dispute Resolution Program ('DRP') Mediation & Binding Arbitration Policy (the 'Policy')—as implemented, modified, amended, restated, or revoked—for all 'Covered Disputes' as defined in the Policy, regardless of whether they relate to or arise out of this Bonus Plan or any predecessor or successor plan(s). Any Bonus Plan participant who is not familiar with or does not have a copy of the most recent version of the Policy can obtain a copy from their Store Director, the Company's Personnel Department, or the Company's Human Resources Department."

Paragraphs 6 and 7 at page 5 (regarding "Eligibility to Earn a Bonus under the Bonus Plan") of the 2003 Bonus Plan stated: "**The Store Member must not have chosen to opt-out of participating in the Bonus Plan.** As set forth below, Bonus Plan eligible Members who do not agree with the terms and conditions of this Bonus Plan must affirmatively opt-out of participating in the Bonus Plan.

"[¶] **The Store Member must not challenge, or have challenged, the legality, validity, or enforceability of this Bonus Plan or any predecessor or successor plan(s) on behalf of the Store Member himself or herself, in any type of representative capacity on behalf of any other current or former employees of the Company, or as a participant in any type of representative action making any such challenge(s)**. . . ." (Original emphasis.)

The "Other Terms and Conditions" section of the 2003 Bonus Plan also contained the following provisions: "[¶] This Bonus Plan, and all predecessor and successor plans, have been or will be voluntarily drafted or implemented by the Company with the intention that they comply with all applicable laws and regulations. The Company did not and does not intend to draft or implement, or incur the expense of defending, any such plans which anyone challenges or are held as not being in any way legal, valid, or enforceable as drafted or implemented. If this Bonus Plan, or any predecessor or successor plan(s), as drafted or implemented, is challenged as unlawful, invalid, unconscionable, or otherwise unenforceable in whole or in part, or held to be such by any

court or arbitrator of competent jurisdiction, by or through any type of individual or representative action or proceeding brought or participated in by any Bonus Plan participant on his or her own behalf or on behalf of any current or former employee(s) of the Company, then such plans will be deemed to be terminated from their inception as to any such Bonus Plan participants and they must return to the Company any payments received thereunder.

"[¶] The Company reserves the exclusive right to amend, modify, or terminate this Bonus Plan at any time and for any reason in its sole and absolute discretion.

"[¶] Any Store Member covered by this Bonus Plan who does not agree to all of the terms and conditions contained herein must affirmatively opt-out of participating in this Bonus Plan by giving notice to the Company of their opting-out of participating in this Bonus Plan. Such notice must be given to the Company in writing no later than **September 26, 2003**, and must be delivered by that date to Ralphs Grocery Company's registered agent for service of process in the state in which the Store Member works for the Company. The written notice must identify the Store Member by name and their social security or employee identification number, contain an affirmative statement that the Store Member is opting-out of participating in this Bonus Plan, and be signed and dated by the Store Member. Any Store Member who fails to give the Company such notice in the manner prescribed herein, or who accepts any bonus distribution under this Bonus Plan after giving such notice, will be deemed to be covered by the terms and conditions of this Bonus Plan and a participant thereof." (Original emphasis.)

Although it apparently was not provided with the 2003 Bonus Plan, the "most recent" (2003) version of the arbitration policy defined "Covered Disputes" to include the same types of disputes subject to the 2001 policy (among others) and also contained a class action waiver provision similar to the one set forth within the 2001 arbitration policy.[4]

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[4] "[T]here is no right or authority for any Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other

According to Ralphs, Massie, Prachasaisoradej, Lee, Mendez, Rosales, McLeod and Wang agreed to the 2003 arbitration policy because they all accepted payments under the 2003 bonus plan and failed to opt out of this plan.

The 2004 Bonus Plan was substantially similar to the 2003 plan before this court in the *Swanson* case except that the 2004 plan states that the calculations "are adjusted based on the principles in *Ralphs v. Superior Court*, 112 Cal.App.4th 1090 (2003)." Further, instead of incorporating the "most recent version" of the arbitration policy by reference, the 2004 Bonus Plan attached the 2004 arbitration policy to the plan (making the plan eleven pages). The 2004 arbitration policy contained a substantially similar definition of "covered disputes" and a substantially identical class action waiver provision as those found in the 2001 and 2003 policies, but also added a number of new provisions. For example, the following language was added: "The submission of an application for employment, acceptance of employment or continuation of employment with the Company by an Employee is deemed the Employee's acceptance of this Arbitration Policy. No signature by an Employee or the Company is required for this Arbitration Policy to apply to Covered Disputes."[5]

Ralphs employees (or any of them), or of other persons similarly situated. The individual Covered Disputes of any Employee bound by this Policy are subject to this Policy. Any action or proceeding brought against Ralphs (or any of them) by any person (whether an Employee bound by this Policy or not) or entity in a representative capacity on behalf of or for the benefit of (in whole or in part) any Employee bound by this Policy is designated as a 'Representative Action' in this Policy. To the fullest extent permitted by law, any individual Covered Disputes of or by an Employee for a remedy pursuant to or under the authority of a Representative Action are governed by and subject to this Policy. Thus, even though some of the Federal Rules of Civil Procedure apply as set forth above, **there are no judge or jury trials and there are no class actions or Representative Actions permitted under this Policy.**" (Original emphasis.)

[5] Further revisions to the 2004 arbitration policy also included the following: "If the parties do not mutually agree on the selection and appointment of a Qualified Arbitrator, the following selection method will be used to select and appoint a Qualified Arbitrator: (1) Each party to the arbitration proceeding will propose a list of three Qualified Arbitrators that they want appointed to hear and decide the Covered Dispute(s);

In addition, a new paragraph was added to the 2004 Bonus Plan, stating as follows: "[¶] **Acceptance of any payment under this Bonus Plan by any participant constitutes a waiver, release, relinquishment and discharge of any and all claims the participant has, had or may have against Ralphs Grocery Company (and/or its predecessor, successor, parent, subsidiary and/or affiliated entities) arising out of or related to any and all previous bonus plans (and the payments made thereunder) and/or any actual or claimed misclassification as a salaried employee rather than as an hourly employee, as previously, now or hereafter made or asserted by such participant, regardless of whether such claims were or are made or asserted by or for such participant individually, collectively, putatively, on a representative basis, or otherwise, including without limitation in connection with the following litigation: *Eddy Korkiat Prachasaisoradej vs. Ralphs Grocery Company*, Los Angeles County Superior Court Case No. BC254143 (commenced July 13, 2001), California Court of Appeal (Second Appellate District) Case No. B165498 (commenced March 3, 2003); *David Swanson vs. Ralphs Grocery Company*, Los Angeles County Superior Court Case No. BC284875 (commenced November 7, 2002), California Court of Appeal (Second Appellate District) Case No. B168257 (commenced June 30, 2003);**

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and (2) The parties will alternate in striking one name from any other party's list of proposed Qualified Arbitrators, *with the first strike to be made by a party who has not demanded arbitration pursuant to this Arbitration Policy*, followed by a continuing rotation of alternating adverse parties until there is only one proposed Qualified Arbitrator that has not been stricken, who will be deemed to be the parties' selected and appointed Qualified Arbitrator to hear and decide the Covered Dispute(s) that are the subject of the arbitration proceedings." (Italics added.)

Another new provision specified: "Except and only to the extent it may be required by applicable law, the parties and the Qualified Arbitrator shall maintain the existence, content and outcome of any arbitration proceedings held pursuant to this Arbitration Policy in the strictest confidence and shall not disclose the same without the prior written consent of all the parties."

Other provisions purported to shorten the applicable statutes of limitation and shift arbitration costs to the extent Ralphs could contractually do so.

and *James Massie, Eddie Korkiat Prachasaisoradej, Teresa Lee, Jose Mendez and Jaime Rosales vs. Ralphs Grocery Company*, Los Angeles County Superior Court Case No. BC321144 (commenced September 7, 2004)." (Original emphasis.)

According to Ralphs, Prachasaisoradej, Mendez, Rosales and Wang agreed to the 2004 arbitration policy by accepting payments under the 2004 bonus plan and by failing to opt out of this plan.

The Massie and McLeod plaintiffs filed opposition to Ralphs' motions to compel arbitration, claiming the arbitration agreements were unconscionable and therefore unenforceable on multiple grounds, including the impermissible inclusion of the class action waivers.

The trial court heard oral argument, took the matter under submission and issued a six-page ruling denying the motions to compel arbitration, finding the class action waivers unconscionable and therefore unenforceable under *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 162-163 (*Discover Bank*) and *Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court* (2005) 133 Cal.App.4th 396, 410-411 (*Mailbox Center*). Because Ralphs indicated it was unwilling to pursue arbitration in the absence of the class action waivers, the trial court denied Ralphs' motions without prejudice.

Ralphs appeals.

DISCUSSION

According to Ralphs, the trial court erred in denying its motions to compel arbitration because its arbitration policies were not unconscionable under *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*), and *Discover Bank, supra,* 36 Cal.4th 148, does not apply in this case. We disagree.

"[U]nder both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [Citations.]" (*Armendariz, supra,* 24 Cal.4th at p. 98, fn.

omitted.) Unconscionability is one such ground. (Civ. Code, § 1670.5, subd. (a).) The party opposing arbitration bears the burden of proving an arbitration provision unconscionable. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972 (*Engalla*).)

Unconscionability includes both procedural and substantive elements. (*Armendariz, supra,* 24 Cal.4th at p. 114.) "The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. . . . [¶] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided." (*Discover Bank, supra,* 36 Cal.4th at p. 160, citation and internal quotations omitted.) "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra,* 24 Cal.4th at p. 114.)

In *Discover Bank, supra*, 36 Cal.4th 148, our Supreme Court addressed the question of whether a class action waiver contained in an arbitration provision added to an existing credit card agreement by way of a "bill stuffer" was unconscionable under California law. The *Discover Bank* court began by considering the "justifications" for class action lawsuits, including the observation in *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 445: "'Justice Tobriner's separate opinion [in *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 387 (conc. opn. of Tobriner, J.)] effectively clarified that trial courts remain under the obligation to consider "the role of the class action in deterring and redressing wrongdoing." [Citation.]'" (*Discover Bank, supra,* 36 Cal.4th at p. 156.)

"It is this important role of class action remedies in California law that led this court to devise the hybrid procedure of classwide arbitration in *Keating* [*v. Superior Court* (1982) 31 Cal.3d 584, 613-614 (*Keating*), overruled on other grounds in *Southland Corp. v. Keating* (1984) 465 U.S. 1]. . . . 'This court has repeatedly emphasized the importance of the class action device for vindicating rights asserted by large groups of

persons. We have observed that the class suit "'both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. [Citation.]'" [Citation.] Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to "retain[] the benefits of its wrongful conduct." [Citation.] [Moreover,] "[c]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication; the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party."'" (*Discover Bank, supra,* 36 Cal.4th at p. 157, citing *Keating, supra,* 31 Cal.3d at p. 609, fn. omitted.)

The *Discover Bank* court then analyzed both the adhesive and substantively unconscionable aspects of the agreement at issue there: "[W]hen, a consumer is given an amendment to its cardholder agreement in the form of a 'bill stuffer' that he would be deemed to accept if he did not close his account, an element of procedural unconscionability is present. [Citation.] Moreover, although adhesive contracts are generally enforced [citation], class action waivers found in such contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy. As stated in Civil Code section 1668: '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.'" (*Discover Bank, supra,* 36 Cal.4th at pp. 160-161, original italics.)

"Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because, as discussed above, damages in consumer cases are often small and because '"[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit"' [citation], '"the class action is often the only effective way to halt and redress such exploitation."' [Citation.] Moreover, such class action or arbitration waivers are indisputably one-sided. 'Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which

the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits.' [Citation.] *Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable*." (*Discover Bank, supra,* 36 Cal.4th at p. 161, italics added.)

In the case before us, apparently abandoning any attempt to dispute the procedural unconscionability of its 2001 arbitration policy, Ralphs argues that the 2003 and 2004 arbitration policies were not procedurally unconscionable because the employees had the "opportunity to opt out." Actually, it is not at all clear that the employees could opt out of the arbitration policies. Indeed, as to the 2004 policy at least, even if employees gave up their bonuses and opted out of the 2004 *Bonus Plan* which incorporated the 2004 arbitration policy, the Arbitration Policy itself separately specified that continued employment constituted acceptance of the arbitration policy.

Without even addressing the brief (apparently 14-day) window of time in which the employees were required to exercise the "opportunity to opt out," the obstacles presented to communicating the exercise of this purported option (given the vague reference to the registered agent for service of process without contact or other information) and other such issues, the point is the employees were merely given the opportunity to "opt out" of the *Bonus Plan* (after working for almost the entirety of the fiscal year on which it was based); as to the arbitration provision, the employees were still forced to "take it or leave it," with no meaningful opportunity to negotiate the arbitration provision or class action waiver. As such, the purported "opt out" opportunity is effectively illusory. (Cf. *Circuit City Stores, Inc. v. Mantor* (9th Cir. 2003) 335 F.3d 1101, 1107 [in light of "Circuit City's insistence that Mantor sign the arbitration agreement under pain of forfeiting his future with the company the fact that in 1995 Mantor was presented with an opt-out form does not save the agreement from being oppressive, for Mantor had no meaningful choice nor any legitimate opportunity, to negotiate or reject the terms of the arbitration agreement"].)

Ralphs further argues that its arbitration policies are not substantively unconscionable because the employees cannot prove that "claims in this setting (the employment setting) involve predictably small amounts of damages" and cannot allege that Ralphs implemented a scheme to "deliberately cheat a large number of people out of individually small sums of money" because the named employees' claims could exceed between $4,000 and $75,000 (for up to a four-year period), plus interest, penalties and attorney fees. In this regard, Ralphs cites the following language in *Discover Bank, supra,* 36 Cal.4th at pages 162 to 163: "We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced."

First, we reject Ralphs' contention that the individual claims encompassed within the Massie and McLeod actions are necessarily not "individually small" in the sense that they may be "too small to warrant individual litigation," (*Keating, supra,* 31 Cal.3d at p. 609), particularly with respect to current Ralphs employees.[6] Moreover, we cannot ignore, as Ralphs does, the remainder of our Supreme Court's opinion in *Discover Bank, supra,* 36 Cal.4th 148. As the *Discover Bank* court emphasized, it is the "important role of class action remedies in California law that led this court to devise the hybrid

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[6] The *Discover Bank* court specifically rejected the argument that the potential availability of attorney fees to the prevailing party in arbitration ameliorates the problem posed by class action waivers as well as the contention that small claims litigation, government prosecution or informal resolution were adequate substitutes for class action or arbitration mechanisms. (*Discover Bank, supra,* 36 Cal.4th at p. 162.)

procedure of classwide arbitration in *Keating, supra,* 31 Cal.3d 584." (*Discover Bank, supra,* 36 Cal.4th at p. 157.) As the *Keating* court cautioned: "If the right to a classwide proceeding could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting [the principles that favor class actions], and for chilling the effective protection of interests common to a group, would be substantial," and denial of a class action in cases where it is appropriate "may have the effect of allowing an unscrupulous wrongdoer" to retain the benefits of its wrongful conduct. (*Keating, supra,* 31 Cal.3d at p. 609.)

As the court in *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, stated: "The manifest one-sidedness of the no class action provision at issue here is blindingly obvious." (*Id.* at p. 1100, cited with approval in *Discover Bank, supra,* 36 Cal.4th at pp. 159-161.) "'The clause is not only harsh and unfair to Discover customers who might be owed a relatively small sum of money, *but it also serves as a disincentive for Discover to avoid the type of conduct that might lead to class action litigation in the first place.* By imposing this clause on its customers, Discover has *essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect. Therefore, the provision violates fundamental notions of fairness.* [¶] . . . This is not only substantively unconscionable, it violates public policy by granting Discover a "get out of jail free" card while compromising important consumer rights.'" (*Discover Bank, supra,* 36 Cal.4th at pp. 159-160, citing *Szetela, supra,* 97 Cal.App.4th at p. 1101, italics added; and see *Discover Bank, supra,* 36 Cal.4th at p. 161 ["class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights"].)

In the employment context, our Supreme Court has expressly cautioned: "Given the lack of choice and the potential disadvantages that even a fair arbitration system can harbor for employees, we must be particularly attuned to claims that employers with

superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement. 'Private arbitration may resolve disputes faster and cheaper than judicial proceedings. Private arbitration, however, may also become an instrument of injustice imposed on a "take it or leave it" basis. The courts must distinguish the former from the latter, to ensure that private arbitration systems resolve disputes not only with speed and economy but also with fairness.'" (*Armendariz, supra*, 24 Cal.4th at p. 115, citing *Engalla, supra,* 15 Cal.4th at p. 989 (conc. opn. of Kennard, J.).)

In *Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court* (*Mailbox Center*) (2005) 133 Cal.App.4th 396, the court considered a "ban on group arbitration" in certain franchise agreements in light of *Discover Bank*. The 35 plaintiff franchisees raised numerous statutory and common law claims challenging the conversion of their stores into a new format. (*Id.* at p. 399 and fn. 1.) Their complaint sought "extensive monetary and injunctive relief (over $470,000 lost investment, etc.)." (*Id.* at p. 404, fn. 4.) The *Mailbox Center* court observed that "franchise agreements, in some cases, have the same qualities of adhesion contracts as do certain consumer contracts, such as were discussed in *Discover Bank, supra*, 36 Cal.4th 148, with regard to the availability of group arbitration. These franchise agreements also resemble employment agreements to the extent that the franchisees' livelihoods are involved and subject to contractual arbitration for dispute resolution, although those clauses are not statutory in nature." (*Mailbox Center, supra*, 133 Cal.App.4th at p. 410.) Without regard to the size of the claims, the *Mailbox Center* court concluded that, "insofar as the arbitration clause contains an unconscionable ban on group arbitration, it is not valid and enforceable." (*Id.* at p. 411; and see *id.* at p. 417 [directing trial court to enter new and different orders striking as unconscionable those provisions of the franchise agreements' arbitration clauses prohibiting representative or class actions].)

We see no principled basis for distinguishing the reasoning of *Discover Bank* in the employment setting at issue here.[7] In this case just as in the consumer credit context, the contract is adhesive, and the "manifest onesidedness" of the class action waiver is "blindingly obvious" as Ralphs would have no reason to use the class action device in disputes with its employees.[8] (*Szetela, supra,* 97 Cal.App.4th at p. 110; and see *Cohen v. DIRECTV, Inc.* (2007) 142 Cal.App.4th 1442, 1455 ["post-*Discover Bank* cases make clear that class action waivers may be found unconscionable in a variety of circumstances, some of them not confined to small sums of money"].) To paraphrase the *Szetela* court, *supra,* 97 Cal.App.4th at page 1101, "While the advantages to [Ralphs] are obvious, such a practice [prohibiting class or representative actions under these circumstances] contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general. (See, e.g., Bus. & Prof. Code, § 17200 et seq.) It provides the [employee] with no benefit whatsoever; to the contrary, it seriously

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[7] In a case on remand in light of *Discover Bank, supra,* 36 Cal.4th 148, Division Five of this District considered the enforceability of a preemployment arbitration agreement containing a class action waiver. (*Gentry v. Superior Court* (*Circuit City Stores, Inc.*) (2005), 135 Cal.App.4th 944, review granted Apr. 26, 2006, S141502.) After reconsidering the issue in light of *Discover Bank,* the *Gentry* court maintained its conclusion that the class action waiver was not unconscionable. Identical to the argument Ralphs asserts here, Division Five distinguished *Discover Bank* on the ground that Gentry had "alleged statutory violations that could result in substantial damages and penalties should he prevail on his individual claims. In fact, the Supreme Court acknowledged in *Discover Bank* that in some employment cases, large individual awards are commonplace. [Citations.]" (*Gentry, supra,* 135 Cal.App.4th at p. 951, review granted Apr. 26, 2006, S141502.) In light of the Supreme Court's grant of review, this issue is presently pending before our Supreme Court and scheduled for oral argument on June 5, 2007.

[8] In *Armendariz, supra,* 24 Cal.4th at page 118, our Supreme Court observed that unconscionability turns not only on a one-sided result, but also on the absence of "justification" for it. Without reasonable justification, "arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose. [Citation.]"

jeopardizes [employees'] rights by prohibiting any effective means of litigating [Ralphs'] business practices. This is not only substantively unconscionable, it violates public policy by granting [Ralphs] a 'get out of jail free' card while compromising important consumer [and employee] rights."[9] (See also Civ. Code, § 1668.)

In light of our conclusion that Ralphs' class action waivers are wholly inconsistent with the reasoning of *Discover Bank, supra*, 36 Cal.4th 148, and Ralphs' reiteration of its disinterest in arbitration if it cannot enforce its class action waivers (see *Keating, supra,* 31 Cal.3d at p. 613-614), we need not resolve any question of severance of this or any other provision of the arbitration agreement. Similarly, we need not address any further arguments as to the unconscionability questions raised here.[10]

DISPOSITION

The orders are affirmed. Respondents are awarded their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, J.

We concur:

JOHNSON, Acting P.J. **ZELON, J.**

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[9] "Furthermore, the [class action waiver] clause violates public policy in another important way. One of the policy reasons for class actions is to promote judicial economy and streamline the litigation process in appropriate cases. To allow litigants to contract away the court's ability to use a procedural mechanism that benefits the court system as a whole is no more appropriate than contracting away the right to bring motions in limine, seek directed verdicts, or use other procedural devices that allow the courts to operate in an efficient manner." (*Szetela, supra,* 97 Cal.App.4th at pp. 1101-1102.)

[10] For the reasons stated in *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1284 to 1287, we reject Ralphs' attempt to argue that the 2004 arbitration policy, at least as to Massie, Prachasaisoradej, Mendez, and Rosales, is a "*post-dispute* arbitration agreement" to which "*Armendariz* is inapplicable."