No. S280256

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

EVANGELINA YANEZ FUENTES,
Plaintiff-Respondent,

v.

EMPIRE NISSAN, INC., ET AL.,
Defendants-Appellants.

AFTER DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT CASE B314490

FROM THE SUPERIOR COURT,
COUNTY OF LOS ANGELES,
CASE NO. 20 STCV35350, ASSIGNED FOR ALL PURPOSES
TO JUDGE MEL RECANA

RESPONDENT EVANGELINA FUENTES'S REPLY BRIEF

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INTRODUCTION

Empire Nissan[1] attempts to shield itself from the patent unfairness of its form arbitration provision behind pleas that this Court should simply "uphold basic contract principles." (Ans. Br. at p. 16.) These efforts to cloud the central issues presented, so Empire Nissan can continue to propagate its illegible arbitration agreement, should be rejected.

First, Empire Nissan's sweeping assertion that mutual assent to support contract formation exists even where the non-drafting party, through no fault of her own, neither knew nor had a reasonable opportunity to know of the agreement's material terms, is simply wrong. Under the facts here, there was no agreement by the parties on the same material terms in the same sense—no mutual consent—and therefore no arbitration agreement was ever formed.

Second, this Court may consider Fuentes's argument that the arbitration agreement within the Applicant Statement and Agreement (the "Arbitration Agreement") is void because there was no mutual assent to support contract formation, as that argument presents a purely legal question "fairly included" within the enforceability issue presented in the petition for review, which can be decided on undisputed facts. The formation question also involves important public policy concerns, further supporting this Court's consideration.

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[1] Defendants-Appellants Empire Nissan, Inc., Romero Motors Corporation, and Oremor Management & Investment Company are referred to collectively herein, as "Empire Nissan."

Third, Empire Nissan fails to undermine Fuentes's argument that no valid arbitration agreement was formed due to fraud in the execution. Contrary to Empire Nissan's representation of the record, Fuentes's unrebutted declaration makes clear not only that the Arbitration Agreement was "almost impossible" to read, but that Empire Nissan did, in fact, misrepresent and deceive her regarding its contents, hurried her along to sign it, and gave her no opportunity to ask questions about what she was signing. (AA 163.) Moreover, Fuentes's declaration was fully supported by both lower courts—the majority and dissent in the Court of Appeal, and the trial court, all concluded that the Arbitration Agreement is, for all intents and purposes, illegible.

Fourth, this Court should reject Empire Nissan's arguments regarding substantive unconscionability. The substantive unconscionability inquiry does not require a party to identify specific terms that, in isolation, are unfair. Rather, under this Court's reasoning in *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 130, an arbitration agreement like Empire Nissan's that "impair[s] the integrity of the bargaining process" and "contravene[s] the public interest" by hiding its substance can be substantively unconscionable when considered in toto. Empire Nissan misrepresents Fuentes's unconscionability argument as being based merely on the subjective readability of the Arbitration Agreement. Instead, Fuentes contends that the Arbitration Agreement is substantively unconscionable because Empire Nissan, the more powerful, drafting party, had exclusive

knowledge of its essential terms because the Agreement is *objectively* "largely unreadable." (Slip Op at p. 2.) This exclusive knowledge gave Empire Nissan an "unreasonably favorable" advantage, which is the essence of substantive unconscionability.

On top of this, Fuentes has identified at least three substantively unconscionable provisions, including the lack of any guidance on how a party might initiate arbitration, the one-sided carve-out of certain claims for Empire Nissan to pursue in civil court, and the prospective, total PAGA waiver. Empire Nissan discounts each as being insufficient to "shock the conscience," but these arguments fall flat. Specifically, Empire Nissan's reliance on a mere passing reference to the entire California Arbitration Act in the Arbitration Agreement does not satisfy the accessibility concerns recently described by this Court in *Kho*. Additionally, Empire Nissan cannot explain away the asymmetry resulting from the apparent carve-out from arbitration for its claims involving proprietary information, trade secrets, and confidential information. Finally, there can be no question that a PAGA waiver provision like the one in the Arbitration Agreement is unenforceable under California law, such that inclusion of the waiver here is further evidence of substantive unconscionability.

Given the extreme degree of procedural unconscionability present, as recognized below, Fuentes need only point to a relatively low degree of substantive unconscionability, a threshold she has satisfied here. Thus, whether based on lack of contract formation, or on unconscionability, this Court should

reverse the Court of Appeal's majority decision and hold that Empire Nissan may not compel arbitration of Fuentes's claims.

LEGAL ARGUMENT

I. Empire Nissan is Wrong in Arguing That Mutual Assent Exists Irrespective of Whether the Receiving Party Knew or Could Have Known an Agreement's Terms.

Empire Nissan argues that, if accepted, "Fuentes' position would call into question the validity of almost every contract in California." (Ans. Br. at p. 16.) Hardly. Fuentes's position is far less radical, relying only on the foundational aspect of contract law requiring mutual assent to form a contract. (*Davis Sewing Machine Co. v. Richards* (1885) 115 U.S. 524, 527 ["A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties."].)

"Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract." (*Sellers v. JustAnswer LLC* (2021) 73 Cal.App.5th 444, 460 [cleaned up, citation omitted].) "'If there is no evidence establishing a manifestation of assent to the "same thing" by *both* parties, then there is no mutual consent to contract and no contract formation.'" (*Id.*) Moreover, "[c]onsent is not mutual, unless the parties all agree upon the same thing in *the same sense*." (Cal. Civ. Code § 1580 [emphasis added]; see also *Am. Employers Grp., Inc. v. Employment Dev. Dep't* (2007) 154 Cal.App.4th 836, 846.)

Contrary to Empire Nissan's argument, "the failure to reach a meeting of the minds on all material points prevents the

formation of a contract even though the parties have orally agreed upon some of the terms, or have taken some action related to the contract." (*Am. Employers Grp., supra*, 154 Cal.App.4th at p. 847 [citation omitted].) Accordingly, Empire Nissan's reliance on *Hunter v. Sparling* (1948) 87 Cal.App.2d 711, 725 is misplaced.

In *Hunter*, the plaintiff knew all the terms of a retirement benefit that he sued to recover from the defendant bank, save for the "precise formula" used to calculate the benefit. (*Hunter*, *supra*, 87 Cal.App.2d at p. 725.) Because he knew and relied on the material terms, this persuaded the court to find the contract sufficiently definite:

> For 23 years plaintiff knew that there was a formula and knew that, if he remained with the bank, upon retirement he would receive a large cash payment as deferred compensation. The fact that the precise terms of the formula were not known to plaintiff is immaterial as long as such terms were capable of ascertainment by the conduct of the parties or otherwise.

(*Id.*) This is unlike the instant case, where Fuentes, through no fault of her own, could not have known the material terms of the Arbitration Agreement, or even that it was an Arbitration Agreement. (AA 163.)

Empire Nissan also misguidedly relies on *Larrus v. First Nat. Bank of San Mateo County* (1954) 122 Cal.App.2d 884 for the broad proposition that a party may assent to be bound by contract terms that he does not know. (Ans. Br. at pp. 14-15.) However, the facts in *Larrus* are distinguishable, and the court

qualified this general proposition accordingly by stating that, "[h]ere the clause is *clearly printed* in the only sentence on the face of the signature card" and "the card was not printed in such a manner that it tended to conceal the fact that it was an express acceptance of the bank's rules and regulations." (*Larrus*, *supra*, 122 Cal.App.2d at p. 889 [emphasis added].) Moreover, *Larrus* noted that the plaintiffs had plenty of time to review the cards at home, and ask questions, prior to signing. (*Id.* at pp. 889-890.)

Unlike *Larrus*, Fuentes submitted evidence explaining that she was severely rushed and had no opportunity to ask about the indecipherable Arbitration Agreement. (See AA 163, cited at AOB p. 32.) Specifically, she averred that she had great difficulty reading the Arbitration Agreement's tiny type, that she was hurried along to just "fill these out" because she was told "time was of the essence" as "the drug testing place was closing" and she had to go there "the same day," and that she had only five minutes to review and fill out the paperwork, with no opportunity to ask questions about it. (AA 163.)

Finally, Empire Nissan's reliance on *Upton v. Tribilcock* (1875) 91 U.S. 45, 50 is also misplaced. (Ans. Br. at p. 16.) *Upton* held that a party to a contract cannot defeat formation (or enforcement) simply by arguing that he did not read the contract prior to signing it or did not know its contents. (*Upton*, *supra*, 91 U.S. at p. 50.) But this is not Fuentes's argument. Instead, Fuentes argues that *no person* could have read and understood Empire Nissan's Arbitration Agreement as drafted, at least not without specialized equipment and extended time.

In sum, Fuentes could not have formed a valid contract with Empire Nissan because she simply did not know what she was signing, nor could she have known the contract's terms through reasonable means. Without being able to read the Arbitration Agreement, Fuentes could not have known any of the material terms of its provisions. There was thus no agreement by the parties on "the same" material terms "in the same sense," and no contract ever formed. (*Am. Employers Grp., supra*, 154 Cal.App.4th at p. 846.)

II. Empire Nissan's Waiver Argument Fails Because Arguments Raised for the First Time in this Court Are Routinely Considered Where the Issue is Purely Legal and Based on Undisputed Facts.

First, Empire Nissan is mistaken that this Court may not consider the lack of mutual assent, or "fraud in the execution," of the Arbitration Agreement because the trial court found that Empire Nissan "met [its] initial burden in establishing the existence of an arbitration agreement." (Ans. Br. at p. 17 [quoting AA 206-207].) The trial court's finding was simply an evidentiary one, acknowledging that Empire Nissan had produced an ostensible written agreement. "The question as to whether, from the facts found, there was a contract . . . or any other legally enforceable obligation, is a question of law and not of fact." (*Hunter*, *supra*, 87 Cal.App.2d at p. 721.) The issue here is a legal one, not a factual one as Empire Nissan argues.

Second, Empire Nissan cites *Ebbetts Pass Forest Watch v. Cal. Dep't of Forestry & Fire Prot.* (2008) 43 Cal.4th 936 fn. 6 to support its proposition that issues not raised before the Court of

Appeal and identified in the Petition for Review are not appropriate for review. (Ans. at pp. 17-19.) Empire Nissan is wrong here for multiple reasons.

Empire Nissan omits the fact that this Court has a well-established exception to the waiver rule for arguments asserted for the first time on appeal that raise "a pure question of law which is presented by undisputed facts." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394 [addressing the constitutionality of Cal. Civ. Code § 789.3 despite it being unchallenged in the trial court].) *Hale* further held that "consideration of points not raised below also may be permitted when important issues of public policy are involved." (*Id.*)

As in *Hale*, historically this Court invoked this exception in cases presenting constitutional issues. (See also *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, fn. 3 [deciding to hear new argument in case posing constitutional challenge to rent control ordinance].) However, since then this Court has applied the exception more broadly, deciding to consider issues even if not raised below, in a wide range of cases. (See, e.g., *Frink v. Prod* (1982) 31 Cal.3d 166, 170-171 [deciding to hear petitioner's argument regarding proper standard of review of administrative disability determinations, because "it is not claimed that additional evidence was available to the parties" and consideration would further the policy of permitting consideration of issues of important public policy]; *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal.4th 1, 6 [noting "[t]his is not the first occasion on which we have addressed a dispositive

issue not raised by the parties below," and deciding to hear issue of whether a tort remedy existed for intentional spoliation of evidence, stemming from a medical malpractice action]; *People v. Superior Court* (2002) 27 Cal.4th 888, 901 fn.5 [deciding to consider additional statutory issues and noting that the California Supreme Court is "empowered, upon review, to 'decide any or all issues in the cause.'"] [citation omitted]; *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089 fn.11 [deciding to consider statute not raised by the plaintiffs in the lower courts, because it was directly relevant to the preemption issue on review, and was a purely legal issue not depending on additional record development].)

In the instant case, the question of whether there was mutual assent is a purely legal one, to be decided on uncontested facts. Moreover, as the dissent below pointed out below, the "form agreement" at issue here "appears to be in use by auto dealerships around the state," (Dissent at pp. 8-9), and thus its validity presents an important public policy issue, a point which further supports this Court reaching the issue.

Separately, as cited in Fuentes's Opening Brief, California Rules of Court, rule 8.520(b)(3) permits the parties to brief issues that were not included in the petition, if such issues were "fairly included" in the issues that were raised in the petition. Rule 8.516(b)(1) also permits the Court to decide issues omitted from the petition but fairly included in the issues raised by the petition.

Here, the primary issue on review is whether the

Arbitration Agreement is enforceable. But enforceability necessarily requires a prior finding of a valid contract. (*Lopez v. Charles Schwab & Co., Inc.* (2004) 118 Cal.App.4th 1224, 1233 ["First, . . . no obligation to arbitrate exists unless the parties have entered into a contract to arbitrate."].) Therefore, whether an Arbitration Agreement ever formed between Empire Nissan and Fuentes is necessarily "fairly included" within the issues before the Court, despite it not having been explicitly raised in the petition and answer. (See *People v. Perez* (2005) 35 Cal.4th 1219, 1228 [concluding that the People could argue that the defendant properly was convicted of possessing hydriodic acid precursors with the intent to manufacture methamphetamine in violation of Health and Safety Code section 11383, subdivision (c)(2) on the theory that he possessed the chemicals "with the intent that someone else use them to manufacture methamphetamine," even though "this precise statutory issue was not part of the People's petition for review," because the issue was "fairly embraced in the petition"]; *People v. Brendlin* (2008) 45 Cal.4th 262, 267 fn.1 [rejecting argument that attenuation issue under the Fourth Amendment was forfeited when not included in petition for review because the issue was one of statewide importance and "this case presents those issues."].)

Finally, even if the Court were to find that the contract formation argument was not fairly included in Fuentes's Petition for Review, the Court may still decide it under Rule 8.516(b)(2) if the parties had notice and a chance to brief the issues. The

formation issue has now been fully briefed by both parties, (see Ans. Br. at pp. 19-26), such that there is no reason for this Court to abstain from deciding it. (See *People v. Braxton* (2004) 34 Cal.4th 798, 809 [concluding that there is no unfairness to defendant who had received a full opportunity in the Supreme Court to respond to the attorney general's allegedly waived arguments].)

III. Empire Nissan Fails to Undermine Fuentes's Argument That No Valid Arbitration Agreement Was Formed Due to Fraud in the Execution.

It is worth noting at the outset that a claim for fraud in the execution is a claim for a determination that the apparent signatory "never assented to any contract" such that the contract is void *ab initio*. (*Rosenthal v. Great Western Fin. Secs. Corp.* (1996) 14 Cal.4th 394, 425; see also 1 The Wagstaffe Group, CA Pretrial Civil Procedure (2023) § 5-IV[F][5] ["Fraud in the inception or execution of a contract occurs when the promisor is deceived as to the nature of the act, and actually does not know what is being signed, or does not intend to enter into a contract at all. In such a situation, mutual assent is lacking, and the contract is void."].) This absence of mutual assent is precisely what Fuentes has argued defeated formation of the Arbitration Agreement here. Thus, Empire Nissan's suggestion that fraud in the execution involves a distinct inquiry is misplaced. (Ans. Br. at pp. 16, 19.)

Empire Nissan also argues that: (1) Fuentes could, in fact, read the Arbitration Agreement; (2) the Arbitration Agreement was presented forthrightly, as an application for employment;

and (3) Fuentes didn't ask questions, nor did Empire Nissan refuse to answer any questions. (Ans. Br. at p. 20.) These facts, Empire Nissan contends, "defeat [Fuentes's] attempts to avoid her obligations under the Agreement." (Ans. Br. at p. 20.)

However, Empire Nissan is wrong on each point. Although Empire Nissan repeats that Fuentes testified that reading the Arbitration Agreement would "severely strain her eyes," as if to diminish this fact, Empire Nissan ignores that she also testified that it was "almost impossible for [her] to read." (AA 163.) What's more, the Court of Appeal and the trial court came to the same conclusion as Fuentes. The majority said that the "tiny and blurred print . . . renders it largely unreadable." (Slip Op. at 2.) The dissent noted that it was "unreadable without magnification," (Dissent at 1), and the trial court agreed that it "is nearly impossible to read." (AA 230.) Thus, the functional illegibility of the Arbitration Agreement has been firmly established.

Moreover, Empire Nissan did, in fact, misrepresent and deceive Fuentes regarding the Arbitration Agreement. Fuentes's unrebutted testimony was that she was told by Empire Nissan that the documents she had been asked to fill out "had to do with the application for employment, contacting my references, but were primarily for the drug testing that I had to do that day." (AA 163.) Even though it composed over half of the overall Applicant Statement and Agreement, the Arbitration Agreement was the only portion that Empire Nissan failed to mention when describing for Fuentes the application's contents. (AA 114; 163.)

Given that she could not read it herself, this was a critical omission and misled Fuentes as to the nature of the document she was signing.

Finally, Fuentes also testified that she had no opportunity to ask any further questions about the document. She testified that she was given "five minutes" to look over all the documents, and unequivocally that she "was not given an opportunity to ask any questions about the documents that [she] was signing." (AA 163.) Empire Nissan pressured her to move quickly, telling her that the drug testing facility was closing and that Fuentes had to get tested that same day. (AA 163.) This coercion prevented Fuentes from asking questions and is the equivalent to Empire Nissan having refused to answer questions.

Empire Nissan's reliance on *Rosenthal* demonstrates precisely why fraud in the execution *does* apply here; as the passage quoted by Empire Nissan demonstrates, it is only if a party had "reasonable opportunity to know of the character or essential terms of the proposed contract," and failed to do so, that the contract is valid. (Ans. Br. at p. 21 [quoting *Rosenthal*, *supra*, 14 Cal.4th at p. 423].) Here, Fuentes did not have a "reasonable opportunity to know . . . the essential terms of the proposed contract." Not only was the contract illegible, but Fuentes's undisputed testimony was that Empire Nissan misrepresented the Applicant Statement and Agreement's contents, deceptively explaining that it concerned only drug testing and reference checks, and that Empire Nissan provided her no opportunity to ask questions given that she had five minutes to review the

entire set of documents. (AA 163.)

Contrary to Empire Nissan's arguments, the cases relied upon in Fuentes's Opening Brief are factually on point and control here. For example, *Najarro v. Superior Court* (2021) 70 Cal.App.5th 871, 887 also involved a misleading statement by the defendant regarding the contract; there, that it contained "nothing important," and here that it merely concerned drug testing and reference checks. In *Najarro*, the plaintiff had been "pressured to sign," while here, Fuentes had been given five minutes to review and was hurried to the drug testing facility. (*Id*. at p. 891; AA 163.) And in *Najarro*, the employer knew plaintiff would have trouble reading the agreement because she could read neither Spanish nor English; here, Empire Nissan knew that *no one* could read the Arbitration Agreement given its illegibility. (*Najarro*, *supra*, 70 Cal.App.4th at pp. 886-888.)

Additionally, in *Jones v. Adams Fin. Servs.* (1999) 71 Cal.App.4th 831, 834, again, the defendant misrepresented the nature of the contract, and the plaintiff was excused from having ferreted out the truth because she had poor eyesight. (*Id*. at pp. 837-840.) In the instant case, Empire Nissan misrepresented the nature of the agreement and knew that Fuentes would be unable to read it given that no normal person could read it as printed.

Similarly, in *Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 688-690, the court found fraud in the execution where the plaintiff had been given two versions of the contract, an English version that contained the arbitration provision and a Spanish version that omitted it; here, the contract given to

Fuentes similarly obscured the Arbitration Agreement by making it impossible to read and not calling it to her attention when explaining the document's contents. (Compare *Ramos*, 242 Cal.App.4th at p. 690 with AA 163.)

Finally, in *Rosenthal*, *supra*, 14 Cal.4th at pp. 424-426, the Court found the at-issue agreement enforceable as to a certain group of plaintiffs, despite potential misrepresentations, *because* they had "neglect[ed] to read [the] written agreement" that was clearly presented. Empire Nissan argues that *Rosenthal*'s conclusion undercuts Fuentes's position. (Ans. Br. at 23.) Not so. Here, unlike in *Rosenthal*, Empire Nissan misled Fuentes as to the contents of the contract and hurried her along to sign it *and* Fuentes was prevented from reading the contract due to Empire Nissan's choice to produce it in an objectively unreadable format. (AA 163-164.) Moreover, Fuentes expressly testified that she was "not given an opportunity to ask any questions about" it. (AA 163). These distinguishing facts would likely have changed the outcome in *Rosenthal* as to those clients. (*Rosenthal*, *supra*, 14 Cal.4th at p. 426.)

Thus, under *Najarro*, *Jones*, *Ramos*, and *Rosenthal*, Fuentes has established that the Arbitration Agreement was void for lack of mutual assent because she did not (and could not) know to what she was supposedly agreeing.

IV. Empire Nissan's Arguments Regarding Substantive Unconscionability Should Also be Rejected.

A. Empire Nissan Fails to Rebut Fuentes's Showing of Substantive Unconscionability, Even if Empire Nissan's Advantage in Knowing the Arbitration Agreement's Terms Were the Only Unfair Aspect Considered.

Empire Nissan starts off its argument in Section III of the Answering Brief by misstating the law of substantive unconscionability. Without citation, it asserts that "Fuentes must establish an actual term or provision of the Agreement that is so unfair, unjust, or one-sided so as to render it substantively unconscionable." (Ans. Br. at p. 28.) This is an overly narrow statement of the law. As this Court has explained, there have been various formulations of substantive unconscionability, but the "central idea" is to focus on "terms that are unreasonably favorable to the more powerful party." (*Kho*, *supra*, 8 Cal.5th at p. 130.)

Importantly, this does not mean that the only way to demonstrate substantive unconscionability is to identify specific terms that, in isolation, are unfair. Instead, this Court has explained that substantive unconscionability is a flexible concept that focuses on terms that "impair the integrity of the bargaining process or otherwise contravene the public interest or public policy." (*Kho*, *supra*, 8 Cal.5th at p. 130 [citing *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145].) The Court then listed several examples of such terms, which it noted were "illustrative, not exhaustive." (*Kho*, *supra*, 8 Cal.5th at p. 130.)

Most relevant here, the substantive unconscionability

analysis need not be laser-focused on isolated terms. Indeed, in *Kho*, this Court noted that the plaintiffs "d[id] not focus on the fairness of specific, isolated terms in the agreement. Rather, they contend One Toyota's arbitral process is so inaccessible and unaffordable, *considered as a whole*, that it does not offer an effective means for resolving wage disputes." (*Kho*, *supra*, 8 Cal.5th at p. 130 [emphasis added].) Therefore, even if Fuentes did not identify specific unfair terms (which she does), an arbitration agreement like Empire Nissan's that "impairs the integrity of the bargaining process" and "contravenes the public interest" by hiding its substance can be substantively unconscionable when considered on the whole.

Empire Nissan also misrepresents Fuentes's argument on this point, as if Fuentes were arguing that the Arbitration Agreement is substantively unconscionable because the "terms are not understood by the signatory," or because the agreement is "unduly more beneficial to one party than the other." (Ans. Br. at p. 30.) However, Fuentes is not arguing that the Arbitration Agreement is substantively unconscionable because she did not understand its terms; rather, she argues that it was objectively unreadable.[2] Therefore, Empire Nissan's argument regarding

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[2] Also, contrary to Empire Nissan's contention, Fuentes does not argue that font size alone constitutes substantive unconscionability. (Ans. Br. at p. 29.) Instead, the Opening Brief relied on *Fisher v. MoneyGram Int'l Inc.* (2021) 66 Cal.App.5th 1084, 1104, to highlight the lack of mutual assent given Empire Nissan's use of blurry 6-point type in its Arbitration Agreement, a font size smaller than the "minimum font sizes" required under various California statutes as acknowledged by the *Fisher* court.

"subjective readability" is inapposite. (Ans. Br. at pp. 35-37.) This Court need not entertain the parade of horribles envisioned by Empire Nissan—including "a world of questions without answers" perhaps requiring "an individualized assessment" of every signatory's eyesight before contracting—because Fuentes's position is that the terms at issue here are objectively unknowable to any signatory not utilizing magnification equipment.

Moreover, Fuentes is not arguing that the Arbitration Agreement was merely "more beneficial" to Empire Nissan. As *Kho* explains, "unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain [citation], but with terms that are unreasonably favorable to the more powerful party." (*Kho*, *supra*, 8 Cal.5th at p. 130.) An illegible agreement coupled with a hurried process, as in the present case, yields an agreement that is "unreasonably favorable" to the more powerful party, here Empire Nissan.

As discussed extensively in the Opening Brief, Empire Nissan's Arbitration Agreement is substantively unconscionable because only Empire Nissan knows what its terms are. This gives Empire Nissan an unreasonable advantage over Fuentes in knowing such important terms as what rules apply, what claims are carved out, applicable time limitations, among other important details hidden in its thicket. (See, e.g., *Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 697, 702-703 [acknowledging the advantages enjoyed by the employer who hid an arbitration provision in a dispute form that did not appear to

be a contract and did not clearly call arbitration obligations, covered claims, or rules to the attention of the recipient]; see also *Kho*, *supra*, 8 Cal.5th at. p. 131 [noting that the lack of guidance in such terms may very well deter employees from bringing claims at all].)

Deliberately obfuscating terms so that the stronger party retains the substantial advantage of knowing what the contract requires, should fall comfortably within the bounds of this Court's prior substantive unconscionability decisions, as such one-sided conduct certainly "shocks the conscience." (See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 118 [holding that an arbitration agreement lacks mutuality if the stronger party imposes terms on a weaker party without accepting those terms for itself]; see also *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1532 [explaining that terms that "shock the conscious" can satisfy a showing of substantive unconscionability].) Where the more powerful, drafting party provides a largely unreadable agreement to the less powerful party imposing terms only known to the drafter, without any justification for doing so, this Court should find, as the dissent did, that it "shocks the conscience." (Dissent at p. 6.)

B. Additionally, Fuentes Identified Multiple Substantively Unconscionable Terms, the Unfairness of Which was Only Magnified by Their Being "Fine-Print Terms."

Empire Nissan argues that Fuentes fails to point to any specific term that she contends is substantively unconscionable. (Ans. Br. at p. 28.) To the contrary, Fuentes points to at least

three terms, each of which demonstrates a lack of mutuality and, taken together, create an Arbitration Agreement that is unreasonably favorable to the more powerful, drafting party, here Empire Nissan.

1. The Absence of Any Guidance on How to File a Claim in Arbitration is Substantively Unconscionable.

First, the Arbitration Agreement fails to provide direction on how one would file a claim in arbitration. Empire Nissan's suggestion that reference to the California Arbitration Act fulfills this function is without merit. (Ans. Br. at pp. 38-39.) Even if one could read the Arbitration Agreement, and even if a mere reference to the entire California Arbitration Act were interpreted as equivalent to pointing to California Code of Civil Procedure § 1281.6, that provision of the statute says nothing about how to initiate a claim. Section 1281.6 does not identify an arbitration provider (like JAMS or AAA), much less who pays for arbitration, does not indicate what rules apply, or provide any other guidance that a non-lawyer employee might need if she wanted to file a claim against her employer. Section 1281.6 speaks to a different issue—narrowly, what happens when parties are at an impasse on selecting the arbitrator to hear the dispute, after one has already initiated a claim with a provider or when the parties on unable to agree on a method. (See *Bosworth v. Whitmore* (2006) 135 Cal.App.4th 536, 543 [describing Section 1281.6 as an appointment procedure wherein the court, on petition of a party, shall appoint the arbitrator].)

Fuentes's argument is not, as Empire Nissan implies, that

the Arbitration Agreement merely failed to specify which rules would apply to claims or that the applicable rules were identified but not actually provided to the employee. (Ans. Br. at p. 39.) The situation Empire Nissan describes, such as where an agreement stated "all such arbitrations will be conducted by AAA, under its Employment Arbitration Rules," but no link was provided to AAA's rules, is much different than the one raised by Empire Nissan's Arbitration Agreement. In the former situation, the employer's failure to include the rules might merely evidence procedural unconscionability. (See, e.g., *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1246.)

Fuentes's challenge is instead based on the inaccessibility of the arbitration *process* flowing from an opaque agreement like Empire Nissan's. In *Kho*, this Court considered whether an arbitration agreement that failed to explain how to initiate arbitration was evidence of substantive unconscionability. (*Kho*, *supra*, 8 Cal.5th at. p. 131.) But nothing in *Kho* suggests that the requirement that an arbitration agreement must include guidance on how to initiate a claim is somehow limited to circumstances involving the waiver of *Berman* procedures. For example, the Court noted that the substantive unconscionability analysis should examine "the features of the dispute resolution process adopted as well as the features eliminated" to determine more generally whether "the arbitral process is so inaccessible" that it does not offer an effective means for resolving disputes. (*Id.*) Under the facts presented in *Kho* (which involved a *Berman* procedure waiver), the Court contrasted the agreement's

complete lack of any explanation of how to initiate the arbitration process with the very clear *Berman* hearing procedures to make the point that a lack of guidance "will inevitably increase the delay and expense involved" in initiating arbitration. (*Id.*) Therefore, the Court's reasoning applies with equal force to the substantive unconscionability analysis here, as the similar lack of direction presented might cause some employees to be so confused that "they are deterred from bringing their [] claims at all." (*Id.*)

As in *Kho*, an employee like Fuentes would have no idea where to begin to initiate a claim under Empire Nissan's Arbitration Agreement. The information she would need, such as the name of the arbitration provider, or a link to its website, was not provided, and this failure is substantively unconscionable. The confusion and claim-suppressing effect of the omission of this key information is exacerbated here by the illegibility of the Arbitration Agreement.

2. The Confidentiality Agreement Permits Empire Nissan Access to Court for Certain Claims While Fuentes Must Arbitrate All of Hers; This Asymmetry is Substantively Unconscionable.

By their own terms, the Arbitration Agreement and subsequent Confidentiality Agreements provide that Fuentes would have to file any claim she had against Empire Nissan in arbitration, while Empire Nissan could seek relief in court to protect its confidential, trade secret, or proprietary information. (AA 114, 168.) In the face of this apparent lack of mutuality, Empire Nissan argues that the Confidentiality Agreements do

not contemplate any forum for enforcement, and use of the term "court" is merely in the context of a boilerplate "savings clause." (Ans. Br. at pp. 42-43.)

But Empire Nissan's Answering Brief glosses over the other two provisions in the Confidentiality Agreements which, when read together, create an escape hatch permitting Empire Nissan to seek injunctive relief and legal damages against Fuentes in civil court, rather than in arbitration. The first provision expressly provides that the Confidentiality Agreements superseded any prior agreements on the issues of Empire Nissan's proprietary information, trade secrets, and confidential information. (AA 168, 172.) The second provision provides that only Empire Nissan retains the right to seek various types of relief against Fuentes for actual or threatened breaches of the Confidentiality Agreement, including "any proper injunction, including but not limited to temporary, preliminary, final injunctions, temporary restraining orders, and temporary protective orders." (AA 168, 171.) These types of provisional remedies are the very types of relief typically obtained in court, and not through arbitration. (See *Sanchez v. Valencia Holding Company*, LLC (2015) 61 Cal.4th 899, 921.) In fact, the California Arbitration Act, which governs here, specifically exempts preliminary injunctions from arbitration. (*Id.* [noting that Code Civ. Proc. § 1281.8, subd. (b) exempts preliminary injunctions from arbitration, allowing an application for "provisional" remedies to be filed directly in court].)

When read together with the subsequent provision

referencing the right of a "court of competent jurisdiction" to interpret the Confidentiality Agreements, the result is that Empire Nissan enjoys a one-sided carve-out from arbitration for certain of its claims and is further evidence of substantive unconscionability. (*Armendariz*, *supra*, 24 Cal.4th at p. 117, 120.) Even if this Court were to accept Empire Nissan's argument that use of the term "court" in the Confidentiality Agreements could theoretically mean something other than "state court," under the canon of contract interpretation *contra proferentem*, ambiguous terms are interpreted against the drafter, here Empire Nissan. (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744 [holding that particularly in the context of adhesive contracts, ambiguous clauses are to be interpreted against the drafter].)

Finally, Empire Nissan argues that the Arbitration Agreement, not the Confidentiality Agreements, is controlling regarding enforcement. But the Arbitration Agreement must be read together with the Confidentiality Agreements as each of those agreements are in effect. (Cal. Civ. Code, § 1642 [several contracts relating to same matters between same parties and made as parts of substantially one transaction are to be taken together].) When read together, the inconsistency between the Arbitration Agreement's scope (providing that all claims either party has against the other must be arbitrated, (Slip Op., Appendix B at p. 3) and the Confidentiality Agreements' reference to "court" determinations and carve-out for Empire Nissan's claims for provisional injunctive relief is further

evidence of Empire Nissan unfairly placing its thumb on the scale.

3. The PAGA Waiver is Unenforceable and Evidence of Substantive Unconscionability.

Empire Nissan's argument that Fuentes's Opening Brief "runs directly afoul" of *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639 and *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104 misses the mark. (Ans. Br. at p. 45.) In focusing only on the *severability* of unenforceable PAGA waivers, Empire Nissan fails to directly address the substantive unconscionability evidenced by its wholesale PAGA waiver. Instead, in its Answering Brief Empire Nissan argues that because any unenforceable provisions may be severed under *Viking River*, the PAGA waiver does not render the entire Arbitration Agreement unenforceable. (Ans. Br. at pp. 47-48.)

Empire Nissan's arguments are misguided, as Fuentes is not arguing that the unenforceable PAGA waiver, alone, renders the entire Arbitration Agreement unenforceable. Rather, Fuentes's Opening Brief illustrates that the Arbitration Agreement's waiver of the right to bring a representative PAGA action is unenforceable under California law, stripping the employee of an important right pre-dispute, thus evidencing some amount of substantive unconscionability. (See Op. Br. at pp. 51-54.) Indeed, neither *Viking River* nor *Adolph* disturbed California's prohibition against wholesale PAGA waivers. (See *DeMarinis v. Heritage Bank of Commerce* (2023) 98 Cal.App.5th 776, 786 [finding PAGA waiver within an arbitration agreement

"unenforceable under *Iskanian*'s principal rule, which *'Viking River* left undisturbed'" [quoting *Adolph*, *supra*, 14 Cal.5th at p. 1117]; *Hasty v. American Automobile Assn.* (2023) 98 Cal.App.5th 1041, 1062-1063 [finding a ban on representative PAGA actions, post *Viking River*, unenforceable because it is not waivable].)

Accordingly, the undisputed unenforceability of PAGA waivers like that included in Empire Nissan's Agreement demonstrates a level of substantive unfairness. (See *Hasty*, *supra*, 98 Cal.App.5th at pp.1062-1063.) In *Hasty*, the Court of Appeal found an almost identical PAGA waiver within an arbitration agreement to be evidence of substantive unconscionability. (*Id.*) The *Hasty* court reasoned that such a prospective elimination of an unwaivable claim rendered the at-issue agreement "one-sided" because it unfairly limited only the employee's rights. (*Id.* at p. 1062 [citing *Navas v. Fresh Venture Foods, LLC* (2022) 85 Cal.App.5th 626, 636].) This remains true even if Fuentes did not assert a PAGA claim in the present case. (*Hasty*, *supra*, 98 Cal.App.5th at p. 1063 ["[I]t is irrelevant that Hasty has not brought a private attorney general action."] [citing *Najarro*, *supra*, 70 Cal.App.5th at pp. 882-883].)

Nor is Empire Nissan correct that an analysis of its wholesale PAGA waiver is "improper for consideration" here. (Ans. Br. at p. 46.) Given the relevance of PAGA waivers in the aftermath of *Iskanian*, *Viking River*, and *Adolph*, whether employers' continuing attempts to strip California employees of their rights under PAGA is unfair and adds some amount of substantive unconscionability is sure to be raised by litigants in

many California courts moving forward. It is thus an appropriate issue for the Court to consider. (See, e.g., *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 10 [explaining that the Court granted review because the question of insurance law was a "recurring issue"].) Moreover, whether such an unenforceable provision is substantively unconscionable is a purely legal issue based on undisputed facts. This Court should reject Empire Nissan's arguments that consideration of the issue is improper.

Simply put, Empire Nissan's Answering Brief zeroes in on the possibility of severability because it cannot dispute that a waiver provision like the one in its Arbitration Agreement is unenforceable under California law, thus demonstrating unfairness and substantive unconscionability. Thus, the PAGA waiver is another substantively unconscionable term within the Arbitration Agreement.

4. The Fine-Print Terms Exacerbate Substantive Unconscionability Here.

Empire Nissan's attempts to distinguish *Davis v. TWC Dealer Group, Inc.* (2019) 41 Cal.App.5th 662 are unpersuasive. (Ans. Br. at p. 34.) Rather, *Davis* is directly on point: both Empire Nissan's and the agreement in *Davis* are one-page documents entitled "Applicant Statement and Agreement," are 6 paragraphs long, and written in small, illegible font, without headings, labels, titles, or boldface. (Compare, AA 114 with *Davis*, *supra*, 41 Cal.App.5th at pp. 665-666.) *Davis* found the presence of "fine-print terms" (along with other aspects of the agreement) to provide much more than the "low degree of substantive unconscionability" needed to invalidate the at-issue

agreement in that case. (*Davis*, *supra*, 41 Cal.App.5th at p. 674.) The same reasoning should be applied here.

To distance this case from the directly-on-point analysis in *Davis*, Empire Nissan suggests, without identifying relevant authority, that "fine-print terms" is a term of art for small font "concealing substantively confusing language"—something more than mere small font size. (Ans. Br. at p. 34.) However, even if "fine-print terms" merely amplify the unfairness of terms that are independently substantively unconscionable, *Davis* remains applicable here. As discussed above, Fuentes has identified at least three substantively unconscionable terms, including the lack of any direction on how to file a claim in arbitration, the one-sided carve-out of certain claims for Empire Nissan to pursue in court, and the PAGA waiver. Taken together, these provisions lead to the conclusion that the Arbitration Agreement is unconscionable and cannot be enforced.

C. Empire Nissan Mistakenly Argues that Severability Is Available Here.

Finally, this Court should reject Empire Nissan's argument that any provision this Court deems unenforceable should simply be severed from the Arbitration Agreement to preserve enforceability. (Ans. Br. at pp. 48-49.) Not only does Empire Nissan's argument fail to cite (much less grapple with) *Armendariz*, the seminal case on this point, but Empire Nissan ignores that in addition to the unenforceable PAGA waiver, the Arbitration Agreement contains two other substantively unconscionable terms. Under *Armendariz*, the presence of multiple unconscionable terms means severance is unavailable

and the entire Arbitration Agreement is void. (*Armendariz*, *supra*, 24 Cal.4th at p. 125.)

Moreover, as Empire Nissan notes, under Civil Code § 1670.5, even if there were only one substantively unconscionable term, severance is unavailable if the "central purpose of the contract is tainted with illegality." (See Ans. Br. at p. 48.) Here, Empire Nissan deliberately made the Arbitration Agreement illegible, hurried Fuentes through signing, while also misrepresenting the Arbitration Agreement's contents. That should demonstrate that the PAGA waiver is part of an overarching illegal purpose, and severance is unavailable. (*Armendariz*, *supra*, 24 Cal.4th at p. 124.)

CONCLUSION

For the foregoing reasons, this Court should reject Empire Nissan's arguments and reverse the Court of Appeal's decision. The Court should reverse because, under the circumstances, no valid Arbitration Agreement was formed between Empire Nissan and Fuentes. In the alternative, the Court should reverse because Empire Nissan's Arbitration Agreement is unconscionable and thus unenforceable.

Dated: March 26, 2024

Respectfully submitted,

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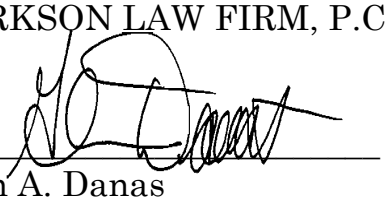
By: 

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CERTIFICATE OF WORD COUNT

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Dated: March 26, 2024

Respectfully submitted,

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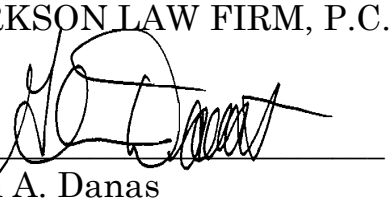

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Los Angeles Superior Court Case No. 20STCV35350
Court of Appeal Case No. B314490
Supreme Court Case No. S280256

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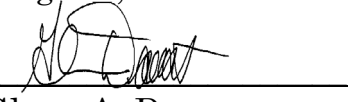

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Los Angeles Superior Court Case No. 20STCV35350
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Supreme Court of California

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/s/Glenn Danas

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