NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARINEH BAGHDASARIAN,

Plaintiff - Appellant,

v.

MACY'S INC.; MACY'S DEPARTMENT STORE; MACY'S,

Defendants - Appellees.

No. 24-3438

D.C. No.
2:21-cv-04153-AB-MAA

MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
André Birotte, Jr., District Judge, Presiding

Submitted April 1, 2025[**]
Pasadena, California

Before: M. SMITH and VANDYKE, Circuit Judges, and MAGNUS-STINSON, District Judge.[***]

Plaintiff Garineh Baghdasarian (Baghdasarian) appeals from a final judgment of the district court confirming an arbitration award in favor of Defendants, Macy's,

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Jane Magnus-Stinson, United States District Judge for the Southern District of Indiana, sitting by designation.

Inc. et al. (Macy's), after granting Macy's motion to compel arbitration. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

"The Federal Arbitration Act (FAA) requires courts to compel arbitration of claims covered by an enforceable arbitration agreement." *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 509–10 (9th Cir. 2023). State law governs whether a valid arbitration agreement exists. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009). We review de novo orders compelling arbitration. *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001). The party challenging the enforceability of an arbitration agreement "bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

1. The parties entered into an enforceable arbitration agreement. Pursuant to section 1281 of the California Code of Civil Procedure, a written agreement to submit a controversy to arbitration is generally "valid, enforceable and irrevocable." Under California law, a valid arbitration agreement exists if the parties provide "[t]heir consent" and "sufficient cause or consideration" exists. Cal. Civ. Code § 1550. Baghdasarian challenges only consent. A party may manifest consent to an arbitration agreement "wholly or partly by written or spoken words or by other acts or by failure to act." *Merced Cnty. Sheriff's Emps.' Ass'n v. Cnty. of Merced*, 188 Cal. App. 3d 662, 670 (1987) (citation omitted). In circumstances similar to those

presented here, we have previously held there is consent when a party failed to opt out of arbitration. *E.g.*, *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014); *Cir. City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002).

At the outset, Baghdasarian argues that she did not receive the opt-out form. But Macy's provided employees with materials about the arbitration agreement during mandatory informational meetings and through two separate mailings. These materials explained that an employee could opt out of arbitration by completing and returning the election form. Ten percent of employees returned the election form to opt out, indicating widespread receipt of the materials. Baghdasarian's claim that she did not receive the election form to opt out of the arbitration agreement strains credulity since she had previously received mail from Macy's and admits that Macy's sent mail to her correct address. As the district court observed, the odds that Baghdasarian did not receive either of the opt-out mailings "amount[s] to a claim that lightning has struck twice in the same place" because mail is rarely lost.

Baghdasarian also argues that the opt-out procedure was insufficient to establish consent to arbitration. But the circumstances indicate that Baghdasarian manifested consent to the arbitration agreement by failing to return the election form. *See Johnmohammadi*, 755 F.3d at 1074. Further evidence of consent is found in Baghdasarian's continued employment. Because the materials provided to her

discuss changes to the employment relationship, Baghdasarian's continued employment revealed that she "accepted the changed terms and conditions." *DiGiacinto v. Ameriko-Omserv Corp.*, 59 Cal. App. 4th 629, 637 (1997); *see also Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1093 (9th Cir. 2014).

2. The arbitration agreement is not unconscionable. To establish unconscionability, "[b]oth procedural and substantive unconscionability must be present." *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1023 (9th Cir. 2016). "[B]ut they need not necessarily be present to the same degree." *Id.* Instead, "there is a sliding scale: 'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1260 (9th Cir. 2017) (citation omitted). The party claiming unconscionability bears the burden of proof. *Id.*; *Tompkins*, 840 F.3d at 1023.

Baghdasarian failed to establish procedural unconscionability. To do so, she must "show[] the [arbitration agreement] was one of adhesion or [show] from the 'totality of the circumstances surrounding the negotiation and formation of the contract' that it was oppressive." *Poublon*, 846 F.3d at 1260 (citation omitted). We have consistently found that "an arbitration agreement is not adhesive if there is an opportunity to opt out of it." *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1211 (9th Cir. 2016); *see also Cir. City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199–1200

(9th Cir. 2002); *Najd*, 294 F.3d at 1108. Baghdasarian had two opportunities spread over a year to opt out after receiving the election form, but she never did so. And the totality of the circumstances surrounding the formation of the arbitration agreement also does not reveal any oppression or suggest that employees were misled by the materials discussing the program. Even if the absence of a signature acknowledging the opt-out provision could be viewed as an "element of procedural unconscionability," *Gentry v. Superior Ct.*, 165 P.3d 556, 561 (Cal. 2007), *abrogated on other grounds by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011), the fact that ten percent of Macy's employees opted out indicates widespread awareness of the opt-out procedure.

Even assuming there is a minimal "element of procedural unconscionability," the "sliding scale" requirement means that there would have to be significant substantive unconscionability for the entire arbitration agreement to reach an actionable level of unconscionability. *See Poublon*, 846 F.3d at 1260. But there is likely no substantive unconscionability here, let alone enough to compensate for any minimal amounts of procedural unconscionability. The arbitration agreement is not "'overly harsh,' 'unduly oppressive,' 'unreasonably favorable,' or … 'shock[ing to] the conscience.'" *Id.* at 1261 (citation omitted). It applies equally to both parties and is not unduly one-sided. It does not exclude from arbitration only claims "likely to be made by" Macy's. *See Ramirez v. Charter Commc'ns., Inc.*, 551 P.3d 520, 534

(Cal. 2024). Employees may also choose to forego steps one through three of the dispute resolution program, which is what Baghdasarian elected to do here. But if an employee chooses to complete any of those steps, a decision in the employee's favor still binds Macy's.

Baghdasarian also raises additional arguments as to why selected features of the arbitration agreement are substantively unconscionable. But her arguments as a whole take issue with features that have been routinely upheld because they are consistent with the spirit of arbitration as efficient and confidential. *E.g.*, *Poublon*, 846 F.3d at 1265–67; *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 684 n.11 (Cal. 2000); *Ramirez*, 551 P.3d 5th at 537–40. Because the arbitration agreement is not unduly oppressive or unreasonably favorable—and certainly not shocking to the conscience—there is no substantive unconscionability. And even if selected features could be viewed as possibly substantively unconscionable, they do not rise to a significant enough level to compensate for the lack of, or even minimal, procedural unconscionability.

AFFIRMED.