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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RIZWAN ALI, Plaintiff - Appellee, v. J.P. MORGAN CHASE BANK, N.A., Defendant - Appellant.	No. 14-15076 D.C. No. 3:13-cv-01184-JSW MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Argued and Submitted February 11, 2016
San Francisco, California

Before: SILVERMAN, FISHER and TALLMAN, Circuit Judges.

J.P. Morgan Chase Bank (JPMC) appeals the district court's order denying its motion to compel arbitration. We have jurisdiction under 9 U.S.C. § 16(a)(1)(B). Reviewing de novo, *see Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1057 (9th Cir. 2013) (en banc), we affirm in part, reverse in part and remand with instruction to compel arbitration.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

1. The district court properly concluded the arbitration agreement was adhesive, and thus at least minimally procedurally unconscionable. The agreement governing various aspects of Ali's employment with JPMC, of which the "Binding Arbitration Agreement" ("BAA") was part, was adhesive because it was offered "on essentially a 'take it or leave it' basis." *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 762 (Cal. 2015). Adhesive contracts are at least minimally procedurally unconscionable under California law. *See Baltazar v. Forever 21, Inc.*, No. S208345, 2016 WL 1176599, at *3 (Cal. Mar. 28, 2016) (citing *Gentry v. Superior Court*, 165 P.3d 556, 573 (Cal. 2007)).

2. The district court erred in concluding it is substantively unconscionable for the BAA to exclude from its coverage certain actions seeking only provisional injunctive relief. This carve-out "does no more than recite the procedural protections already secured by [California Code of Civil Procedure] section 1281.8(b), which expressly permits parties to an arbitration to seek preliminary injunctive relief during the pendency of the arbitration." *Id.* at *5. A provision "which does no more than restate existing law does not render the agreement unconscionable." *Id.* at *1 (citation omitted).[1]

[1] The district court did not have the benefit of the California Supreme Court's recent decision in *Baltazar*.

3. The district court also erred in concluding the BAA's initiation provision is substantively unconscionable. Although this provision lacks mutuality, substantive unconscionability "turns not only on a one-sided result, but also on an absence of justification for it." *Armendariz v. Found. Health Psychcare Servs.*, 6 P.3d 669, 692 (Cal. 2000) (quoting *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Ct. App. 1982)) (internal quotation marks omitted). The initiation provision is narrowly designed to accommodate JPMC's legal obligation to pay all costs unique to arbitration, and thus has a "reasonable justification . . . based on 'business realities.'" *See Armendariz*, 6 P.3d at 687-89, 691.

4. The district court properly concluded the BAA's confidentiality provision is not substantively unconscionable. Ali suggests, in a brief and conclusory argument and without citing any authority, that the confidentiality provision is unfairly one-sided because "having the hearing closed benefits Chase, not the Plaintiff as it prevents others from observing and learning of Chase's illegal policies and practices." Ali does not argue he would be unfairly disadvantaged in resolving his own dispute with JPMC; rather, his concern appears to be solely for other, potential plaintiffs. This "concern[] ha[s] nothing to say about the fairness or desirability of a secrecy provision with respect to the parties themselves." *Woodside Homes of Cal., Inc. v. Superior Court*, 132 Cal. Rptr. 2d 35, 42 (Ct. App.

2003). "[A] provision which favors one side is not substantively unconscionable if the advantage is completely collateral to the issues surrounding a fair resolution of the dispute." *Id.* at 42 n.11.[2]

5. None of the other provisions in the BAA are substantively unconscionable. The BAA's discovery "guidelines" may be expanded or restricted in the arbitrator's "reasonable discretion" and the BAA expressly requires discovery "consistent with . . . general standards of due process [and] the Rules of AAA." *See Dotson v. Amgen, Inc.*, 104 Cal. Rptr. 3d 341, 349 (Ct. App. 2010) (enforcing an arbitration discovery limitation because "the agreement gives the

[2] We have recognized that confidentiality provisions in an arbitration agreement are not per se unconscionable under California law. *See Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1079 (9th Cir. 2007) (citing *Mercuro v. Superior Court*, 116 Cal. Rptr. 2d 671, 679 (Ct. App. 2002); *see also Baltazar*, 2016 WL 1176599, at *7 ("Agreements to protect sensitive information are a regular feature of modern litigation, and they carry with them no inherent unfairness."). But we have also held that a confidentiality provision is "written too broadly," and thus substantively unconscionable, when, for example, it "precludes even mention to anyone 'not directly involved in the mediation or arbitration' of . . . even 'the existence of a controversy and the fact that there is a mediation or an arbitration proceeding'" because "[s]uch restriction[] would prevent an employee from contacting other employees to assist in litigating (or arbitrating) an employee's case." *Davis*, 485 F.3d at 1078. Ali has not, however, contended the confidentiality provision here "would handicap [or] stifle [his] ability to investigate and engage in discovery." *Id.* Ali remains free to argue to the arbitrator that the confidentiality provision is unenforceable as applied in his case. *See Kilgore*, 718 F.3d at 1059 n.9 ("[T]he enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue during arbitration that the confidentiality clause is not enforceable.").

arbitrator the broad discretion contemplated by the AAA rules to order the discovery needed to sufficiently litigate the parties' claims"). The BAA's unilateral modification clause is subject to "the fundamental limit . . . imposed by the covenant of good faith and fair dealing implied in every contract." *Serpa v. Cal. Sur. Investigations, Inc.*, 155 Cal. Rptr. 3d 506, 514 (Ct. App. 2013). It is not inherently unfair for the BAA to authorize an arbitrator to rule on summary judgment motions. *See Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 986 n.1 (Cal. 2003) ("To the extent that the availability of dispositive pre-arbitration motions favor [sic] [the employer] as defendant, they confer no more of an advantage than would be the case had the action been brought in court.").

6. In sum, because the BAA is not substantively unconscionable, the district court erred in failing to enforce it. *See Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013) ("Under California law, a contract must be both procedurally and substantively unconscionable to be rendered invalid." (citing *Armendariz*, 6 P.3d at 690)). Accordingly, we reverse the district court's order, and remand with the instruction to compel arbitration.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

The parties shall bear their own costs on appeal.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

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Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk