NOT FOR PUBLICATION

FILED

JUL 3 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RITAROSE CAPILI,

Plaintiff - Appellee,

v.

THE FINISH LINE, INC.,

Defendant - Appellant,

and

CIGNA HEALTH CORPORATION; LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

No. 15-16657

D.C. No. 3:15-cv-01158-HSG

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Haywood S. Gilliam, Junior, District Judge, Presiding

Argued and Submitted April 17, 2017
San Francisco, California

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

Before: SCHROEDERR and RAWLINSON, Circuit Judges, and DRAIN,** District Judge.

The Finish Line, Inc. ("Finish Line") 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 Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1259 (9th Cir. 2017), we affirm.

"[A]fter *Concepcion,* unconscionability remains a valid defense to a petition to compel arbitration." *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 201 (Cal. 2013). This is because California's "unconscionability standard is, as it must be, the same for arbitration and nonarbitration agreements." *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 749 (Cal. 2015). Under California law, both procedural and substantive unconscionability must be present to find a contract unconscionable; however, they need not be present in the same degree. *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1210 (9th Cir. 2016).

The district court properly concluded the arbitration agreement was adhesive, and thus at least minimally procedurally unconscionable. *See Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922–23 (9th Cir. 2013). Capili's employment

** The Honorable Gershwin A. Drain, United States District Judge for the Eastern District of Michigan, sitting by designation.

application at Finish Line, which included The Finish Line, Inc. Employee Dispute Resolution Plan ("the Arbitration Agreement"), was adhesive because it was offered "on essentially a 'take it or leave it' basis." *Victoria v. Superior Court*, 710 P.2d 833, 837 (Cal. 1985) (en banc). Adhesive contracts are at least minimally procedurally unconscionable under California law. *See Baltazar v. Forever 21, Inc.*, 367 P.3d 6, 11 (Cal. 2016) (citing *Gentry v. Superior Court*, 165 P.3d 556, 573 (Cal. 2007)).

The district court also correctly determined the unconscionability of the Arbitration Agreement "at the time it was made." Cal. Civ. Code, § 1670.5, *Sanchez*, 353 P.3d at 755. Finish Line may not retroactively moot the provisions of Capili's contract to prevent unconscionability analysis.

The district court properly determined that the cost-sharing provision was substantively unconscionable. The provision required Capili, a retail employee making $15 per hour, to pay up to $10,000 at the outset of arbitration, not including the fees and costs for legal representation. Much like *Chavarria*, the cost-sharing provision here imposes substantial non-recoverable costs on low-level employees just to get in the door, effectively foreclosing vindication of employees' rights. 733 F.3d at 926–27.

The district court was also correct in finding that the clause that allowed

Finish Line, but not Capili, to seek judicial resolution of specified claims was substantively unconscionable. While judicial carve-outs are not unconscionable for claims an employer is more likely to bring, these exemptions must still have a modicum of bilaterality. *See Poublon*, 846 F.3d at 1273 (acknowledging the concession that an employer's unilateral claim exemptions were substantively unconscionable); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1031 (9th Cir. 2016) (allowing both parties to pursue intellectual property claims in court); *Baltazar*, 367 P.3d at 13 (allowing both parties to seek injunctive relief in court). Based on the entire record, the district court did not err in finding that the Arbitration Agreement was both procedurally and substantively unconscionable.

At the time the order was issued, the district court was correct in finding the forum selection clause to be substantively unconscionable; however, subsequent precedent has refined the standard by which forum selection clauses are judged. *See Tompkins*, 840 F.3d at 1029–30. Parties opposing a forum selection clause must now show that the forum is "unavailable or unable to accomplish substantial justice" in order to demonstrate substantive unconscionability. *Id*. at 1029. Inconvenience and additional expense are not sufficient, unless proceeding in the selected forum will be "so gravely difficult and inconvenient that [the plaintiffs] will for all practical purposes be deprived of [their] day in court." *Id*. (quoting *Aral*

v. EarthLink, Inc., 36 Cal. Rptr. 3d 229, 241–42 (Ct. App. 2005)). Capili's pleadings did not provide sufficient details of such a hardship. Given the selected forum was not shown to be unavailable or unable to accomplish substantial justice, the forum selection provision was not substantively unconscionable.

The district court did not abuse its discretion by declining to sever the unconscionable portions of the Arbitration Agreement. *See Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005–06 (9th Cir. 2010); Cal. Civ. Code § 1670.5(a). Although the Federal Arbitration Act articulates a preference for the enforcement of arbitration agreements, employers may not stack the deck unconscionably in their favor to discourage claims, then force courts "to assume the role of contract author rather than interpreter." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003). Where unconscionability permeates the entire agreement, California courts may refuse to sever unconscionable provisions. *See Poublon*, 846 F.3d at 1272. Based on the record, the district court did not abuse its discretion by finding that severance would not serve the interests of justice.

For all of the above reasons, the district court properly denied Finish Line's motion to compel arbitration.

AFFIRMED.

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.

Continue to next page

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