NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIAN K. NYGAARD, DBA BKN Appraisals, Inc., DBA PDA Sacramento, DBA PDA Stockton, Plaintiff-Appellee, v. PROPERTY DAMAGE APPRAISERS, INC., Defendant-Appellant.	No. 18-15055 D.C. No. 2:16-cv-02184-VC MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Vince Chhabria, District Judge, Presiding

Argued and Submitted June 3, 2019
Seattle, Washington

Before: D.W. NELSON, BEA, and N.R. SMITH, Circuit Judges.

Property Damage Appraisers, Inc. appeals the district court's order denying its motion to compel arbitration in a diversity action brought by Brian Nygaard and BKN Appraisals, Inc. We review de novo the district court's denial of a motion to compel arbitration. *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1259 (9th Cir.

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

2017). Because the district court correctly held that, applying California contract law, there was no "meeting of the minds" regarding arbitration based on the franchise license agreements, we affirm.

"[T]he [Federal Arbitration Act (FAA)] provides that arbitration agreements are generally valid and enforceable, 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264–65 (9th Cir. 2006) (en banc). In a diversity case, we "apply ordinary state-law principles that govern the formation of contracts to decide whether an agreement to arbitrate exists" and "follow a published intermediate state court decision regarding California law unless [we] are convinced that the California Supreme Court would reject it." *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1283–84 (9th Cir. 2017) (citations omitted).

We are bound by the California Court of Appeal's decision in *Winter v. Window Fashions Professionals, Inc.*, 166 Cal.App.4th 943 (2008). In a case containing the same language at issue here—a venue selection clause containing the phrase "[t]his provision may not be enforceable under California law"—*Winter* invalidated an entire arbitration provision because there was no meeting of the minds. *Id.* at 950 (citing *Laxmi Investments, LLC v. Golf USA*, 193 F.3d 1095 (9th Cir. 1999)). No California court has issued a decision contrary to *Winter*. Contrary to Appellant's contentions, the court in *MKJA, Inc. v. 123 Fit Franchising, LLC*

did not reach the issue whether *Winter* was correctly decided because it found there was no jurisdiction. 191 Cal.App.4th 643, 662 (2011). Footnote 9 in that opinion describes the defendant's argument, not the court's opinion. *Id.* at 662 n.9. We are not "convinced that the California Supreme Court would reject" *Winter*; therefore, we are bound to follow it. *Norcia*, 845 F.3d at 1283.

California regulations mandate only that the language in question, "[t]his provision may not be enforceable under California law," be included in a Uniform Offering Circular. 10 Cal. Code Reg. § 310.114.1(c)(B)(v); Cal. Civ. Prac. Bus. Litig. § 23:7; Cal. Corp. Code § 31114. The offering circular is required to be provided to prospective buyers, and functions as a pre-contract disclosure. Cal. Corp. Code § 31119. In the instant case, the language was not provided to the parties in a pre-contract offering circular; rather, it was included in an addendum to the franchise agreement itself that was signed and executed on the same date as the franchise agreement. The fact that the parties included the language voluntarily, rather than as required by law, makes the case to follow *Winter* that much stronger.

Lastly, *Winter* does not violate the FAA. The FAA "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Concepcion*, 563 U.S at 339. Arbitration agreements may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Id.* Lack of mutual consent,

or "meeting of the minds," is a "generally applicable contract defense[]" that continues to be an important inquiry in California contract law. *See, e.g.*, *Pierson v. Helmerich & Payne Internat. Drilling Co.*, 4 Cal.App.5th 608, 630 (2016); *HM DG, Inc. v. Amini*, 219 Cal.App.4th 1100, 1109 (2013).

It is not the case that every state law ruling that "stand[s] as an obstacle to the FAA's objectives" violates *Concepcion*. *See AT&T Mobility v. Concepcion*, 563 U.S. 333, 343 (2011). *Concepcion* simply requires courts to "place arbitration agreements on an equal footing with other contracts." *Id.* at 339; *cf. Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (finding Kentucky's "clear-statement rule" preempted by the FAA because it applied *only* to waivers of trial by jury). Here, *Winter*'s holding that a venue selection clause as to which there was no assent because of the phrase "[t]his provision may not be enforceable under California law" is not limited to arbitration agreements by the holding's text. If *Winter* were preempted by the FAA, every court construing ambiguous language in arbitration agreements would be forced to conclude that the language favored arbitration.

AFFIRMED.