No. 92655-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 71855-0-I

TRACI TURNER,

Appellant-Petitioner,

v.

VULCAN, INC., et al.,

PETITION FOR REVIEW

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I. INTRODUCTION & IDENTITY OF PETITIONER

Traci Turner (appellant in the Court of Appeals, plaintiff in the Superior Court) asks this Court to accept review of the Court of Appeals' decision terminating review, designated in Part II.

This case presents the opportunity for the Court to clarify important issues surrounding employer-promulgated arbitration clauses, resolve a conflict between divisions of the Court of Appeals, and provide much-needed guidance to lower courts.

First, the Court of Appeals' decision in *Turner v. Vulcan, Inc.,* No. 71855-0-I (slip op., Nov. 2, 2015), Appendix A,[1] runs counter to this Court's decisions clearly requiring that in deciding a motion to compel arbitration, the court, not the arbitrator, must resolve gateway issues as to whether there is a valid contract to arbitrate. RAP 13.4(b)(1), (2). Contrary to those decisions, the *Turner* court held that the arbitrator was the proper person to decide the validity of Vulcan's arbitration clause. In reaching this conclusion, contrary to Washington and Ninth Circuit law, *Turner* held that the arbitration clause's adoption of the American Arbitration Association (AAA) rules reflected the parties' clear and unmistakable intent to delegate questions of arbitrability to the arbitrator, not the court. Slip op., 11- 14. Should this ruling stand, it will eviscerate

[1] Respondents are Vulcan, Inc., and certain executives (collectively "Vulcan").

the important judicial role to decide gateway issues of contract formation, including unconscionability.

Second, though the trial court refused to permit an evidentiary hearing, the Court of Appeals determined that signing the arbitration clause under threat of termination was not procedurally unconscionable, as a matter of law. This conclusion conflicts with the Court of Appeals' decision the next day in *Mayne v. Monaco Enterprises, Inc.*, No. 32978-0-III, -- Wn. App. --, 2015 WL 6689919 (Nov. 3, 2015) (Appendix B) that an arbitration agreement offering an existing employee the option to sign or be fired lacks "meaningful choice." Further, *Mayne* observed that the coercive impact of the arbitration "offer" calls into doubt whether the employee's waiver of the constitutional right to a jury trial is knowing and voluntary. *Turner*'s holding to the contrary presents a significant question of constitutional law for this Court to resolve. RAP 13.4(b)(3).

Third, *Turner* conflicts with this Court's decision in *LaCoursiere v. CamWest Development, Inc.*, 181 Wn.2d 734, 747-49, 339 P.3d 963 (2014) and other cases prohibiting fee-shifting to an employee in statutory employment and wage claim cases. The Court of Appeals affirmed the trial court's remand of attorney fees to the arbitrator, who then shifted fees to the employee (Turner) for the second time, by carving out an

"alternative" exception to the prohibition. Washington law does not permit the arbitrator to carve such an exception from a common nucleus of facts. Thus, the remand and reduced fee award against Turner violate public policy just as much as the original award which Turner succeeded in vacating.

Turner involves issues of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

II. COURT OF APPEALS DECISION

Turner requests review of the Court of Appeals' unpublished decision, *Turner v. Vulcan, Inc.*, No. 71855-0-I (slip op., Nov. 2, 2015) (Appendix A).

III. ISSUES PRESENTED FOR REVIEW

1. Does *Turner's* ruling that the arbitrator decides gateway issues of contract formation conflict with decisions of this Court, *e.g., Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 53, 308 P.3d 635 (2013), *cert. denied,* 134 S. Ct. 2821, 189 L. Ed. 2d 785 (2014), holding that contract formation defenses are gateway issues for the court? RAP 13.4(b)(1), (2).

2. Does *Turner* conflict with the Court of Appeals' opinion issued the next day in *Mayne v. Monaco Enterprises, Inc.*, that an employer presenting an arbitration agreement to an already-existing employee must ameliorate the coercive impact of the "offer," in order to protect against

procedural unconscionability and to ensure the employee's waiver of her constitutional right to a jury trial is voluntary? RAP 13.4(b)(2), (3).

3. Does *Turner's* ruling affirming remand of the vacated attorney fees award, which was a violation of public policy, conflict with this Court's decisions in, *e.g., LaCoursiere*? RAP 13.4(b)(1).

4. Do the above questions present issues of substantial public interest that should be determined by this Court? RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE[2]

When Vulcan hired Turner as a senior executive protection (EP) specialist in January 2011, she signed an Employee Intellectual Property Agreement (EIPA), providing for attorney fees to the prevailing party in an employment dispute. The EIPA contained no arbitration clause. CP 2359-63. Seven months later, in July 2011, under threat of losing her job, Turner signed a Guaranteed Bonus Agreement (GBA), releasing any then-existing claims against Vulcan, and agreeing to confidential arbitration of disputes.[3] In exchange, Turner was given a so-called "guaranteed bonus payment", which bonuses Vulcan had previously routinely awarded EP employees. CP 2623, 2851, 3212-13.

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[2] Unless otherwise cited, the facts are set forth in the *Turner* opinion.

[3] The GBA's arbitration clause states: "Any and all claims, disputes, or other matters in controversy on any subject arising out of or related to this Agreement and your employment shall be subject to confidential arbitration." CP 281 (Appendix C).

After Turner was constructively discharged in September 2011, she filed an employment discrimination suit against Vulcan (*Turner I*). Vulcan immediately filed a six-day motion to compel arbitration based on the GBA's arbitration clause. Turner opposed the motion on several grounds including unconscionability, and noted that summary judgment standards applied. CP 75-79. Judge Patrick Oishi granted the motion to compel arbitration. Turner moved for reconsideration, and then voluntarily dismissed the case on November 1, 2011, to allow mediation. Mediation was unsuccessful.

On December 14, 2011, Vulcan initiated arbitration proceedings asserting several claims against Turner. Turner changed counsel. On January 27, 2012, Turner filed a second lawsuit in superior court (*Turner II*), which was assigned to Judge Monica Benton. Vulcan moved to dismiss *Turner II* based on res judicata and issue preclusion, and alternatively to again compel arbitration under the GBA. On June 8, 2012, the court dismissed the first five claims in *Turner II* based on Judge Oishi's order to compel arbitration, and dismissed the remaining five claims to be included in the ongoing arbitration. By this time, the AAA had already billed Turner over $20,000 in arbitration fees she could not afford. CP 2454; CP 1813, 1822, 1824-25, 2430.

On August 27, 2012, Turner's attorney withdrew. On September 7, 2012, Turner (pro se) requested a four-month continuance. The arbitrator denied the continuance without prejudice. On October 17, 2012, Turner withdrew from the arbitration. The arbitration took place on November 26, 2012, without Turner. On December 21, 2012, the arbitrator dismissed Turner's claims with prejudice and awarded Vulcan $5,696.63 for breach of contract (repayment of relocation expenses). On March 7, 2013, the arbitrator further awarded Vulcan $113,235.00 in attorney fees under the EIPA.

In April, 2013, Turner (now represented by current counsel) moved to vacate the final award, including the attorney fees award as a violation of public policy. Judge Bruce Heller confirmed the award of $5,696.63 to Vulcan, and vacated all attorney fees as against public policy. On Vulcan's request following that order, the court remanded the matter to the arbitrator to consider Vulcan's alternative fee request. On remand, the arbitrator awarded $39,524.50 in attorney fees to Vulcan for two partial summary judgment motions. Turner appealed. Vulcan cross-appealed from the remanded, reduced attorney fees award.

The Court of Appeals ruled that because Turner had challenged the GBA "as a whole," and the GBA incorporated the AAA rules, the arbitrator, not the court, had the authority to decide whether the arbitration

clause was valid and enforceable. Slip. op., 11-14. The court concluded the language, "any arbitration proceedings ... shall be conducted ... in accordance with applicable AAA Rules," CP 281, was a clear and unmistakable expression that the parties intended to have the arbitrator decide whether the dispute was subject to arbitration. Slip op., 13. This decision allowed the court to avoid the fact that neither Judge Oishi nor Judge Benton applied the necessary summary judgment standards, which required an evidentiary hearing on Turner's contract formation defenses. Turner does not waive any of her defenses on review.

Despite these reversible errors, the Court of Appeals proceeded to resolve disputed issues of material fact on unconscionability against Turner, as a matter of law. Slip op., 14-16. The court held the GBA was not procedurally unconscionable because it gave her the option (24 hours) to seek legal advice and find the AAA rules before signing. The court ignored the undisputed fact that Turner believed she would be fired if she did not sign. CP 585-86, 622-23, 643,[4] 3212-16.[5] Instead, *Turner* focused

[4] Vulcan's then-Director of Security Kathy Leodler.

[5] CP 3212-16 (Vulcan Human Resources Director Laura Macdonald testified the entire EP team would lose their jobs if they did not sign the GBA "urgently"). Vulcan did not clearly dispute Turner's belief that she would be fired if she did not sign, but rather vaguely claimed it was undecided what would happen to those who refused to sign the document, admitting that no one declined to sign. CP 3214 (Macdonald: "I don't believe that was ever decided"), 3216. In the trial court, Vulcan conceded it was significantly different if Turner was told she would lose her job if she did not sign, then argued that Turner should have presented this contention to Judge Oishi. CP 4129.

on the lack of "evidence that Turner sought additional time" or that she felt she needed legal advice, implying 24 hours was enough time to remove procedural unconscionability. *Id.*, 15.

The court agreed that the attorney fees award violated public policy as to statutory employment and wage claims, but affirmed the award of fees to Vulcan for prevailing on two partial summary judgment motions regarding defamation and the validity of the release. While noting that this "is largely an employment dispute based primarily on an employee's statutory claims", slip op., 1, the court concluded that the issues on the two motions "are not necessarily intertwined with statutory claims under the WLAD and the MWA."[6] Slip op., 20-25.

The court held the arbitration agreement did not violate Turner's constitutional right to a jury trial or the separation of powers doctrine. Slip. op., 19-20. The court denied attorney fees on appeal to either party. Slip op., 25.

[6] Washington Law Against Discrimination, RCW Chapter 49.60; Washington Minimum Wage Act, RCW Chapter 49.46.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. *Turner* Conflicts With This Court's Clear Holding That The Existence Of A Contract To Arbitrate Is A Gateway Issue For the Court.

1. Turner Disputed That She Ever Agreed to Arbitrate, A Gateway Matter For The Court.

The court, not the arbitrator, must decide challenges to a contract's very existence before compelling arbitration. *E.g., Hill,* at 53 (citing *Satomi Owners Ass'n v. Satomi, LLC,* 167 Wn.2d 781, 809-10, 225 P.3d 213 (2009)); *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 377-78, 292 P.3d 108 (2013). In *Hill,* recognizing that a party cannot be required to submit to arbitration when she has not agreed to it, this Court held:

> To that end, we have recognized our authority to decide "'gateway dispute[s].'" ... These types of disputes go to the validity of the contract and are preserved for judicial determination, as opposed to arbitrator determination, unless the parties' agreement clearly and unmistakably provides otherwise. ... Unconscionability is one such gateway dispute.

Hill, at 53 (citing, *e.g., Satomi,* at 809); *McKee v. AT&T Corp.,* 164 Wn.2d 372, 404, 191 P.3d 845 (2008) ("Courts, not arbitrators, decide the validity of arbitration agreements"); *Romney v. Franciscan Med. Grp.,* 186 Wn. App. 728, 735, 349 P.3d 32, *review denied,* 184 Wn.2d 1004 (2015) (policy favoring arbitration "does not ... lessen this court's responsibility to determine whether the arbitration contract is valid"; unconscionability "is a preliminary question for judicial consideration"; citing *Hill,* at 53). *See also, e.g., Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.,* 925

F.2d 1136, 1140-41 (9th Cir. 1991) ("challenges going to the very existence of a contract that a party claims never to have agreed to" are for court); *Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 962-64 (9th Cir. 2007) ("challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration").[7]

Nevertheless, to affirm the orders compelling arbitration, the Court of Appeals concluded Turner was attacking the "whole contract," which delegated contract formation to the arbitrator by adopting the AAA rules.[8]

In *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 264-65, 306 P.3d 948 (2013),[9] *Romney,*[10] and *Gorden v. Lloyd Ward & Associates,*

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[7] "The order ...interpreted *Prima Paint* as mandating that the court decide all challenges to an arbitration clause but the arbitrator decide all challenges to the contract as a whole. We rejected this argument in *Three Valleys*". *Id.* at 963-64. *See also Olsen v. U.S. ex rel. Fed. Crop Ins. Corp.*, 334 F. App'x 834, 835 (9th Cir. 2009) (rejecting contention that defendant challenged "validity of the whole contract," when defendant contended it had not consented to arbitration; broad arbitration language adopting AAA rules, *Olsen v. U.S. ex rel. U.S. Dep't of Agric.*, 546 F.Supp.2d 1122, 1125 (E.D. Wash. 2008), *aff'd,* 334 F. App'x 834 (9th Cir. 2009)); *Kum Tat Ltd. v. Linden Ox Pasture, LLC,* No. 14-CV-02857-WHO, 2014 WL 6882421, at *4-6 (N.D. Cal. Dec. 5, 2014); *Oracle Am., Inc. v. Myriad Group A. G.*, 724 F.3d 1069, 1072 (9th Cir. 2013) ("presumption in favor of arbitrability applies only where the *scope* of the agreement is ambiguous as to the dispute at hand").

[8] The court did not cite to the only Washington case Turner is aware of in which the Court concluded plaintiffs challenged the entire contract, *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 458-60, 268 P.3d 917 (2012) (distinguishing the case *Turner* relies on, *McKee v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008)). In *Townsend,* plaintiffs' claims against an entire multi-page agreement, including a "minor" arbitration provision, were "inseparable"; "one could decide whether the arbitration clause is unenforceable only by deciding whether the PSA as a whole is unenforceable." *Id.* As in *Mayne,* Turner's situation as an already-existing employee presented with the option to sign or be fired is entirely different.

[9] "[A]any controversy or claim arising out of or relating to this Agreement ... shall be settled by final and binding arbitration" under AAA provisions. Resp. Br., 2 (https://www.courts.wa.gov/content/Briefs/A08/879532%20Respondents'%20Brief.pdf).

P.C., 180 Wn. App. 552, 562-63, 323 P.3d 1074 (2014),[11] analyzing broad language in the arbitration clause, the courts did not perceive any delegation of gateway issues to the arbitrator. Based on this similarly broad language, this Court held: "the issue of arbitrability has not been clearly and unmistakably delegated to the arbitrator on the face of the contract. Therefore, it is proper for us to determine the enforceability of the agreement."[12]

"The 'clear and unmistakable' standard is exacting, and the presence of an expansive arbitration clause, without more, will not suffice." *Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union,* 665 F.3d 96, 102 (4th Cir. 2012).

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[10] "[T]he arbitrability issue has not been clearly and unmistakably delegated to the arbitrator on the face of the contract. Thus, the trial court ... had subject matter jurisdiction to determine the arbitration agreement's enforceability." *Id.* The arbitration clause in *Romney* required the parties to "arbitrate all Claims" between them; claims were defined as "all disputes arising out of or related to the Employment Agreement," or the employment or separation from employment. Resp. Br., 9. (https://www.courts.wa.gov/content/Briefs/A01/716255%20Respondent's.pdf).

[11] The parties agreed to mediate or arbitrate "any complaint against Firm prior to the initiation of any public or private complaints or claims of any kind against LWG". *Id.*

[12] "A threshold dispute as to whether an arbitration agreement is unconscionable is ordinarily a decision for the court and not the arbitrator." *Brown,* at 264-65. California law applied to the controversy, but Washington law applying the FAA is the same, as demonstrated by the Washington Court of Appeals' adoption of this holding in *Gorden* (applying Washington law).

The *Turner* court relied heavily on the fact that in *Preston v. Ferrer,* 552 U.S. 346, 128 S.Ct. 978, 984, 169 L.Ed.2d 915 (2008),[13] the arbitration clause in the contract at issue adopted the AAA rules, which allow the arbitrator to determine the validity of a contract. Slip op., 13 (citing *Fallo v. High-Tech Inst.,* 559 F.3d 874, 878 (8th Cir. 2009)).[14] State courts are not bound by this unresolved split in federal contract law. Even under the FAA, the threshold question of what a contract says is a matter of state interpretational law. *E.g., Hill,* 179 Wn.2d at 53-58. *See First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985 (1995).[15]

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[13] In determining that Turner challenged the whole contract, the *Turner* court relied on *McKee,* 164 Wn.2d at 383-84, 394, which distinguished *Preston.* In *Preston,* "there was no discrete challenge to the arbitration clause". In *McKee,* however, plaintiff's challenge related only to the dispute resolution/arbitration section of a consumer services agreement.

[14] The parties were a former judge (plaintiff) and a lawyer (defendant). Defendant interpreted the choice-of-law clause to call for exclusive jurisdiction with the California Labor Commissioner, not an arbitrator. *Id.,* 552 U.S. at 361. The parties' adoption of the AAA rules in *Preston* was just one factor in rejecting plaintiff's reliance on a choice-of-law clause in the contract.

[15] *See, e.g., Tompkins v. 23andMe, Inc.,* No. 5:13-CV-05682-LHK, 2014 WL 2903752, at *11 (N.D. Cal. June 25, 2014) ("a bare reference to the AAA rules in [defendant's] ... contract does not show that the parties clearly and unmistakably intended to delegate arbitrability"); *Brennan v. Opus Bank,* 796 F.3d 1125, 1131 (9th Cir. 2015) (limiting holding to facts involving an arbitration agreement "between sophisticated parties"; citing *Oracle America, Inc. v. Myriad Group A.G.,* 724 F.3d 1069, 1074-75 & n.2 (9th Cir. 2013) ("We express no view as to the effect of incorporating arbitration rules into consumer contracts.").

2. By Affirming Orders Compelling Arbitration On An Incomplete, Disputed Factual Record, *Turner* Conflicts With The FAA and Washington Law.

The *Turner* court's resolution of both motions to compel allowed it to avoid the fact that the trial court never held a required hearing on Turner's contract formation defenses. In turn, the court did not need to address Vulcan's arguments that Judge Oishi's order had preclusive effect (res judicata/collateral estoppel).[16]

A motion to compel arbitration is decided according to the standards for summary judgment under CR 56. "If there is doubt as to whether such an agreement exists, the matter, upon a proper and timely demand, should be submitted to a jury." *Three Valleys,* 925 F.2d at 1141; 9 U.S.C. § 4. The court gives the party opposing a motion to compel arbitration "the benefit of all reasonable doubts and inferences that may arise." *Three Valleys,* at 1141. Where "the making of the arbitration

[16] While Washington law is quite clear that the gateway matter whether a contract exists is for the court, in some instances, the line between issues that are for the court and those for the arbitrator can be difficult to discern. Taking advantage of this difficulty, Vulcan constructed contradictory arguments to the trial court regarding who was authorized to decide which of these "questions of arbitrability." Vulcan argued to Judge Oishi that all issues of arbitrability and unconscionability were for the arbitrator, not the court. CP 4139, 4214-15. Vulcan then urged Judge Benton to order arbitration because Judge Oishi had already decided the exact same issues (triggering issue or claim preclusion), and blamed Turner for not previously convincing Judge Oishi. CP 1991, 2008-09, 4129, 4222, 4233-34. These circumstances amplify the prejudice resulting from the Court of Appeals' ruling that Turner challenged the "whole contract" and agreed to have the arbitrator decide gateway issues. *See, e.g., Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. 63, 78, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010) (Stevens J., dissenting). The FAA suggests courts have the authority to consider both before compelling arbitration. 9 U.S.C. § 4 (allowing courts to consider "making" of arbitration agreement).

agreement" is at issue, "the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4; *Switch, LLC v. ixmation, Inc.*, No. 15-CV-01637-MEJ, 2015 WL 4463672, at *3 (N.D. Cal. July 21, 2015) (quoting *Sanford,* at 962; *Three Valleys,* at 1140-41).

In *Switch,* examining two agreements (one containing an arbitration provision) the court held that state contract principles were "difficult to apply on an undeveloped record with so many factual issues" and it was "not clear from the documents themselves that an agreement to arbitrate exists." "If there is doubt as to whether an express, unequivocal agreement to arbitrate exists, the matter should be submitted to a jury." *Id.* at *4.[17] *See also Adler v. Fred Lind Manor,* 153 Wn.2d 331, 350-51, 103 P.3d 773 (2004) (remand for resolution of factual questions on procedural unconscionability); *Walters v. AAA Waterproofing, Inc.*, 151 Wn. App.

[17] Citing *Concat LP v. Unilever, PLC,* 350 F.Supp.2d 796, 804 (N.D.Cal.2004) (where motion to compel arbitration "is opposed on the ground that no agreement to arbitrate was made," court should apply a summary judgment-type standard); *e.g., Kwan v. Clearwire Corp.*, No. C09-1392JLR, 2012 WL 32380, at *10 (W.D. Wash. Jan. 3, 2012) (declining to resolve disputed issues as to plaintiff's notice of arbitration agreement); *E.E.O.C. v. Fry's Elecs., Inc.*, No. C10-1562RSL, 2011 WL 666328, at *5 (W.D. Wash. Feb. 14, 2011) ("Where there is conflicting evidence regarding one party's assent to the arbitration agreement, the parties will not be forced to arbitrate unless and until it is finally determined that a binding agreement was formed"; proceeding "summarily to a trial"); *In re Park W. Galleries, Inc., Mktg. & Sales Practices Litig.*, No. 09-2076RSL, 2010 WL 3732910, at *2 (W.D. Wash. Sept. 17, 2010) ("There being a genuine issue of material fact regarding the formation of the contract, plaintiffs cannot be compelled to arbitrate this threshold issue."); *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764 (3d Cir. 2013) (plaintiff came forward with sufficient evidence that she did not agree to or intend to be bound by arbitration provision, triggering summary judgment standard to motion to compel arbitration).

316, 320-22, 211 P.3d 454 (2009) (ruling on denied summary judgment motion where facts were undisputed).

The orders improperly compelling arbitration denied Turner her right to the benefit of summary judgment standards which would have led to an evidentiary hearing on the disputed facts whether she ever agreed to Vulcan's arbitration clause.

B. *Turner* Conflicts With The Court Of Appeals' On-Point Decision In *Mayne*.

The Court of Appeals concluded that because Turner had 24 hours to consult an attorney before signing the arbitration clause, the fact she was threatened with losing her job if she did not sign was inconsequential. That conflicts with a Court of Appeals opinion issued the next day, *Mayne v. Monaco Enterprises, Inc.* In *Mayne,* considering the same forced-arbitration employment context, the court held that a second arbitration agreement, which the employer required an already-existing employee to sign to avoid being fired, was procedurally unconscionable:

> There is a fine line between informed consent and coercion in this context. An employer can condition employment upon the employee waiving his right to a jury trial and *voluntarily* signing an arbitration agreement. That is easily accomplished at the onset of employment, as in *Zuver,*[18] where the employee knows the condition before agreeing to accept employment.
>
> The task is more difficult when there is already an existing at-will employment relationship. As the 2011 agreement in this case demonstrates, we believe most employees will

[18] *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004).

> voluntarily sign an arbitration agreement upon request, even if they are not required to sign in order to remain employed. Still, they should be aware of the consequence of not agreeing if the employer is set on having an arbitration-only work force. To that end, we believe an employer should in some manner notify the employee of the policy and then take some action to ameliorate the coercive impact of that information in order to ensure a voluntary decision. Perhaps the employee could be offered a reasonable time to sign before voluntarily leaving employment, or could be offered some incentive[3] as consideration for the waiver of the constitutional right. A meaningful choice is needed. A choice compelled by the threat of immediate termination is not a meaningful choice.
>
> [3]As an example, we note that a noncompetition agreement entered into at the start of employment is ordinarily valid as part of the employment contract, but **any change to the agreement or a newly incorporated noncompetition agreement requires independent consideration to be valid.** *See Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004). We also note that some states require consideration even for arbitration agreements entered in conjunction with initial employment. *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo.2014); *Cheek v. United Healthcare of the Mid–Atlantic, Inc.*, 378 Md. 139, 835 A.2d 656 (2003).

Id. at *4-5 (emphasis added).

Judge Brown, concurring in the result, concluded the employer should have notified employees of the rights they would be giving up to record attorney fees, and the arbitration costs they would face. *Id.* at *5. Though Turner had made precisely this argument on an incomplete record without any discovery from Vulcan, no court considered this lack of a meaningful choice and absence of consideration. [19]

[19] Turner argued below that the GBA lacked consideration. *E.g.*, CP 76, 100-01; Turner's Reply, at 21 (citing *Labriola*, at 834). The evidence from Vulcan demonstrates the $25,000 payment was strictly for Turner's release, not for arbitration. CP 3212-16.

In contrast to *Mayne*, the Court of Appeals in *Turner* held that Traci Turner had a meaningful choice in entering into the GBA. But there is no record of "all the circumstances surrounding the transaction", which the court is required to examine. Slip op., 14 (quoting *Zuver,* at 303).[20]

In *Mayne,* properly following the FAA, the court noted, "the states need not enforce agreements that violate 'generally applicable contract defenses' including unconscionability." *Id.* at *2 (citing *Zuver* at 302) (citing FAA § 2)).[21] That is what the trial court in this case should have done but failed to do. The Court of Appeals' analysis of unconscionability as a matter of law on this vigorously disputed and inaccurate record conflicts with applicable law and does nothing to remedy the trial court's errors.

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[20] *Turner* also conflicts with the Court of Appeals' decision in *Romney,* 186 Wn. App. at 736-40, where the circumstances were the exact opposite of here: for example, sophisticated hospital employees (doctors and a nurse practitioner) signed "multiple agreements" over time containing a mandatory arbitration clause. There was no "urgency" or 24-hour limitation.

[21] In *Mayne,* the second arbitration agreement provided, "had the Employee not agreed to execute this Arbitration Agreement, the Company would not have agreed to employ the Employee." *Id.* at *3. It was undisputed that this meant Mayne "would be fired if he did not consent to execute the agreement. Under the circumstances, this was no 'meaningful choice.'" *Id.* at *3-4 (citing and discussing *Zuver,* at 303; *Adler v. Fred Lind Manor,* 153 Wn.2d 331, 350-51, 103 P.3d 773 (2004) (remand for questions of fact on procedural unconscionability)). In this case, the issue is vigorously disputed, even on an incomplete record. The court should have held an evidentiary hearing. 9 U.S.C. § 4.

C. Affirming The Trial Court's Remand On Attorney Fees Is Internally Inconsistent and Conflicts With This Court's Decisions.

In affirming the remanded award of fees to Vulcan for prevailing on two partial summary judgment motions involving claims arising from Turner's employment, the court applied the FAA's highly deferential standard of review to the arbitrator's award,[22] instead of a de novo standard to the erroneous remand. On remand, the arbitrator made the same error as before, carving out an exception to the statutory fee-shifting prohibition. CP 3594-95.[23] Because Washington law does not permit the arbitrator to carve such an exception out from a common nucleus of facts, the remand conflicts with this Court's decisions.

The Washington Supreme Court decisively confirmed the public policy prohibition against fees to a prevailing defendant in *LaCoursiere v. CamWest Development, Inc.,* 181 Wn.2d 734, 747-49, 339 P.3d 963 (2014). There, relying on *Walters* and *Brown,* the Court reversed an award of attorney fees to the employer, because under RCW 49.52.070,

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[22] Judicial review of arbitration awards under the FAA, 9 U.S.C. § 10, is "extremely narrow and exceedingly deferential." *UMass Mem'l Med. Ctr. V. United Food & Comm'l Workers Union,* 527 F.3d 1, 5 (1st Cir. 2008); *Bosack v. Soward,* 586 F.3d 1096, 1106 (9th Cir. 2009); *Intern'l Union Op. Eng'rs v. Port of Seattle,* 176 Wn.2d 712, 720, 295 P.3d 736 (2013); CP 3587-88 (Heller Mem. Op.); slip op., 25 (citing *Broom v. Morgan Stanley DW, Inc.,* 169 Wn.2d 231, 236-37, 236 P.3d 182 (2010).

[23] This case demonstrates how an arbitrator can make a legally-erroneous decision which is then insulated from judicial review. Judge Heller held, and *Turner* affirmed, that "an employment agreement or arbitration award that ... awards fees to a prevailing defendant in a WLAD or wage and hour lawsuit violates public policy." CP 3595; slip op., 22, 24-25. On remand, the arbitrator again violated that ruling, but *Turner* court saw "no facial legal error" in the award. Slip op., 25.

"reasonable attorney fees and costs are available only to prevailing employees." *Id.* Justice Gonzalez, concurring, agreed that "[i]t would frustrate the broad remedial purpose of the act to allow an employer to override the clear statutory system by contract." *Id.* at 749.

The trial court erred in remanding the "alternative basis" for fees to the arbitrator, who again frustrated the purpose of the WLAD and MWA by creating another carve-out. Summary judgment motions to dismiss related claims arising out of a common core of facts simply do not qualify an employer for fee-shifting. *See, e.g., Hume v. American Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994) (where court finds claims so related that no reasonable segregation of fees can be made, it need not do so).[24]

V. CONCLUSION

Turner asks this Court to accept review of the significant issues raised by the conflicts between the Court of Appeals' opinion in *Turner* and this Court's decisions, as well as with the Court of Appeals' opinion in *Mayne*. *Turner's* holding that contract formation is for the arbitrator instead of the court blatantly contradicts this Court's repeated holding that

[24] *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 352, 279 P.3d 972 (2012) (where " 'the plaintiff's claims for relief ... involve a common core of facts or [are] based on related legal theories,'" a lawsuit cannot be "'viewed as a series of discrete claims'" and, thus, the claims should not be segregated in determining an award of fees); *Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 547, 548 n.7, 151 P.3d 976 (2007); *Brown*, at 274 (refusing to shift fees to prevailing defendant though only "some of the underlying claims f[e]ll under the Washington Minimum Wage Act"); *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001) ("court is not required to artificially segregate time ... where the claims all relate to the same fact pattern, but allege different bases for recovery.").

the existence of a contract is a gateway issue for the court. It also insulates employers from judicial review of arbitrators' resolutions of disputes concerning arbitration clauses, when these clauses are invariably favorable to the employer. Once safely in arbitration, the employer is aided by an extremely deferential standard of review, permitting virtually all errors of law committed by an arbitrator to be immune from review. Further, *Turner* allows courts to resolve unconscionability without applying summary judgment standards or holding an evidentiary hearing. This Court should accept review and reiterate public policy that Washington State will not permit employers to violate important employee rights with impunity.

RESPECTFULLY SUBMITTED this 2nd day of December, 2015.

SCHROETER GOLDMARK & BENDER

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APPENDICES

Appendix A - Unpublished Opinion filed Nov. 2, 2015, Court of Appeals Division One, No. 71855-0-I

Appendix B - Mayne v. Monaco Enterprises, --- P.3d --- (2015)

Appendix C - Guaranteed Bonus Agreement, CP 280-82

Appendix D - Memorandum Opinion, Judge Bruce E. Heller, King County Superior Court Cause No. 12-2-03514-8-SEA, dated Sept. 27, 2013, CP 3583-3598

Appendix E - Non-Washington Cases Cited Under GR 14.1

CERTIFICATE OF SERVICE

On the 2nd day of December, 2015, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Harry H. Schneider, Jr. Kevin J. Hamilton Joseph M. McMillan Perkins Coie LLP 1201 Third Ave., Suite 4800 Seattle, WA 98101-3099 HSchneider@perkinscoie.com KHamilton@perkinscoie.com JMcMillan@perkinscoie.com	☒ Via Hand Delivery – ABC Legal ☐ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☒ Via Email
Jeffrey I. Tilden, WSBA #12219 Jeffrey M. Thomas, WSBA #21175 Michael P. Brown, WSBA #45618 Gordon Tilden Thomas & Cordell, LLP 1001 Fourth Ave., Suite 4000 Seattle, WA 98154 jtilden@gordontilden.com jthomas@gordontilden.com	☒ Via Hand Delivery – ABC Legal ☐ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☒ Via Email

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 2nd day of December, 2015.

s/ Darla Moran

Darla Moran
Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TRACI TURNER, Appellant/Cross Respondent, v. VULCAN, INC., PAUL ALLEN, JODY ALLEN, Respondents/Cross Appellants, RAY COLLIVER, and LAURA MACDONALD, Respondents.	No. 71855-0-I DIVISION ONE UNPUBLISHED OPINION FILED: November 2, 2015

TRICKEY, J. — In a motion to compel arbitration, a trial court must determine whether there is a valid agreement to arbitrate and, if so, whether the dispute is within the scope of that agreement. Here, the agreement to arbitrate is neither procedurally nor substantively unconscionable. The subject of the dispute is contained within the agreement to arbitrate. The challenge to the contract as a whole is a question for the arbitrator. Because this arbitration provision is part of an employment contract, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, applies.

The claims presented here are in connection with what is largely an employment dispute based primarily on an employee's statutory claims asserted under the Washington Law Against Discrimination Act (WLAD), chapter 49.60 RCW, and the Washington Minimum Wage Act (MWA), chapter 49.46 RCW. Because the employer's requested attorney fees would frustrate the broad

remedial purposes of those acts, we affirm the arbitrator's award granting attorney fees only for the employer's motion on the validity of the employee's release of claims against the employer and for prevailing on the defamation claim.

In all respects, we affirm the trial court's order affirming the arbitrator's award.

FACTS

Vulcan, Inc. hired Traci Turner as a senior executive protection (EP) specialist in January 2011. At the same time, Turner signed an Employee Intellectual Property Agreement (EIPA) providing for an award of attorney fees to the prevailing party in any lawsuit arising out of her employment or the agreement itself.

Vulcan promoted Turner to the lead EP detail for Paul Allen in April 2011. In May 2011, she was assigned as the lead EP for Paul Allen's personal security detail. Two months later, in July 2011, Turner signed a Guaranteed Bonus Agreement (GBA), waiving and releasing any then-existing claims against Vulcan and agreeing to confidential arbitration in exchange for a guaranteed bonus payment in excess of the maximum wages she would otherwise receive. Turner's yearly wage at the time was $140,000.00. Her minimum guaranteed bonus was $25,156.00, subject to proration if her employment ended before the end of the year.

On September 23, 2011, Turner submitted her resignation, which she characterized as a constructive discharge. Shortly thereafter, Turner filed her first employment discrimination suit against Vulcan and several of its executives

(Turner I). Vulcan immediately moved for an order compelling arbitration based on the GBA. Judge Patrick Oishi granted Vulcan's motion, compelled arbitration, and stayed the proceedings in King County Superior Court.

Turner moved for reconsideration and Vulcan responded. Before any decision was made on the reconsideration motion, Turner filed a notice of voluntary dismissal that was granted ex parte on November 1, 2011. Turner's stated reason for dismissal was that a mediation involving other Vulcan employees was taking place and, if successful, would resolve all of the issues. That mediation was unsuccessful, however. None of the other employees involved in the mediation voluntarily dismissed the cases that they had filed in superior court. One of those employees who, like Turner, had signed a GBA, was ordered to arbitration on February 24, 2012, by a different judge.

Meanwhile, on December 14, 2011, Vulcan initiated arbitration proceedings asserting several claims against Turner. The next day, Turner's counsel, Jerald Pearson, sent an e-mail informing Vulcan that Turner's current instructions to him were to refile the court case and to not accept the arbitration process. On January 5, 2012, Pearson withdrew as Turner's counsel.

On January 26, 2012, Vulcan e-mailed Turner's new attorney, Patrick McGuigan of the HKM law firm,[1] informing him that it had filed arbitration proceedings and intended to proceed with its claims. Vulcan asserted breach of the EIPA, anticipatory breach of the EIPA, breach of duty of loyalty, breach of confidential relationship, violation of Computer Fraud and Abuse Act (18 U.S.C. §

[1] For ease of reference, we refer to McGuigan and HKM law firm collectively as HKM.

1030), repayment of prorated bonuses, declaratory relief for nonliabilty for the employment related causes of action, fraud, defamation, and any actions prior to July 26, 2011.

On January 27, Turner filed a second lawsuit in superior court (Turner II), which was assigned to Judge Monica Benton. Her complaint reiterated the first five claims made in Turner I and asserted five additional claims. The first complaint asserted claims for gender discrimination, constructive termination, retaliation, hostile work environment, and defamation. The five additional claims asserted in Turner II were sexual orientation discrimination, age discrimination, intentional infliction of emotional distress, negligent infliction of emotional distress, and withholding of wages.

After unsuccessfully trying to transfer this second suit to Judge Oishi, Vulcan moved to dismiss the complaint because of the doctrines of res judicata and issue preclusion, and, alternatively, to once again compel arbitration under the GBA. On March 5, 2012, Turner filed a CR 60 motion to vacate the order compelling arbitration in Turner I.

On March 9, 2012, HKM notified the arbitrator of Turner's counterclaims against Vulcan and its executives. In that notification, HKM also challenged the arbitrator's jurisdiction, noting that Turner would request a schedule to brief that issue during a telephonic case management conference set for March 26, 2012.

The trial court heard oral argument on April 5, 2012. On April 16, the court entered an order denying Turner's CR 60 motion, but reserved ruling on Vulcan's

motion to dismiss affording the parties an opportunity to submit additional briefing on whether the additional claims were subject to mandatory arbitration.

On June 8, 2012, the court entered an order dismissing the first five claims that were already subject to arbitration as a result of Judge Oishi's order in Turner I. The court also dismissed the remaining five claims and referred them to the arbitration that was already in progress.

During these legal proceedings in Turner II, HKM also sought to pursue discovery. Vulcan disputed Turner's right to proceed with legal depositions, informing HKM that discovery was available in the arbitration proceedings.[2] Judge Benton granted Vulcan's motion for a protective order and quashed the depositions.

On July 13, 2012, HKM requested a four month continuance of the arbitration hearing scheduled for November 26, 2012, to pursue discovery. The arbitrator denied the continuance. On July 16, Vulcan sent a notice that it intended to depose Turner's current and past psychologists and her partner.

On July 30, 2012, HKM sent a letter stating that financial constraints on Turner would force a discontinuance of the arbitration. Previously, in response to

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[2] Am. Arbitration Ass'n, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 9 (Nov. 1, 2009). Rule 9 provides:

> The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.
>
> The [American Arbitration Association (AAA)] does not require notice of discovery related matters and communications unless a dispute arises. At that time, the parties should notify the AAA of the dispute so that it may be presented to the arbitrator for determination.

HKM's inquiry regarding applicable rules, the American Arbitration Association (AAA) case manager had indicated that the employment arbitration rules applied. The case manager subsequently billed both parties in excess of $20,000.00. Vulcan paid its portion of the fees, and Turner paid $900.00.

After receiving HKM's notice of discontinuance, the case manager for AAA sent a letter advising that Turner would not be pursuing the counterclaims but noting that the matter was moving forward with Vulcan's claims. Vulcan objected to the dismissal of Turner's claims under CR 41(a)(3) arguing, inter alia, that the GBA was an employer promulgated plan and, under the rules of the AAA, Vulcan was responsible for the costs of the arbitration pertaining to those employment claims as well as the arbitrator's fees. Vulcan eventually paid all the administrative costs of the arbitration as well as the arbitrator's fees, totaling $34,961.24.

On August 9, 2012, Turner filed a motion to dismiss claims and end the arbitration proceedings. Turner argued that, in view of Vulcan's failure to advise the AAA that the GBA was an employer promulgated agreement, it could not now offer to pay all fees to continue the arbitration. On August 21, 2012, the arbitrator issued her ruling denying Turner's motion to dismiss and end the arbitration proceedings. The arbitrator based her ruling on the fact that Turner's pleadings cited Rule 48 of the AAA rules,[3] which permitted the parties to disagree with the

[3] Am. Arbitration Ass'n, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 48 (Nov. 1, 2009). Rule 48 provides:

> **Costs of Arbitration (Including AAA Administrative Fees)**
>
> This Costs of Arbitration section contains two separate and distinct sub-sections. Initially, the AAA shall make an administrative determination as to whether the dispute arises from an employer-promulgated plan or an individually-negotiated employment agreement or contact.

determination of fees, but that she had failed to do so earlier. Vulcan had no obligation to assert a claim on Turner's behalf. Because Vulcan agreed that it was responsible for the fees, there was no impediment to Turner pursuing arbitration of her employment claims. The arbitrator gave Turner five days to reinstate her counterclaims.

On August 27, 2012, HKM withdrew as Turner's attorney. On September 7, 2012, Turner, representing herself, requested a four month continuance. The arbitrator denied the continuance without prejudice and set a schedule for Vulcan's motions for summary judgment and Turner's response.

On October 16, 2012, Vulcan deposed Turner's current psychologist. Turner was present at that deposition and asked questions. The following day, based on her experience in the deposition, Turner sent an e-mail stating that she was withdrawing from the arbitration.

The arbitration hearing took place as scheduled on November 26, 2012, without Turner.[4] The arbitrator entered Findings of Fact, Conclusions of Law, and an Interim Arbitration Award on December 21, 2012. The interim award dismissed

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> If a party disagrees with the AAA's determination, the parties may bring the issue to the attention of the arbitrator for a final determination. The arbitrator's determination shall be made on documents only, unless the arbitrator deems a hearing is necessary.

[4] Am. Arbitration Ass'n, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 29 (Nov. 1, 2009). Rule 29 provides:

> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative, who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be based solely on the default of a party. The arbitration shall require the party who is in attendance to present such evidence as the arbitrator may require for the making of the award.

Turner's claims with prejudice and awarded Vulcan $5,696.63 based on Turner's breach of contract for failing to repay Vulcan a portion of the bonuses received at the start of her employment since she left before the end of the year.

Vulcan requested $117,735.00 in fees for its efforts in securing a second court order compelling arbitration and its success in claims outside of the statutory discrimination claims (recovery of defamation and recovery of bonus).

On March 7, 2013, the arbitrator awarded Vulcan $113,235.00 in attorney fees under the EIPA, which contained a fee provision. Because the dispute arose out of Turner's employment and Vulcan was the prevailing party, the arbitrator found that Vulcan was entitled to fees except for amounts incurred in defending against Turner's statutory employment discrimination claims.

The arbitrator limited the fees to those incurred

> in the second lawsuit in which Vulcan successfully sought to enforce the arbitration provision contained in the Guaranteed Bonus Agreement (Turner II). Vulcan does not seek fees incurred in the first lawsuit in which it successfully sought to enforce the arbitration provision (Turner I). Vulcan has further limited its request to only those fees incurred in Turner II for partners Harry H. Schneider Jr., Joseph M. McMillan, and then associate Jeffrey M. Hanson, and only as to days on which the lawyer billed at least three hours on this matter.[5]

Vulcan and its executives moved to confirm the final arbitration award and for judgment against Turner. Rebecca Roe entered a notice of appearance for Turner causing Vulcan's motion for confirmation to be reassigned to Judge Bruce Heller, who then entered an order confirming the award on April 5, 2013.

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[5] Clerk's Papers (CP) at 4072.

Turner moved for reconsideration. Judge Heller granted Turner's motion for reconsideration and set the matter for oral argument.

Turner sought to vacate the final award, arguing that the arbitrator's denial of Turner's request for a continuance amounted to misconduct and that the award of attorney fees was "irrational"[6] and, further, that the arbitrator violated public policy and exceeded her authority under the state constitution. WASH. CONST. art. IV, § 6.

At the hearing to confirm the arbitration award, Judge Heller requested supplemental briefing on whether attorney fees for Vulcan's efforts to compel arbitration a second time violated public policy. The court then entered an order confirming in part and vacating in part the arbitration award. The matter was remanded to the arbitrator to consider whether Vulcan's alternative fee request related to non-statutory claims.

On remand the arbitrator revisited her attorney fee award and, after receiving revised information from Vulcan, awarded $39,524.50 in attorney fees to Vulcan as follows: $18,875.00 incurred for its successful motion for partial summary judgment on Turner's defamation claim, and $21,449.50 for prevailing on the partial summary judgment motion on the enforceability of the contractual release signed by Turner. The court upheld the revised award and entered final judgment.

[6] CP at 2601.

Vulcan then moved to confirm the amended final award. Turner responded and requested attorney fees for prevailing on the reduction of attorney fees awarded in the first final arbitration award. The court denied her request.

Turner appeals the trial court orders compelling arbitration in Turner I and Turner II, the final judgment and final arbitration award, and the order denying her request for attorney fees.

Vulcan cross appeals, objecting to the reduction of attorney fees from the original amount awarded by the arbitrator.

ANALYSIS

The party opposing arbitration has the burden of demonstrating that an arbitration agreement is not enforceable. Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 302, 103 P.3d 753 (2004). This court reviews de novo a trial court's decision to compel or deny arbitration. Gandee v. LDL Freedom Enter., Inc., 176 Wn.2d 598, 602, 293 P.3d 1197 (2013); Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 797, 225 P.3d 213 (2009).

Turner moved to vacate the final arbitration award. That motion to vacate necessarily includes our answering the question of whether the trial court appropriately granted the motion to compel arbitration. Tuefel Constr. Co. v. Am. Arbitration Ass'n, 3 Wn. App. 24, 26-27, 472 P.2d 572 (1970) (order compelling arbitration not appealable, but if arbitrator without authority, court may later refuse to confirm award); see also ACF Prop. Mgmt., Inc. v. Chaussee, 69 Wn. App. 913, 921, 850 P.2d 1387 (1993); Agnew v. Lacey Co-Play, 33 Wn. App. 283, 288, 654 P.2d 712 (1982) ("If a dispute is not arbitrable, the arbitrators have no power to

resolve it."). Failure to seek discretionary review of a motion to compel arbitration does not waive a later challenge. Saleemi v. Doctor's Assocs., Inc., 176 Wn.2d 368, 376, 292 P.3d 108 (2013) (citing with approval Division Two's rejection of the proposition that such failure waives a later challenge in Saleemi v. Doctor's Assocs., Inc., 166 Wn. App. 81, 91, 269 P.3d 350 (2012)). Here, the trial court correctly compelled arbitration.

Under both federal and state law, a request to compel arbitration presents two threshold questions: (1) whether there is an agreement to arbitrate and, if so, (2) whether the dispute is within the scope of that agreement. If the answer to both questions is affirmative, the trial court's authority is substantially constrained. See Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc., 148 Wn. App. 400, 402, 200 P.3d 254 (2009). Because this is a dispute between an employee and her employer, the FAA governs. See Zuver, 153 Wn.2d at 301 (citing 9 U.S.C. § 2).

Turner argues that it is the court, not the arbitrator, that determines whether an arbitration clause is valid and enforceable. While it is true that the courts determine whether an arbitration clause is valid and enforceable, that determination is separate and distinct from the question of the validity of the contract as a whole. McKee v. AT&T Corp., 164 Wn.2d 372, 383-84, 191 P.3d 845 (2008). Here, Turner challenges the validity of the contract itself.

A challenge to the validity of the parties' contract as a whole, as opposed to the arbitration clause contained in the contract, is for the arbitrator to decide. See McKee, 164 Wn.2d at 394.

The United States Supreme Court has addressed these gateway challenges to arbitration under the FAA, beginning with Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). There, the Court held that a challenge to the validity of the entire agreement as fraudulently induced was for the arbitrator, not the court. Prima Paint, 388 U.S. at 404.

In Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46,126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), the United States Supreme Court reached the same conclusion. Analyzing its earlier decisions, including Prima Paint, the Court restated three pertinent principles:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.

Buckeye, 546 U.S. at 445-46. The Court concluded "that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court." Buckeye, 546 U.S. at 446.

Here, Turner challenges the contract as a whole, arguing that she was forced to sign the contract for fear of losing her job and that she was not given sufficient time to review it. Like in Prima Paint and Buckeye, these are issues that need to be addressed by the arbitrator.

The parties' contract, here, provides that

> [a]ny and all claims, disputes, or other matters in controversy on any subject arising out of or related to this Agreement and your employment shall be subject to confidential arbitration.[7]

This language is a "clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator." Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009); see also Preston v. Ferrer, 552 U.S. 346, 349, 28 S. Ct. 978, 169 L. Ed. 2d 917 (2008) (when parties agree to arbitrate all questions arising under the contract, the question of arbitrability is for the arbitrator).

In Preston v. Ferrer, 552 U.S. 346, 28 S. Ct. 978, 169 L. Ed. 2d 917 (2008), the contract provided that the arbitration would be in accordance with the rules of the AAA. One of those rules, Rule 7(b), provided that the arbitrator has the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Preston, 552 U.S. at 362. The Court held that to be a sufficient indicator that the parties intended the arbitrator and not the court to determine the arbitrability. Similarly here, the GBA provided that "any arbitration proceedings shall be conducted in Seattle, Washington in accordance with applicable AAA rules."[8] This requirement furthers Congress's intent "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 US.1, 22, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

Arbitration is a matter of contract. "'[I]t is the language of the contract that defines the scope of disputes subject to arbitration.'" NASDAQ OMX Grp., Inc. v. UBS Sec., LLC, 770 F.3d 1010 (2nd Cir. 2014) (quoting EEOC v. Waffle House,

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[7] CP at 281.
[8] CP at 1570.

Inc., 534 U.S. 279, 289, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002)). There is a body of substantive federal law that both state and federal courts are required to apply. Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).

Turner also contends that the trial court erred in compelling arbitration because the GBA she signed was procedurally and substantively unconscionable. Washington recognizes two types of unconscionability for invalidating arbitration agreements, procedural and substantive. McKee, 164 Wn.2d at 396-402. Procedural unconscionability applies to impropriety during the formation of the contract, while substantive unconscionability applies in cases where a term in the contract is alleged to be one-sided or overly harsh. Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995). Either is sufficient to void the agreement. Hill v. Garda CL Nw., Inc., 179 Wn.2d 47, 55, 308 P.3d 635 (2013) (citing Adler v. Fred Lind Manor, 153 Wn.2d 331, 347, 103 P.3d 773 (2004)).

Procedural Unconscionability

Procedural unconscionability is "the lack of meaningful choice, considering all the circumstances surrounding the transaction including '[t]he manner in which the contract was entered,' whether each party had 'a reasonable opportunity to understand the terms of the contract,' and whether 'the important terms [were] hidden in a maze of fine print." Zuver, 153 Wn.2d at 303 (alterations in original) (internal quotation marks omitted) (quoting Nelson, 127 Wn.2d at 131). None of those circumstances are present here. The GBA offered Turner a guaranteed bonus in 2011 for a full release of claims, arbitration, and confidentially.

In her declaration opposing arbitration in her first case, Turner indicated that, although the agreement itself provided that she could seek review by counsel, the agreement had to be signed within 24 hours. In her declaration in Turner II, Turner said she felt she would be fired if she did not sign the agreement within 24 hours and that the arbitration agreement itself was confusing because she did not have an opportunity to "find out" what the AAA rules said. There is no evidence that Turner sought additional time to make her decision or that she felt she needed to consult with counsel before signing the agreement.

The law is well settled that absent fraud or misrepresentation, a party who voluntarily and knowingly signs a written contract is bound by its terms. Nat'l Bank of Wash. v. Equity Inv'rs, 81 Wn.2d 886, 912, 506 P.2d 20 (1973), superseded by statute on other grounds by LAWS OF 1973, 1st Ex. Sess., ch. 47, § 3. "[I]gnorance of the contents of a contract expressed in a written instrument does not ordinarily affect the liability of one who signs it . . . ." Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 897, 28 P.3d 823 (2001). A party who has the opportunity to read a plain and unambiguous instrument cannot claim to have either been misled by or ignorant of its terms. Equity Inv'rs, 81 Wn.2d at 913 (quoting Johnston v. Spokane & I.E.R. Co., 104 Wash. 562, 569, 177 P. 810 (1919)). Moreover, in Turner's motion for relief from the order compelling arbitration (Turner II), HKM argued that Turner "did not even read the agreement, which was in the form of a letter. She simply turned the letter to its last page and signed it."[9]

[9] CP at 594.

Turner next argues that the GBA is an adhesion contract and therefore unconscionable. As this court recently noted, the key inquiry is whether an employee lacked a meaningful choice. Such a choice can always include employment elsewhere. Romney v. Franciscan Med. Grp., 186 Wn. App. 728, 736-37, 349 P.3d 32 (2015), review denied, No. 91686-1 (Wash. Sept. 30, 2015). Similarly in Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 103 P.3d 753 (2004), the court concluded that an employment agreement offered to an employee on a "take it or leave it" basis is insufficient to negate the existence of an arbitration agreement where the employee had a reasonable opportunity to inspect the agreement and the terms were fully disclosed. 153 Wn.2d at 305.

Likewise here, the terms of the agreement were fully disclosed and Turner was afforded a reasonable opportunity to inspect the agreement. Her argument that she signed only because she thought she would lose her job does not support a finding of procedural unconscionability under Washington law. This is particularly true here, because the language in the GBA itself clearly stated that Turner was entitled to seek advice before executing the agreement. Furthermore, none of the paragraphs contained in the GBA were of small type or buried in a sea of fine print.

Substantive Unconscionability

Substantive unconscionability focuses on the terms of the agreement and the presence of overly harsh or one-sided results. To be substantively unconscionable, the contract must shock the conscious, be monstrously harsh, or

exceedingly callous. Romney, 186 Wn. App. at 740 (quoting Alder, 153 Wn.2d at 344-45). None of these terms apply to the contract here.

On appeal, Turner argues for the first time that the GBA contained a unilateral litigation option, making the agreement one-sided. The clause in question provides that

> Vulcan shall have the right, upon its election, to seek emergency injunctive relief in court in aid of arbitration to preserve the status quo pending determination of the merits in arbitration.[10]

Similarly, Turner would also have the right to seek such relief if Vulcan had pursued its recovery in litigation rather than in arbitration. For example, if Vulcan had sued Turner to recover the funds overpaid in court, Turner could have moved to compel arbitration, thus seeking a stay and preserving the status quo pending the determination. Even if this were not the case, this court has already held that mutuality of obligation does not mandate identical requirements. Romney, 186 Wn. App. at 742. "In short, substantive unconscionability does not concern 'whether the parties have mirror obligations under the agreement, but rather whether the effect of the provision is so "one-sided" as to render it patently "overly harsh."'" Romney, 186 Wn. App. at 742 (quoting Zuver, 153 Wn.2d at 317 n.16).

Here, Vulcan had the initial burden of proving the existence of the agreement to arbitrate the parties' dispute. Submission of the EIPA and the GBA agreements, both signed in 2011, met this burden. Those documents included provisions that all matters in dispute of the agreement and arising from employment were subject to binding arbitration. Once the existence of that valid

[10] CP at 281.

agreement to arbitrate was established, the burden shifted to Turner, as the party opposing arbitration, to demonstrate that the agreement could not be interpreted to require arbitration of her disputes. This Turner has failed to do. General allegations concerning lack of discussion or understanding regarding the inclusion of an arbitration clause are insufficient to prevent arbitration. Cady v. A.G. Edwards & Sons, Inc., 648 F.Supp. 621, 623-24 (1986).

Turner argues that the provision requiring confidentiality of the arbitration violates both McKee v. AT&T Corp., 164 Wn.2d 372, 191 P.3d 845 (2008), and Zuver. But confidential agreements have been upheld as the exception to the state constitutional requirement for public judicial proceedings. Barnett v. Hicks, 119 Wn.2d 151, 159, 829 P.2d 1087 (1992). Confidentiality agreements are routinely found in collective bargaining agreements. Zuver, 153 Wn.2d at 314 (citing Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997)). In Zuver, the court held the confidentially agreement unconscionable because it hampered an employee's ability to prove a pattern of discrimination. 153 Wn.2d at 315. Even so, there, the Zuver court struck the provision rather than finding the entire agreement unconscionable. 153 Wn.2d at 322.

McKee involved a consumer dispute. The court held the policy of confidentially to be in direct conflict with public policy, particularly because it dealt with consumers. McKee, 164 Wn.2d at 398-99.

The scenarios in Zuver and McKee are not present here. Furthermore, the confidentiality clause is not particularly one-sided because it benefits both the employee and the employer. Vulcan, Paul Allen, his family, and Vulcan's

executives obviously desire their privacy. Any employee, such as Turner, would desire that the particulars of his or her employment be private, particularly, as here, when it involves Turner's personal details. Neither the litigation clause nor the confidentiality clause is substantively unconscionable.

Constitutional Issues

Turner next argues that the arbitration agreement violates both her constitutional right to a jury trial and the separation of powers doctrine by improperly delegating judicial authority to arbitrators. Neither contention has any merit. First, there is no dispute that Turner signed the agreement at issue. Once that has been established "a party implicitly waives his [or her] right to a jury trial by agreeing to an alternative forum, arbitration." Adler, 153 Wn. 2d at 360-61.

Second, the FAA is not an incursion on the separation of powers. The FAA permits enforcement of agreements to arbitrate. Its primary purpose is to ensure that private agreements to arbitrate are enforced in accordance with its terms. Such challenges to arbitration agreements as an unconstitutional delegation of judicial power have uniformly been rejected. Snyder v. Superior Court of Amador County, 24 Cal. App. 2d 263, 74 P.2d 782 (1937); see also Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).

In Schor, a case discussing the limited jurisdiction of the Commodity Futures Trading Commission, the Court stated:

> In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of

> powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.

478 U.S. at 855.

Turner relies on State ex rel. Everett Fire Fighters, Local No. 350 v. Johnson, 46 Wn.2d 114, 121, 278 P.2d 662 (1955), wherein the court held that the municipal charter requiring fire fighter contract disputes to be arbitrated was unconstitutional. As the Supreme Court noted in City of Spokane v. Spokane Police Guild, 87 Wn.2d 457, 464, 553 P.2d 1316 (1976), Everett Fire Fighters "was decided prior to the enactment . . . of the Public Employees' Collective Bargaining Act . . . and what was held unlawful in that case is now both lawful and mandatory." Everett Fire Fighters does not apply here.

Turner's Request for Attorney Fees

Turner argues that she is a prevailing party because she succeeded in substantially reducing the attorney fees awarded to Vulcan for Vulcan's prevailing in its suit against her. The prevailing party was Vulcan. Turner did not prevail on any of the claims submitted to arbitration. Turner cites Johnson v. Department of Transportation, 177 Wn. App. 684, 695 n.7, 313 P.3d 1197 (2013), review denied, 179 Wn.2d 1025, 320 P.3d 718 (2014), for the "general rule [that] fees incurred while litigating an entitlement to fees are recoverable under remedial statues such as the WLAD." In Johnson, an employee sought an award of attorney fees after a successful settlement of a claim against the State. Johnson was in fact the prevailing party.

Here, Turner is not the prevailing party. RCW 4.84.330 states, "As used in this section 'prevailing party' means the party in whose favor final judgment is rendered." See also Blair v. Wash. State Univ., 108 Wn.2d 558, 571-72, 740 P.2d 1379 (1987) ("In Washington, the prevailing party is the one who receives judgment in that party's favor" or "succeeds on any significant issue which achieves some benefit the party sought in bringing suit.") (citing Andersen v. Gold Seal Vineyards, Inc., 81 Wn.2d 863, 505 P.2d 790 (1973); Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). Turner is not entitled to an award of attorney fees.

Attorney Fees and Vulcan's Cross Appeal

As noted above, the arbitrator initially awarded Vulcan $113,235.00 for attorney fees incurred in connection with the litigation in Turner II. Because the attorney fee award violated public policy, the trial court vacated it and remanded to the arbitrator to determine Vulcan's alternative basis for the fees.

On remand, the arbitrator awarded Vulcan $39,524.50 for reasonable attorney fees in connection with two successful partial summary judgments obtained by Vulcan. Those amounts include $18,875.00 awarded for Vulcan's successful dismissal of Turner's defamation claim, and $21,449.50 for prevailing on the enforceability of the contractual release signed by Turner in the GBA.

Turner contends that the reduced amended award is likewise against public policy and should be reversed. Vulcan cross appeals and contends that the superior court erred when it vacated on public policy grounds that part of the initial arbitration award granting it attorney fees.

It is well settled that a court may vacate an arbitration award that violates a well-defined, explicit, and dominant public policy, such as the laws in the WLAD. Int'l Union of Operating Eng'rs, Local 286 v. Port of Seattle, 176 Wn.2d 712, 722-23, 295 P.3d 736 (2013).

In its Memorandum Opinion vacating the arbitrator's attorney fee award, the trial court recognized that Turner's claims under the WLAD and the MWA were subject to this dominant public policy. The WLAD aims "'to enable vigorous enforcement of modern civil rights litigation and to make it financially feasible for individuals to litigate civil rights violations.'" Martinez v. City of Tacoma, 81 Wn. App. 228, 235, 914 P.2d 86 (1996) (quoting Hume v. Am. Disposal Co., 124 Wn.2d 656, 675, 880 P.2d 988 (1994)). Thus, prevailing plaintiffs, but not prevailing defendants, are entitled to reasonable attorney fees. RCW 49.60.030(2); Collins v. Clark Cty. Fire Dist. No. 5, 155 Wn. App. 48, 104-05, 231 P.3d 1211 (2010). Likewise, the legislature in enacting the MWA expressed a similar strong policy. See, e.g., Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 157, 961 P.2d 371 (1998) ("The Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages."). Thus, an award of attorney fees to an employer who prevails as a defendant in an action under these legislative actions violates public policy.

In Gandee v. LDL Freedom Enterprises, Inc., 176 Wn.2d 598, 606, 293 P.3d 1197 (2013), our Supreme Court held that a "loser pays" provision in an arbitration agreement, found in a debt adjustment contract, to be unconscionable because it

served to benefit only LDL Freedom and chilled a consumer's ability to bring a suit under the Consumer Protection Act (CPA), chapter 19.86 RCW.

We reached a similar conclusion in Walters v. A.A.A. Waterproofing, Inc., 151 Wn. App. 316, 324-25, 211 P.3d 454 (2009), where we stated:

> While Walters is assured that he will recover his expenses and legal fees if he wins decisively, he must assume the risk that if he loses, he will have to pay Waterproofing's expenses and legal fees. This risk is an enormous deterrent to an employee contemplating a suit to vindicate the right to overtime pay. Under these circumstances, in the context of an employee's suit where the governing statutes provide that only a prevailing employee will be entitled to recover fees and costs, a reciprocal attorney fees provision is unconscionable and, therefore, unenforceable.

The provision in the EIPA here is similar to the "loser pays" provisions held unconscionable in both Gandee and Walters. By limiting its initial request for fees to those incurred in Turner II, Vulcan itself recognized the inapplicability of the EIPA to the arbitration proceedings. The fees the arbitrator awarded were for the second motion to compel arbitration in Turner II as well as other attorney fees incurred during that litigation, e.g., quashing discovery.

Turner, although compelled to submit to arbitration by the court order issued by Judge Oishi, filed a second suit, thereby generating additional costs and attorney fees. But the fees in the litigation of Turner II were incurred in a motion to compel arbitration in a suit brought by Turner based in part on the WLAD and the MWA. However, in Turner II, the court's order compelling arbitration did not find that Turner had done anything inappropriate in bringing her five additional claims in a second suit.

Vulcan relies on Zuver to support the award of attorney fees in the Turner II litigation. In Zuver, the employee asserting claims under WLAD challenged the attorney fee provision requiring that the party who filed the judicial action must pay attorney fees and costs to the opposing party who successfully stays and/or compels arbitration. Because the proviso enabled either party to recover fees, the court ruled that it did not "appear to be so one-sided and harsh as to render it substantively unconscionable." Zuver, 153 Wn.2d at 319.

But as noted in Gandee, Zuver merely addressed "the possibility that the arbitrator would refuse to award a prevailing plaintiff costs and fees as required under the CPA." Gandee, 176 Wn.2d at 605-06 (emphasis omitted) (citing Zuver, 153 Wn.2d at 310-12). Here, that possibility became a reality, and when applied to Turner's claims under the WLAD and the MWA, the EIPA provision becomes unconscionable. Thus, the trial court was correct in vacating the attorney fees initially awarded for litigation costs in Turner II. Vulcan is not entitled to attorney fees in its defense against claims asserted under the WLAD and the MWA. The trial court's order vacating that portion of the arbitrator's award was correct.

Standing alone, the EIPA provision is not substantively unconscionable, particularly when applied to claims to other than those asserted to recover monies an employee might be entitled to under the WLAD and the MWA. Here, the arbitrator awarded fees for two separate partial summary judgment motions regarding the GBA. The arbitrator concluded that the unsuccessful defamation claim and the enforceable contractual release signed by Turner were valid

alternative grounds for the award of attorney fees unrelated to the statutory claims under the WLAD and the MWA.

The trial court accepted the arbitrator's decision. Defamation and a contractual release are not necessarily intertwined with statutory claims under the WLAD and the MWA. The narrow grounds to vacate or modify an arbitrator's decision include a facial error "on the face of the award" but such an error is rarely demonstrated. Broom v. Morgan Stanley DW, Inc., 169 Wn.2d 231, 236-37, 236 P.3d 182 (2010). We see no facial legal error in the arbitrator's alternative grounds award of attorney fees.

We affirm the arbitrator's award of $18,875.00 for Vulcan's successful dismissal of Turner's claim of defamation and $21,449.50 for prevailing on the enforceability of the contractual release signed by Turner. That claim is outside the purview of either the WLAD or the MWA, and, as such, is subject to the attorney fee clause found in the EIPA.

Attorney Fees on Appeal

Finally, both parties request attorney fees on appeal. RAP 18.1. Because Vulcan substantially prevailed on the appeal of the enforceability of the arbitration agreement, and Turner substantially prevailed on the cross appeal of the reduction of the attorney fee award, there is no "prevailing party" under RCW 4.84.330 or the attorney fee provision in the EIPA. American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990); Philips Bldg. Co, Inc. v. An, 81 Wn. App. 696, 701-02, 915 P.2d 1146 (1996). We decline to award fees to either party.

The trial court is affirmed in requiring arbitration and in the award of $5,696.63 for breach of contract. The attorney fees award is affirmed.

Trickey, J

WE CONCUR:

Cox, J.

APPENDIX B

2015 WL 6689919
Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 3.

Stephen MAYNE, a married man, Appellant,
v.
MONACO ENTERPRISES, INC., a Delaware for-profit corporation; Gene Monaco, an individual, and Roger Barno, an individual, Respondents.

No. 32978-0-III. | Nov. 3, 2015.

Synopsis

Background: Employee brought action against his former employer for negligent misrepresentation and promissory estoppel following his termination. Employer moved to dismiss and compel arbitration. The Superior Court, Spokane County, Michael P. Price, J., granted motion. Employee appealed.

Holdings: The Court of Appeals, Korsmo, J., held that:

[1] arbitration agreement was not buried in fine print, as element in determining whether it was procedurally unconscionable;

[2] circumstances surrounding making of second arbitration agreement presented no meaningful choice, and thus agreement was void as procedurally unconscionable;

[3] first arbitration agreement was not procedurally unconscionable; and

[4] argument that attorney fee provision was substantively unconscionable was speculative.

Affirmed and modified.

Brown, A.C.J., concurred in result and filed opinion.

West Headnotes (16)

[1] **Alternative Dispute Resolution**
Scope and Standards of Review

The question of whether an arbitration agreement is unconscionable is reviewed de novo. 9 U.S.C.A. § 2 et seq.

Cases that cite this headnote

[2] **Alternative Dispute Resolution**
Evidence

The burden to show than an arbitration agreement is unconscionable rests on the party opposing arbitration. 9 U.S.C.A. § 2 et seq.

Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Arbitration Favored; Public Policy

There is a strong federal policy in favor of arbitration. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[4] **Alternative Dispute Resolution**
Preemption

In accordance with the Supremacy Clause, states must comply with the policy of the Federal Arbitration Act (FAA) and presume arbitrability. U.S.C.A. Const. Art. 6, § 2; 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[5] **Contracts**
Procedural Unconscionability

"Procedural unconscionability" involves impropriety in the formation of an agreement.

Cases that cite this headnote

[6] **Contracts**
Substantive Unconscionability

"Substantive unconscionability" involves overly harsh or one-sided provisions of an agreement.

Cases that cite this headnote

[7] **Contracts**
Procedural Unconscionability

"Procedural unconscionability" exists if there was no meaningful choice under all the circumstances surrounding the making of the agreement, and factors to be considered in this determination include the manner in which the contract was created, whether both parties had a reasonable opportunity to understand the terms of the agreement, and whether important terms were buried in a lot of fine print.

Cases that cite this headnote

[8] **Alternative Dispute Resolution**
Unconscionability

Arbitration agreement was not buried in fine print, as element in determining whether it was procedurally unconscionable, even though it was included in a 60-page employee handbook, where agreement was a two-page document and was labeled as an arbitration agreement, and agreement contained an acknowledgment that employee had read agreement, that he knew that he was waiving his right to a jury trial, and that he understood agreement. 9 U.S.C.A. § 2 et seq.

Cases that cite this headnote

[9] **Alternative Dispute Resolution**
Unconscionability

Circumstances surrounding employer's making of second arbitration agreement with employee presented no meaningful choice, and thus agreement was void as procedurally unconscionable; employee had worked for company for many years, including for a year in a new state, before the first arbitration agreement was presented to him, first agreement was optional in that employee had 30 days to opt out after signing agreement, but second agreement stated that employee would have been fired if he did not consent to execute it. 9 U.S.C.A. § 2 et seq.

Cases that cite this headnote

[10] **Contracts**
Adhesion Contracts; Standardized Contracts

Contracts
Procedural Unconscionability

An "adhesion contract" exists, as element in determining procedural unconscionability, if a standard printed contract was prepared by one party on a "take it or leave it" basis with no genuine bargaining equality between the parties.

Cases that cite this headnote

[11] **Contracts**
Adhesion Contracts; Standardized Contracts

Contracts
Procedural Unconscionability

The existence of an adhesion contract is not a dispositive factor in determining the existence of procedural unconscionability but constitutes a fact that bears on it.

Cases that cite this headnote

[12] **Alternative Dispute Resolution**
Unconscionability

A procedurally unconscionable arbitration agreement is void because the waiver of the right to a jury trial is not knowing, voluntary, and intelligent. U.S.C.A. Const.Amend. 7; 9 U.S.C.A. § 2 et seq.

Cases that cite this headnote

[13] **Alternative Dispute Resolution**
Unconscionability

Employee's first arbitration agreement with employer was not procedurally unconscionable, even though it was presented to employee after he had already been working for employer and had relocated to a different state for employer, where employee had 30 days to opt out of agreement and there was no threat of termination if he refused to sign it. 9 U.S.C.A. § 2 et seq.

Cases that cite this headnote

[14] **Alternative Dispute Resolution**
Writing, Signature, and Acknowledgment

Jury

Submission to Arbitration

An employer can condition employment upon the employee waiving his right to a jury trial and voluntarily signing an arbitration agreement. U.S.C.A. Const.Amend. 7; 9 U.S.C.A. § 2 et seq.

Cases that cite this headnote

[15] **Contracts**

Covenants Not to Compete

Contracts

Restraint of Trade or Competition in Trade

A noncompetition agreement entered into at the start of employment is ordinarily valid as part of the employment contract, but any change to the agreement or a newly incorporated noncompetition agreement requires independent consideration to be valid.

Cases that cite this headnote

[16] **Alternative Dispute Resolution**

Unconscionability

Employee's argument that arbitration agreement containing provision permitting arbitrator to award attorney fees to the prevailing party "to the extent permitted by law" was substantively unconscionable because arbitrator might not abide the law was speculative, on appeal of trial court's order granting employer's motion to compel arbitration of employee's negligent misrepresentation and promissory estoppel claims; argument was made prior to arbitration, and there was a presumption that arbitrator would apply correct law in the event employee prevailed. 9 U.S.C.A. § 2 et seq.

Cases that cite this headnote

Appeal from Spokane Superior Court, Michael P. Price, J.

Attorneys and Law Firms

Michelle K. Fossum, Sayre, Sayre & Fossum, PS, Spokane, WA, for Appellant.

James B. King, Markus William Louvier, Evans Craven & Lackie PS, Spokane, WA, for Respondent.

PUBLISHED OPINION

KORSMO, J.

*1 ¶ 1 Stephen Mayne appeals from the trial court's rulings compelling arbitration of his employment termination claims and dismissing his action for damages. We conclude that the 2013 arbitration agreement was procedurally unconscionable and remand for arbitration under the 2011 agreement.

FACTS

¶ 2 Mr. Mayne worked for Monaco Enterprises from 1997 until late 2013. He lived in Massachusetts when initially hired by Monaco, but relocated to Texas six years later. In September 2010, Mr. Mayne and his family moved to Spokane to work closer to the company's home office. The reason for that move is the disputed question in this litigation.

¶ 3 Mr. Mayne contends that he was promised a promotion upon his supervisor's retirement if he moved to Spokane. Monaco contends that Mr. Mayne simply was told he had a much better chance of promotion if he worked closer to the home office. The supervisor in question had not retired at the time of this litigation and Mr. Mayne was never promoted.

¶ 4 Mr. Mayne held the same position in Spokane as he did in Texas. In May 2011 he signed an arbitration agreement. The parties are uncertain whether Mr. Mayne had signed an arbitration agreement prior to moving to Spokane. Mr. Mayne signed a new arbitration agreement in March of 2013. Various provisions of the two agreements figure prominently in this appeal.

¶ 5 The 2013 agreement stated that Monaco would not have continued to employ Mr. Mayne if he did not execute the agreement. Clerk's Papers (CP) at 23. The 2011 agreement did not contain a similar provision. The 2011 agreement also allowed the employee 30 days after signing to consult with an attorney and opt out of the agreement. CP at 21–22. Both provisions required that arbitration procedures would be governed by state law. CP at 21, 24. The original agreement set venue in the county where the claim arose, but the revised agreement set venue in Spokane County. CP at 22, 24.

¶ 6 Under the 2011 agreement, Monaco would pay the costs of the arbitration and both sides would be responsible for their own attorney fees, but the arbitrator was permitted to award costs and attorney fees to the prevailing party "to the extent permitted by law." CP at 22. In contrast, the 2013 agreement required the parties to evenly share the costs of the arbitrator, but the prevailing party "shall be entitled to recover the costs of arbitration against the non-prevailing party, including without limitation, reasonable attorney's fees, costs, and litigation expenses including expert fees and costs." CP at 24. The 2013 agreement, unlike its predecessor, contained a severance clause directing a court to amend or remove an "offending provision" while leaving the remainder of the agreement intact. CP at 24.

¶ 7 Mr. Mayne's employment was terminated at the end of 2013. He promptly filed suit against Monaco in the Spokane County Superior Court alleging theories of negligent misrepresentation and promissory estoppel. Monaco moved to dismiss and compel arbitration. The trial court granted the motion.

*2 ¶ 8 Mr. Mayne then timely appealed. The matter proceeded to oral argument before a panel of this court.

ANALYSIS

¶ 9 Mr. Mayne challenges the trial court's ruling, arguing that the 2013 arbitration agreement was both procedurally and substantively unconscionable. We first briefly address some general principles governing this appeal before turning to the claim of procedural unconscionability.

[1] [2] [3] [4] ¶ 10 The question of whether an arbitration agreement is unconscionable is reviewed de novo. *Romney v. Franciscan Med. Grp.*, 186 Wash.App. 728, 735, 349 P.3d 32 (2015). The burden rests on the party opposing arbitration. *Id.* The Federal Arbitration Act (FAA) states a strong federal policy in favor of arbitration. *Gilmer v. Inter state/Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). In accordance with the Supremacy Clause, Washington and other states must comply with the policy of the FAA and presume arbitrability. *Zuver v. Airtouch Commc'ns, Inc.* ., 153 Wash.2d 293, 301–02, 103 P.3d 753 (2004). However, the states need not enforce agreements that violate "generally applicable contract defenses" including unconscionability. *Id.* at 302, 103 P.3d 753 (citing FAA § 2).

[5] [6] ¶ 11 Washington recognizes that provisions of a contract can be either substantively unconscionable or procedurally unconscionable. *Schroeder v. Fageol Motors, Inc.*, 86 Wash.2d 256, 259–60, 544 P.2d 20 (1975). Procedural unconscionability involves impropriety in the formation of an agreement. *Id.* at 260, 544 P.2d 20. Substantive unconscionability involves overly harsh or one-sided provisions of an agreement. *Id.* Mr. Mayne contends both types are present in this case. Accordingly, we turn to those contentions.

Procedural Unconscionability

¶ 12 Mr. Mayne first argues that the 2013 arbitration agreement is an adhesion contract and therefore should be rejected as procedurally unconscionable because he had no choice but to sign the agreement. An adhesion contract does not itself demonstrate that an agreement was procedurally unconscionable. Nonetheless, we do agree that the 2013 arbitration agreement was procedurally unconscionable.

[7] ¶ 13 Procedural unconscionability exists if there was no "meaningful choice" under all the circumstances surrounding the making of the agreement. *Zuver,* 153 Wash.2d at 303, 103 P.3d 753. Factors to be considered include the manner in which the contract was created, whether both parties had a reasonable opportunity to understand the terms of the agreement, and whether important terms were buried in a lot of fine print. *Id.*

[8] ¶ 14 Mr. Mayne concedes that he is not arguing the second factor. He was not denied an opportunity to understand the terms of the agreement. Brief of Appellant at 11. He does argue that the third fact does favor finding procedural unconscionability, noting that the arbitration agreements were included in a 60 page employee handbook. This argument is unpersuasive. Each of the arbitration agreements is a two page document, labeled an arbitration agreement, and contains an acknowledgement that Mr. Mayne had read the arbitration agreement, knew that he was waiving his right to a jury trial, and understood the agreement. CP at 22, 24. Under these facts, the arbitration agreement was not buried in fine print even if it was part of a much larger document.

*3 [9] [10] [11] ¶ 15 The circumstances surrounding the making of the agreement present a closer question. Mr.

Mayne argues first that he was required to sign an adhesion contract. An adhesion contract exists if a standard printed contract was prepared by one party on a "take it or leave it" basis with no genuine bargaining equality between the parties. *Zuver,* 153 Wash.2d at 304, 103 P.3d 753. We agree that the arbitration agreements between Mayne and Monaco constituted adhesion contracts. However, the existence of an adhesion contract is not a dispositive factor, but constitutes a fact that bears on procedural unconscionability. *Id.* In *Zuver,* the Court noted that Washington cases had long rejected the argument that unequal bargaining position, even when exemplified by an adhesion contract, justified finding procedural unconscionability. *Id.* at 305, 103 P.3d 753. The court then summed up that issue:

> In the end, Zuver relies solely on her lack of bargaining power to assert that we should find the agreement procedurally unconscionable. This will not suffice. At minimum, an employee who asserts an arbitration agreement is procedurally unconscionable must show some evidence that the employer refused to respond to her questions or concerns, placed undue pressure on her to sign the agreement without providing her with a reasonable opportunity to consider its terms, and/or that the terms of the agreement were set forth in such a way that an average person could not understand them.

Id. at 306–07, 103 P.3d 753.

¶ 16 Mr. Mayne, however, is in a different situation than the plaintiff in *Zuver.* There the employee was presented with the arbitration agreement when the job initially was offered to her and had fifteen days to accept or reject the position. *Id.* at 298, 306, 103 P.3d 753. Here, Mr. Mayne had worked for the company many years, including a year in Spokane, before the first arbitration clause was presented to him. That clause, as noted previously, was optional—the employee had 30 days to opt out after signing the agreement. CP at 21. There was no such option with the new agreement, which also contained the following sentence in the second paragraph:

> Moreover, had the Employee not agreed to execute this Arbitration Agreement, the Company would not have agreed to employ the Employee.

CP at 23.

¶ 17 Although curiously [1] worded, this sentence bears only one meaning in this context—Mr. Mayne would be fired if he did not consent to execute the agreement. Under the circumstances, this was no "meaningful choice." *Zuver,* 153 Wash.2d at 303, 103 P.3d 753. Instructive is *Zuver's* companion case, *Adler v. Fred Lind Manor,* 153 Wash.2d 331, 103 P.3d 773 (2004).

¶ 18 There the court was unable to resolve the employee's procedural unconscionability claim. The employee contended he was told that he would be fired if he did not sign the agreement, while the employer denied any such statement or intention. *Id.* at 350, 103 P.3d 773. The court concluded that if such a threat was made, it would support the employee's procedural unconscionability claim. *Id.* The court then returned the matter to the trial court for resolution of the factual dispute. *Id.* at 350–51, 103 P.3d 773.

*4 ¶ 19 Unlike *Adler,* there is no disputed question about the employer's intent here. Whether or not Monaco actually would have fired Mr. Mayne, the agreement is a clear statement that it would do so and anyone signing the agreement would understand the statement in that manner. Under these circumstances, the process by which the 2013 agreement supplanted the existing 2011 agreement was procedurally unconscionable. Mr. Mayne could decline to sign the agreement and immediately end his employment, or he could sign the agreement and continue working. There was no meaningful choice.

[12] **[13]** ¶ 20 A procedurally unconscionable agreement is void because the waiver of the right to a jury trial is not "knowing, voluntary, and intelligent." *Adler,* 153 Wash.2d at 350 n. 9, 103 P.3d 773. In typical circumstances, a void agreement means that the right to jury trial prevails. That is not the situation here, however, due to the 2011 arbitration agreement. The parties agreed at oral argument that if the 2013 agreement was invalid, the 2011 agreement would govern. [2] We concur in that assessment. The 2011 agreement was not adopted in an unconscionable manner. Indeed, the thirty day opt out provision ensured that Mr. Mayne's decision to sign the arbitration agreement was a voluntary and meaningful choice.

[14] ¶ 21 There is a fine line between informed consent and coercion in this context. An employer can condition employment upon the employee waiving his right to a jury trial and *voluntarily* signing an arbitration agreement. That is easily accomplished at the onset of employment, as in *Zuver,* where the employee knows the condition before agreeing to accept employment.

[15] ¶ 22 The task is more difficult when there is already an existing at-will employment relationship. As the 2011 agreement in this case demonstrates, we believe most employees will voluntarily sign an arbitration agreement upon request, even if they are not required to sign in order to remain employed. Still, they should be aware of the consequence of not agreeing if the employer is set on having an arbitration-only work force. To that end, we believe an employer should in some manner notify the employee of the policy and then take some action to ameliorate the coercive impact of that information in order to ensure a voluntary decision. Perhaps the employee could be offered a reasonable time to sign before voluntarily leaving employment, or could be offered some incentive [3] as consideration for the waiver of the constitutional right. A meaningful choice is needed, A choice compelled by the threat of immediate termination is not a meaningful choice.

Substantive Unconscionability

[16] ¶ 23 need only briefly discuss this topic in light of the procedural unconscionability ruling since the arguments Mr. Mayne raised were primarily directed at provisions of the 2013 agreement. However, we briefly discuss one of those arguments in the event it becomes an issue during arbitration.

*5 ¶ 24 Mr. Mayne challenged the agreement's attorney fees provision on the basis that it conflicted with his statutory right to attorney fees under RCW 49.48.030, RCW 49.52.050, and RCW 49.52.070 in the event he prevails on his claims. Monaco contended that the argument was premature under *Zuver* and stated at oral argument that it would not attempt to deny Mayne his rightful fees under the statutes if he prevailed at arbitration. Monaco is correct.

¶ 25 A similar argument arose in *Zuver.* There the court concluded that a provision is not substantively unconscionable merely because the arbitrator might not abide by the law. 153 Wash.2d at 310–11, 103 P.3d 753. Such an argument is speculative. *Id.* at 312, 103 P.3d 753. We agree with Monaco that this argument likewise is speculative here. We presume that the arbitrator would apply the correct law in the event Mr. Mayne prevails.

¶ 26 Accordingly, we affirm the decision to compel arbitration, but modify that decision to require that arbitration proceed under the terms of the 2011 arbitration agreement.

¶ 27 Affirmed and modified.

I CONCUR: FEARING, J.

BROWN, A.C.J. (concurring in result).

¶ 28 Regarding procedural unconscionability, I agree Stephen Mayne lacked a meaningful choice when considering the 2013 arbitration agreement, however, I disagree with the majority's rationale. Except for moving to Washington to better position himself for promotion (a disputed fact), Mr. Mayne's situation as an at-will employee in 2013 is little different from when he signed the 2011 arbitration agreement. My focus is the lack of explanation of employee rights given up under Washington law that allow an employee to recover attorney fees in employee termination wage-dispute cases, but not the employer. No explanation of arbitration costs was given. Not only is arbitration fee splitting included in the 2013 agreement, but attorney fees can be awarded to Monaco. Thus, Mr. Mayne lacked knowledge to make an intelligent decision. Therefore, without knowledge of costs and what Mr. Mayne was giving up, he lacked a meaningful choice. Accordingly, I concur in the result.

¶ 29 Regarding substantive unconscionability, this record is unfortunately silent about the trial court's reasoning in ordering arbitration. Mr. Mayne made his record of financial hardship and high up front arbitration costs. In my view, Monaco failed to sufficiently respond and did not offer to assume arbitration costs or give up its right to collect attorney fees from Mr. Mayne. Under *Zuver, Adler,* and *Mendez v. Palm Harbor Homes, Inc.,* 111 Wash.App. 446, 465–70, 45 P.3d 594 (2002) (adopted by *Zuver),* the trial court failed to make a record on its exercise of discretion, if any. If not exercised, an abuse of discretion exists. I would remand or dissent, but do not because my substantive unconscionability concerns are not present under the 2011 agreement.

All Citations

--- P.3d ----, 2015 WL 6689919

Footnotes

1 The language appears to be designed for an arbitration agreement entered into in conjunction with the initial offer of employment. In light of our conclusion here, we recommend that other approaches be used to impose an arbitration requirement on existing employees.

2 Counsel for Mr. Mayne did argue that the 2011 agreement was procedurally unconscionable because it was presented to Mr. Mayne after he had relocated to Spokane and started building a house, leaving him financially unable to refuse. In light of the fact that the employee had 30 days to opt out of arbitration and there was no threat of termination, we see nothing unconscionable in the 2011 agreement.

3 As an example, we note that a noncompetition agreement entered into at the start of employment is ordinarily valid as part of the employment contract, but any change to the agreement or a newly incorporated noncompetition agreement requires independent consideration to be valid. *See Labriola v. Pollard Grp., Inc.*, 152 Wash.2d 828, 100 P.3d 791 (2004). We also note that some states require consideration even for arbitration agreements entered in conjunction with initial employment. *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo.2014); *Cheek v. United Healthcare of the Mid–Atlantic, Inc.*, 378 Md. 139, 835 A.2d 656 (2003).

End of Document

APPENDIX C

Dear Traci Turner;

We are pleased to extend to you this offer to guarantee your 2011 discretionary bonus, in exchange for your agreement to waive any potential claims against Vulcan and its affiliates. If, after reviewing this letter, you would like to accept this offer, please sign and return this letter to me at your earliest convenience. Of course I would be happy to discuss the details or answer any questions you might have as well.

A. Guaranteed 2011 Bonus

In exchange for your waiver and release of any claims as set forth below, Vulcan will guarantee, on a one-time basis, your 2011 Annual Bonus Opportunity at 125% of your 2011 annual bonus target, pro rated from your start date or the beginning of the year (whichever is more recent) through the end of the year (your "Guaranteed Bonus"). Traci, you are eligible for a minimum bonus of $25,156 under this agreement. If your employment terminates for any reason (including voluntary resignation) before December 31, 2011, you will receive a prorated amount of your Guaranteed Bonus through the date your Vulcan employment ends on the date bonuses would normally be paid. You do not need to be employed by Vulcan on the day the bonuses are paid in order to receive the Guaranteed Bonus. Except as set forth above, the Guaranteed Bonus will otherwise be payable pursuant to Vulcan's applicable bonus schedule and policies.

B. Full Release of Claims

You hereby release and forever discharge (i) Vulcan, and each and every affiliate (meaning any person or entity which controls, is controlled by, or is under common control with Vulcan), and every shareholder, member, partner, manager, director, officer, employee, contractor, agent, consultant, representative, administrator, fiduciary, attorney and benefit plan of Vulcan and any such affiliate, and (ii) every predecessor, successor, transferee and assign of each of the persons and entities described in this sentence, from any and all claims, disputes and issues of any kind, known or unknown, that arose on or before the date you signed this Agreement. This release of claims, however, does not extend to claims that arise after you sign this agreement.

C. Arbitration

Any and all claims, disputes, or other matters in controversy on any subject arising out of or related to this Agreement and your employment shall be subject to confidential arbitration; provided, however, that Vulcan shall have the right, upon its election, to seek emergency injunctive relief in court in aid of arbitration to preserve the status quo pending determination of the merits in arbitration and venue and jurisdiction for any such injunctive action will exist exclusively in state and federal courts in King County, Washington. Upon receipt of a demand for arbitration, the parties shall promptly attempt to mutually agree on an arbitrator and, if mutual agreement cannot be made, an arbitrator shall be selected and any arbitration proceedings shall be conducted in Seattle, Washington in accordance with applicable AAA rules. The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. The parties and the arbitrator shall treat all aspects of the arbitration as strictly confidential and not subject to disclosure to any third party or entity, other than to the parties, the arbitrator and any administering agency.

D. Confidentiality

The terms of this Agreement and your employment with Vulcan are intended to be confidential. Except as specifically permitted by this Agreement, in response to a lawful subpoena, court order or governmental administrative request, or as otherwise required by law, you have not and will not discuss with or communicate to any person or entity the terms of this Agreement.

E. Applicable Law

This Agreement will be governed by the laws of the State of Washington, without regard to conflict of law principles.

Please carefully review this letter. I would be happy to respond to any questions you might have. If you would like to accept this offer, please sign and date this letter and return a copy to me at your earliest convenience.

F. Other Terms of Employment

Except as provided in this Agreement, your other terms of employment and the agreements that govern your employment, including your Employee Intellectual Property Agreement, shall remain in full force and effect.

G. Other Terms

You are entitled to seek the advice of your own counsel before executing this Agreement. If you should seek such advice, remember that your attorney must also agree to be bound by the confidentiality provisions of this Agreement.

Thank you for your continued service at Vulcan.

Sincerely,

Kathy Leodler

AGREED and ACCEPTED this 26 **day of** July **2011:**

Tracy Turner

Print Name

Signature

APPENDIX D

HON. BRUCE E. HELLER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TRACI TURNER,

Plaintiff,

v.

VULCAN, INC., PAUL ALLEN, JODY ALLEN, RAY COLLIVER, and LAURA MACDONALD,

Defendants.

No. 12-2-03514-8 SEA

MEMORANDUM OPINION

I. INTRODUCTION

This matter is before the court on cross motions to confirm and vacate an arbitration award. The two primary issues presented are (1) whether the Arbitrator's refusal to grant a continuance of the arbitration hearing constituted "misconduct" under the Federal Arbitration Act and (2) whether the award of $113,234 in attorneys' fees against Traci Turner should be vacated, either because it is "completely irrational" or because it violates public policy. The court concludes that the Arbitrator's denial of the requested continuance was within her discretion. However, the court vacates the attorneys' fee award because it violates public policy.

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II. BACKGROUND

Traci Turner began working for Vulcan as a Senior Executive Protection Specialist on January 17, 2011. This job involved providing security for Paul Allen and his family. When she was hired, Turner signed an Employee Intellectual Property Agreement (EIPA) that provided:

> In any lawsuit arising out of or relating to this agreement or my employment, including without limitation arising from any alleged tort or statutory violation, the prevailing party shall recover their reasonable costs and attorneys fees, including an appeal.

Declaration of Harry Schneider, Ex. 7, Section 11.

On July 26, 2013, Turner signed a Guaranteed Bonus Agreement (GBA) that contained the following arbitration provision:

> Any and all claims, disputes, or other matters in controversy on any subject arising out of or related to this Agreement and your employment shall be subject to confidential arbitration.

Declaration of Rebecca Roe, paragraph C. The GBA also included a release of claims provision that applied to all claims arising prior to its execution. *Id.*, paragraph B.

In September 2011, Turner terminated her employment with Vulcan. Soon thereafter, she filed a lawsuit in this court against Vulcan and several of its executives (collectively "Vulcan"), alleging constructive discharge, hostile work environment, gender discrimination and retaliation ("*Turner I*"). On October 6, Judge Patrick Oishi granted Vulcan's Motion to Compel Arbitration. Turner filed a motion for reconsideration but took a voluntary nonsuit before obtaining a ruling. After an unsuccessful mediation, Turner filed a second lawsuit in this court that alleged discrimination based on sexual orientation, age and gender, hostile work environment, retaliation, willful withholding of wages, constructive termination, defamation, and negligent and intentional infliction of emotional distress ("*Turner II*"). On June 8, 2012,

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Judge Monica Benton ordered Turner to submit all of her employment claims against Vulcan to binding arbitration.

Meanwhile, on December 14, 2011, Vulcan filed a demand for arbitration with the American Arbitration Association. On March 1, 2012, Carolyn Cairns was appointed as the arbitrator. On July 13, 2012, Turner's counsel requested a four-month continuance of the November 26, 2012 arbitration hearing in order to provide additional time for discovery. The Arbitrator denied the continuance. On August 27, 2012, Turner's attorney withdrew from the case. On September 7, 2012, Turner, now acting pro se, requested a four-month continuance of the hearing date:

> I am requesting this continuance on the basis for my active search for new counsel, and due to the inactivity around discovery during the month of August while motions were being heard . . .
>
> I will keep you appropriately apprised of my progress around finding new counsel . . . As you are aware, I am a layperson with respect to legal matters and do not possess the institutional knowledge necessary to answer and respond to motions, pleadings, etc. However, I assure you I will do my best to keep up with the process in a timely manner.

Schneider Decl. Ex. 31.

Vulcan opposed the continuance. It argued that the requested continuance was the latest in Turner's attempts to avoid and delay the arbitration, noting that Turner's attorney had informed her that his withdrawal would result in a continuance of the hearing. Vulcan urged the arbitrator to hear its motion for partial summary judgment on the validity of the Release of Claims provision in the GBA and revisit the issue of continuing the hearing if the motion were denied. Vulcan also advised the arbitrator that it would take no further action in the case until September 30, 2012 in order to give Turner thirty days from her attorney's August 27, 2013 withdrawal to obtain new counsel. Finally, Vulcan argued that a continuance was not

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warranted for conducting further discovery because, according to Vulcan, Turner's attorney had refused to go forward with scheduled discovery beginning on July 30, 2012.

On September 18, 2012, the arbitrator denied the requested continuance:

> There is no current basis for granting a motion for continuance of any length, let alone 120 days. Ms. Turner's motion is denied without prejudice, meaning that she can make another request for a continuance depending on the outcome of [Vulcan's proposed motion on the enforceability of Turner's release of claims].

Schneider Decl. Ex. 33. The Arbitrator further explained that if she granted Vulcan's motion and upheld the release, the case would be substantially reduced, resulting in the need for less discovery. On the other hand, if the motion were denied, the Arbitrator would revisit the issue of discovery and hearing dates. *Id.*

On September 26, 2012, Turner, still acting pro se, urged the Arbitrator not to consider Vulcan's motion to enforce the release of claims provision, contending the GBA was procedurally unconscionable. On October 17, 2012, after Vulcan filed its motion, Turner withdrew from the arbitration proceedings:

> I am incapable of continuing pro se. I am not an attorney and I simply don't know what I'm doing . . .
>
> I am unable to pay for counsel because I'm unemployed and do not have the financial means to pay hourly fees. I fear I am only hurting myself by continuing in a process that requires years of schooling.

Roe Decl. Ex. 29.

On October 31, 2012, the Arbitrator granted Vulcan's Motion for Partial Summary Judgment on Validity and Effect of Release. Schneider Decl. Ex. 35. The Arbitrator noted that although Turner had filed no response to the motion, she had considered the pleadings filed by Turner's counsel in *Turner I* and *Turner II* regarding the enforceability of the GBA.

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The arbitration hearing took place on November 26, 2012, without Turner being in attendance. On December 21, 2012, the Arbitrator ruled in Vulcan's favor on all issues presented. In her Findings of Fact, Conclusions of Law, and Interim Arbitration Award ("Interim Arbitration Award"), she dismissed Turner's claims with prejudice and awarded Vulcan $5,696.63 based on Vulcan's claim of breach of contract related to a relocation bonus. Schneider Decl. Ex. 38. With regard to attorneys' fees, the Arbitrator found:

> Vulcan may not recover attorneys' fees and costs flowing from Ms. Turner's statutory claims of employment discrimination in the absence of a showing that her statutory claims were frivolous, unreasonable, or without foundation. Based on the available record, the Arbitrator cannot conclude that this is among the rare cases where such a finding should be made. Based on the fees provision in the EIPA, Ms. Turner is liable for Vulcan's reasonable costs and attorneys' fees in this arbitration only as to non-statutory claim **and some portion of the attorneys' fees and costs incurred in two lawsuits seeking to enforce the arbitration clause contained in the [GBA].**

Id. at ¶19 (emphasis added, internal quotation marks omitted). Vulcan subsequently filed a motion for an award of attorneys' fees. The fee request was limited to a portion of its fees incurred in *Turner II*. On March 7, 2013, the Arbitrator awarded Vulcan $113,235 in attorneys' fees based on Vulcan's successful efforts to compel arbitration in *Turner II*. Schneider Decl. Ex. 40.

III. DISCUSSION

A. Standard of Review

Judicial review of arbitration awards under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1-16 is "extremely narrow and exceedingly deferential." *UMass Mem'l Med. Ctr. v. United Food & Commerial Workers Union*, 527 F.3rd 1, 5 (1st Cir. 2008) (internal quotation marks omitted). Both federal and Washington cases have consistently reaffirmed this limited

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scope of review. Thus, in *Bosack v.* Soward, 586 F.3rd 1096, 1106 (9th Cir. 2009)(as amended), the court stated that:

> [W]e do not decide the rightness or wrongness of the arbitrator's contract interpretation, only whether the panel's decision draws its essence from the contract. We will not vacate an award simply because we might have interpreted the contract differently." (citations and internal quotation marks omitted).

In *International Union of Operating Engineers v. Port of Seattle*, 176 Wn.2d 712, 720, 295 P.3rd 736 (2013), the Washington Supreme Court observed that to apply anything other than a limited standard of review would "call into question the finality of arbitration decisions and undermine alternate dispute resolution." However, notwithstanding such judicial deference, arbitration awards will be vacated if they violate "an explicit well defined and dominant public policy, not simply general considerations of supposed public interest." *Id.*, 176 Wn.2d at 721. (internal quotation marks omitted).

B. The Arbitrator's Denial of Turner's Request for a Continuance of the Hearing Was Within Her Discretion

Turner asks the court to vacate the arbitration Award based on Section 10(a)(3) of the FAA, which grants courts the power to vacate arbitration awards "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown . . ." 9 U.S.C. § 10(a)(3). Courts have interpreted Section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be second-guessed. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3rd 16, 20 (2nd Cir. 1997). Thus, courts will not intervene in an arbitrator's decision denying a requested continuance if any reasonable basis for it exists. *El Dorado Sch. Dist. No. 15 v. Continental Cas. Co.*, 247 F.3rd, 843, 848 (8th Cir. 2001).

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The failure by an arbitrator to give a reason for the denial does not indicate misconduct as long as reasons for the decision appear in the record. *Id.* In *Tempo Shain*, the court found that an arbitration panel's refusal to keep open the record to permit the testimony of a witness unable to attend the hearing because of his wife's unexpected reoccurrence of cancer constituted misconduct under Section 10(a)(3). *Id.*, 120 F.3d at 20. Similarly, in *Naing Int'l Enterprises, Ltd v. Ellsworth Assoc., Inc.*, 961 F.Supp. 1, 3-5 (D.D.C. 1997), a refusal to allow one party to complete a critical pre-hearing investigation constituted misconduct because it resulted in "the foreclosure of the presentation of pertinent and material evidence." *Id.* at 3. On the other hand, an arbitrator's denial of an attorney's request for a continuance on the eve of the hearing because his son had been scheduled for outpatient surgery for a recurrent ear infection problem was held not to violate Section 10(a)(3). *El Dorado,* 247 F.3d at 847-48.

Turner argues that the Arbitrator's denial of her request for a continuance was tantamount to a refusal to hear evidence from her. She points out that her request came at a crucial point in the arbitration when the Arbitrator was about to consider the validity of the Release of Claims provision in the GBA. Further, in her decision granting Vulcan's motion for partial summary judgment, the Arbitrator stated that Turner's testimony would have been relevant in determining whether the release was unconscionable, but without any submission from Turner, the Arbitrator had no choice but to accept Vulcan's version of the events.

According to Turner, the denial of the motion for continuance of the motion also ensured that she would be unable to find counsel. Turner's current counsel, Ms. Rebecca Roe, provided a declaration stating that she was approached about the possibility of representing Turner in August or September 2012 but declined "because of the very real possibility the arbitration would occur in November." Suppl. Roe Decl. at ¶3. The Roe Declaration also

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notes that Judge George Finkle, acting as an arbitrator in a parallel case involving Vulcan and co-employees of Turner's (presumably represented by counsel), denied the identical motion for partial summary judgment by Vulcan. *Id.* at ¶5.

In response, Vulcan argues that the Arbitrator did not refuse to consider evidence but rather that Turner refused to present evidence when she abandoned the arbitration process. Vulcan relies on *Three S Delaware, Inc. v. Dataquick Info Systems. Inc.I,* 492 F.3rd 520(4th Cir. 2007) in which the court rejected a Section 10(a)(3) challenge to an arbitration award because the party challenging the award would have had an ample opportunity to present its evidence if its owner had not insisted on abandoning the arbitration hearing. According to Vulcan, nothing prevented Turner from telling her side of the story regarding how she came to sign the GBA. Vulcan also asserts that the issues involved in the partial summary judgment motion – the conscionability of the GBA – had been litigated twice in *Turner I* and *Turner* II, and that the Arbitrator considered those briefs, including declarations by Turner, in her decision. Finally, Vulcan argues that the Arbitrator would have been fully justified in viewing Turner's counsel's withdrawal as tactical given counsel's admission that he told Turner that his withdrawal would likely result in a continuance.

In ruling on motions for continuance to seek new counsel, arbitrators, like judges, must balance the needs of the party requesting the continuance against the adverse party's right to finality without undue delay. Whether this court believes that the Arbitrator struck the right balance is not the question. Rather, it is whether there are reasons in the record that would support the Arbitrator's decision and whether the decision deprived Turner of fundamental fairness. As to the first question, the Arbitrator, like this court, was presented with competing.

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non-frivolous arguments which supplied a basis for her decision. Consequently, her denial of the requested continuance was not arbitrary.

Whether the Arbitrator's ruling deprived Turner of fundamental fairness is a closer question. Even though, as Vulcan points out, Turner was capable of presenting evidence regarding the circumstances surrounding the execution of the GBA, she was placed at a severe disadvantage in having to resist Vulcan's partial summary judgment motion without legal representation. For example, she could not have been expected to know that the legal standards applicable to enforcement of releases may be distinct from an unconscionability analysis and that perhaps a different approach from the briefing in *Turner I* and *Turner II* was required. *See Finch v. Carlton*, 84 Wn.2d 140, 143 (1974)(setting forth five-factor test in determining whether release was "fairly and knowingly made."). The fact that other former Vulcan employees with legal representation were successful in resisting the same partial summary judgment motion before another arbitrator is troubling.

Ultimately, however, the court concludes that Turner bears some of the responsibility for what occurred. When she requested the continuance, Turner told the Arbitrator, "I will keep you appropriately apprised of my progress around finding new counsel." Schneider Decl. Ex. 31. She never did. Had Turner told the Arbitrator, for example, that she was diligently seeking new counsel and that she was unsuccessful because no attorney was willing to step in given the current deadlines, the Arbitrator might have considered a different briefing and hearing schedule. Or, if new counsel had made a limited appearance and asked for a reasonable continuance to get up to speed, it is difficult to imagine a fair-minded arbitrator denying the request. Instead, Turner never requested an adjustment of the summary judgment

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briefing schedule and then withdrew a few days before her summary judgment response was due.

Under these circumstances, without any additional information about Turner's progress in obtaining counsel, the Arbitrator's scheduling orders were within her discretion and cannot be considered misconduct.

C. The Award of Attorneys' Fees

1. The Fee Award is not completely irrational

Under Section 10(a)(4) of the FAA, a reviewing court may vacate an award "where the arbitrators exceeded their powers." An arbitrator exceeds her powers where the award "is completely irrational or exhibits a manifest disregard for the law." *Kyocera Corp. v. Prudential-Bache Trade Services*, 341 F.3rd 987, 997 (9th Cir. 2003). Review of an arbitrator's award under Section 10(a)(4) requires the same deferential standard of review as under Section 10(a)(3). In *Oxford Health Plans LLC* v. *Sutter*, ___U.S. ___, 133 S.Ct. 2064, 2068, 2013 WL 2459522 (June 10, 2013), the United States Supreme Court stated with respect to Section 10(a)(4): "... [A]n arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits." (internal quotations marks omitted).

Here, the arbitrator based her fee award on Section 11 of the EIPA, which provides: "In any lawsuit arising out of or relating to this agreement or my employment, including without limitation arising from any alleged tort or statutory violation, the prevailing party shall recover their reasonable costs and attorneys fees, including on appeal." Schneider Decl. Ex. 7. Turner's contention that the award of attorneys' fees was "completely irrational" is based on

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the argument that Section 11 is limited to lawsuits, whereas the fees here were awarded in an arbitration proceeding:

> Vulcan neither included an attorney fees provision in the GBA, nor incorporated the EIPA's lawsuit-fees provision in the GBA. In contrast, in the GBA, Vulcan confirmed prior confidentiality provisions to which employees had agreed.

Mem. in Support of Motion to Vacate at 21.

Regardless of the merits of this argument, it does not follow that the Arbitrator's contrary conclusion "is completely irrational or exhibits a manifest disregard for the law." *Kyocera Corp, Inc.*, 341 F.3d at 997. First, it could be argued that in limiting fees to the *Turner II* lawsuit, the Arbitrator's ruling was consistent with Section 11 of the EIPA, which allows for fees "in any lawsuit." Second, case law from California and Florida supports the argument that the term "lawsuit" in the EIPA may be broadly construed to encompass arbitrations. *Severtson v. Williams Constr. Co.*, 222 Cal.Rptr. 400, 406 (Ct. App. 1985)("[T]he use of the term 'suit' in the present contact was broad enough to embrace arbitration, and attorneys' fees and costs were properly awarded by the arbitrator."); *Tate v. Saratoga Sav. & Loan Assn.*, 265 Cal. Rptr. 440, 448 (Ct. App. 1989)(same); *Par Four, Inc. v. Gottlieb*, 602 So.2d 689, 690 (Fla. Dist. Ct. App. 1992)(The phrase "in the event of any litigation, the prevailing party would be entitled to attorneys' fees" included arbitration proceedings.).

Based on the existence of legitimate arguments supporting the Arbitrator's reliance on the fee provision in the EIPA, the court concludes that Turner has not met her burden of demonstrating that the fee award was completely irrational.

2. The Award of Attorneys' Fees Against an Employee Raising Statutory Claims Violates Public Policy

As previously noted, courts will vacate an arbitration award that violates "an explicit, well-defined, and dominant public policy, not simply general considerations of supposed

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public interest." *Operating Engineers*, 176 Wn.2d at 721. The need to identify with precision the public policy at issue stems from the fact that the public policy exception is a "narrow" one, *Kitsap County Deputy Sheriffs Guild v. Kitsap* County, 167 Wn.2d 428, 436 (2009), and that courts are not to vacate arbitration awards simply because they disagree with the result.

Since Turner brought claims in *Turner II* pursuant to the Washington Law Against Discrimination (WLAD), RCW 49.60 et seq., and the Washington Minimum Wage Act (MWA), RCW 49.48 et seq., the court begins its analysis with those statutes. First, regarding the WLAD, the Washington Supreme Court has held that "[t]he laws against workplace discrimination set forth an explicit, well-defined and dominant public policy." *Operating Engineers*, 176 Wn.2d at 721. The WLAD aims "to enable vigorous enforcement of modern civil rights litigation and to make it financially feasible for individuals to litigate civil rights violations." *Martinez v. City of Tacoma*, 81 Wn.App. 228, 235 (1996). Consequently, the WLAD entitles prevailing plaintiffs, but not prevailing defendants, to reasonable attorneys fees. RCW 49.60.030(2); *Collins v. Clark Cnty Fire District No.* 5, 155 Wn.App. 48, 98 (2010).

The wage and hour laws occupy a position of similar importance in Washington. "The Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157 (1998). Additionally,

> [b]y providing for costs and attorney fees, the Legislature has provided an effective mechanism for recovery even where wage amounts wrongfully withheld may be small. This comprehensive legislative system with respect to wages indicates a strong legislative intent to assure payment to assure payment to employees of wages they have earned.

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Id. at 159.

Consequently, an employment agreement or arbitration award that denies attorneys' fees to a prevailing plaintiff or awards fees to a prevailing defendant in a WLAD or wage and hour lawsuit violates public policy. In *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598 (2013), the court found unconscionable a "loser pays" provision in an arbitration agreement contained in a debt adjustment contract that is virtually identical to the provision in Section 11 of the EIPA. The court reasoned that "[b]ecause the 'loser pays' provision serves to benefit only Freedom and, contrary to the legislature's intent, effectively chills Gandee's ability to bring suit under the CPA, it is one-sided and overly harsh." *Id.* at 606. In *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn.App. 316 (2009), Division I reached a similar conclusion:

> While Walters is assured that he will recover his expenses and legal fees if he wins decisively, he must assume the risk that if he loses, he will have to pay Waterproofing's expenses and legal fees. This risk is an enormous deterrent to an employee contemplating a suit to vindicate the right to overtime pay. Under these circumstances, in the context of an employee's suit where the governing statutes provide that only a prevailing employee will be entitled to recover fees and costs, a reciprocal attorney fees provision is unconscionable, and therefore, unenforceable.

Id. at 324-325.

In this case, the Arbitrator awarded Vulcan its attorneys' fees based on a provision that is substantially similar, if not identical, to the "loser pays" provisions found unconscionable in *Gandee* and *Walters*. Both Vulcan (implicitly) and the Arbitrator (explicitly) recognized that Section 11 was unenforceable if it were used to award fees incurred by Vulcan in defeating statutory claims at arbitration. Instead, Vulcan limited its fee request to its efforts to compel

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arbitration in *Turner II*, and the Arbitrator agreed. The narrow issue before the court is whether this "carve-out" violates public policy. The court concludes that it does.[1]

As counsel for Vulcan acknowledged at oral argument, there are no cases recognizing an exception to fee shifting principles if an employer prevails on procedural, as opposed to substantive, grounds. Thus, if an employee brought a discrimination claim that was subsequently dismissed on statute of limitations grounds, the prevailing employer would not be entitled to attorneys' fees. Yet Vulcan argues it is entitled to fees because in *Turner II* it prevailed based on a different procedural defense, i.e., that the litigation should occur in a different forum.

Vulcan relies primarily on *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 319 (2004), in which the Washington Supreme Court upheld a provision requiring a party who files a judicial action to pay the attorneys fees and costs of the opposing party who successfully compels arbitration. The court based this holding on the following two sentences:

> . . . [A]s Airtouch aptly notes, this provision permits *either* party to recover fees on a successful motion to stay an action and/or to compel arbitration. Thus it does not appear to be so one-sided and harsh as to render it substantively unconscionable.

Id. at 319.

There is a serious question whether the *Zuver* court's exclusive focus on the bilateral nature of the fee provision continues to represent the current view of the court.[2] In *Gandee*, issued nine years later, the court invalidated a bilateral "loser pays" provision because (1) in

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[1] Neither party has briefed the issue of whether the Arbitrator exceeded her powers by giving a more limited interpretation, i.e., "blue-pencilling," a fee provision that is unconscionable on its face. It is not necessary to address this issue in light of the court's conclusion that the "carve-out" is unenforceable as well.

[2] *Zuver* is not directly on point since it addressed unconscionability as opposed to violations of public policy. However, the two concepts are closely related. A provision in an arbitration agreement may be

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reality, the provision benefited only one party, and (2) the prospects of having to pay the company's fees effectively chilled the consumer's exercise of her rights under the CPA.

These two rationales apply equally here. First, while it is theoretically possible that an employee could be awarded fees against an employer resisting arbitration, such a scenario is extremely unlikely. When arbitration agreements are signed in the employment setting, they are, almost without exception, done so at the behest of the employer, not the employee. That is what occurred here when Vulcan presented Turner with the GBA. Therefore, the party benefitting from a fee provision like the one in *Zuver* will almost invariably be the employer, not the employee. Second, the prospects of having to pay attorneys' fees to an employer successful in compelling arbitration will almost certainly have a chilling effect on an employee contemplating a court action to challenge the conscionability of an arbitration agreement and/or to vindicate her statutory rights.

An additional distinction between this case and *Zuver* is that there was no evidence presented in *Zuver* regarding the effect of the fee provision on the employee. This perhaps explains the court's conclusion that the provision did not "appear to be" overly harsh. *Id.* at 319. Here, the effect of the Arbitrator's fee award was to impose a daunting amount – $113,235 – on a terminated employee who a few months earlier had written the Arbitrator, "I am unable to pay for counsel because I'm unemployed and do not have the financial means to pay hourly fees." Roe Decl. Ex. 29. In *Gandee*, the court defined a substantively unconscionable provision as being "one-sided or overly harsh" and "shocking the conscience."

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substantively unconscionable if it effectively undermines an employee's ability to vindicate his or her statutory rights. *Adler v. Fred Lind Manor*, 153 Wash.2d 316, 355 (2004). It is difficult to conceive of a provision that fits within this definition of unconscionability that would not also violate public policy.

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Id., 176 Wn.2d at 603 (quoting *Adler*, 153 Wn.2d at 344-45). In this court's view, these terms aptly describe the effect of the fee award on Turner.

In addition to being unconscionable, the court finds that the $113,235 fee award violates an explicit, well-defined, and dominant public policy because it undermines an employee's ability to vindicate her statutory rights.

III. CONCLUSION

The Arbitrator's Interim and Final Awards are hereby CONFIRMED in part. The award of attorneys' fees in both Awards is VACATED. The parties are directed to present on Order consistent with this Opinion.

IT IS SO ORDERED.

ENTERED this 27th day of September, 2013.

BRUCE E. HELLER, JUDGE

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue, C - 203
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APPENDIX E

Non-Washington Cases Cited Under GR 14.1

334 Fed.Appx. 834
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals, Ninth Circuit.

Lynn OLSEN, dba Olsen Agriprises; et al., Plaintiffs-Appellants,
v.
UNITED STATES of America, through the FEDERAL CROP INSURANCE CORP., Reinsurer of American Growers Insurance Company, Defendant-Appellee.

No. 08-35228. | Argued and Submitted May 4, 2009. | Filed June 10, 2009.

Synopsis
Background: Insureds brought action to enforce arbitration award against Federal Crop Insurance Corporation (FCIC). The United States District Court for the Eastern District of Washington, Fred L. Van Sickle, J., entered summary judgment in favor of FCIC, 546 F.Supp.2d 1122, and insureds appealed.

Holdings: The Court of Appeals held that:

[1] whether arbitration agreement was enforceable against FCIC was for court, not arbitrator, to decide, and

[2] arbitration agreement was not enforceable against FCIC that was not party to agreement.

Affirmed.

West Headnotes (2)

[1] Insurance
Alternative dispute resolution
Issue whether arbitration agreement was enforceable against Federal Crop Insurance Corporation that was not party to agreement was for district court, not arbitrator, to resolve.

1 Cases that cite this headnote

[2] Insurance
Alternative dispute resolution
Arbitration agreement was not enforceable against Federal Crop Insurance Corporation (FCIC) that was not party to agreement, and arbitration provision made clear that any disagreement with FCIC had to be resolved through administrative appeal.

Cases that cite this headnote

Attorneys and Law Firms

***834** John G. Schultz, Andrea Jean Clare, Leavy, Schultz, Davis & Fearing, P.S., Kennewick, WA, for Plaintiffs-Appellants.

Rolf Harry Tangvald, Assistant U.S., USSP-Office of the U.S. Attorney, Spokane, WA, for Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Washington, Fred L. Van Sickle, District Judge, Presiding. D.C. No. 2:06-cv-05020-FVS.

Before: WARDLAW, PAEZ, and N.R. SMITH, Circuit Judges.

MEMORANDUM *

****1** Lynn Olsen and Carr Farms, LLC ("Olsen and Carr") appeal the district court's grant of summary judgment to the United States in their action to enforce their respective arbitration awards against the Federal Crop Insurance Corporation ("FCIC"). On cross-motions for summary judgment, the district court granted summary ***835** judgment in favor of the United States and vacated the arbitration awards. The district court had jurisdiction to consider the government's motion to vacate the awards pursuant to 28 U.S.C. § 1331 and 7 U.S.C. § 1506(d), *cf.*

United States v. Park Place Assocs., Ltd., 563 F.3d 907, 919-20 (9th Cir.2009), and we have jurisdiction to review the district court's final order under 28 U.S.C. § 1291. [1] We review the grant of summary judgment de novo, *see Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1047-48 (9th Cir.2008), and we affirm.

[1] "It is axiomatic that '[a]rbitration is a matter of contract and a party cannot be required to submit any dispute which he has not agreed so to submit.' " *Sanford v. Memberworks, Inc.*, 483 F.3d 956, 962 (9th Cir.2007) (alteration in original) (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). Further, because an arbitrator's authority and jurisdiction to adjudicate a dispute is derived from the agreement of the parties, "the question of arbitrability-whether a[n] ... agreement creates a duty for the parties to arbitrate the particular grievance-is undeniably an issue for judicial determination" and "is to be decided by the court, not the arbitrator." *AT & T Techs.*, 475 U.S. at 649, 106 S.Ct. 1415; *see also Three Valley Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140-41 (9th Cir.1991) ("[B]ecause an arbitrator's jurisdiction is rooted in the agreement of the parties, a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate." (citations and internal quotation marks omitted)).

[2] Here, the FCIC repeatedly contested the making of an arbitration agreement before the arbitrators, and the United States renewed those objections during the present suit. [2] The arbitrators thus lacked authority to determine whether the FCIC was bound by the arbitration clause in the policies issued by American Growers Insurance Company. *Cf. John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). Further, because the FCIC was not a party to the contract containing the arbitration clause, and because the arbitration provision makes clear that disagreements with the FCIC must be resolved through the administrative appeals process, the arbitrators lacked authority to proceed with arbitration and to enter awards against the FCIC. The district court therefore properly granted summary judgment to the United States and vacated the arbitration awards.

AFFIRMED.

All Citations

334 Fed.Appx. 834, 2009 WL 1638652

Footnotes

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

1 In light of our determination that the district court properly vacated the awards, we need not address whether the government waived its sovereign immunity to confirmation of an arbitration award under 7 U.S.C. § 1506(d). *Cf. Park Place*, 563 F.3d at 923-29.

2 We reject Olsen and Carr's contention that the FCIC challenged the "validity of the whole contract," rather than the existence of an agreement to arbitrate, and that the arbitrator therefore had authority to resolve the threshold question of arbitrability. The FCIC did not argue that the contract was invalid, but rather argued that it was not a party to the contract and had not consented to arbitration. *See Sanford*, 483 F.3d at 962 (noting that "[i]ssues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator," but that "challenges to the *existence* of a contract ... must be determined by the court prior to ordering arbitration").

2014 WL 6882421
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Kum Tat Limited, Plaintiff,
v.
Linden Ox Pasture, LLC, Defendant.

Case No. 14–cv–02857–WHO
| Signed December 5, 2014

Attorneys and Law Firms

Daniel L. Casas, Anthony Francis Basile, Casas Riley & Simonian, LLP, Campbell, CA, Charles Michael Schaible, Patrick P. Gunn, Cooley Godward Kronish LLP, San Francisco, CA, for Plaintiff.

Jeffrey L. Fillerup, Andrew S. Azarmi, McKenna Long & Aldridge LLP, San Francisco, CA, for Defendant.

ORDER DENYING MOTION TO COMPEL ARBITRATION

Re: Dkt. No. 50

WILLIAM H. ORRICK, United States District Judge

INTRODUCTION

***1** Plaintiff Kum Tat Limited ("Kum Tat") and defendant Linden Ox Pasture, LLC ("Linden Ox") entered negotiations for the purchase of residential property owned by Linden Ox. When Linden Ox terminated negotiations and contracted to sell the property to a third-party, Kum Tat sued for breach of contract and specific performance. Kum Tat moves to compel Linden Ox to arbitrate the dispute. Because Kum Tat has not shown the existence of a binding contract between the parties, the motion is DENIED.

BACKGROUND

I. FACTUAL BACKGROUND

Except where otherwise indicated, the following facts are drawn from the Court's September 18, 2014 order granting Linden Ox's motion to expunge lis pendens. *See* Dkt. No. 43 at 1–4. I include them here for ease of reference.

The property at issue is a residential estate located in Atherton, California. In early 2014, Linden Ox listed the property for sale through its real estate agent, Mary Gullixson. On May 12, 2014, Kum Tat executed a Real Estate Purchase Contract ("REPC") offering to purchase the property for $38 million. Lam Decl. ¶ 2, Ex. A (Dkt. No. 27). The offer provided that the purchase price would include all the property's furniture, artwork, and other furnishings, and that Linden Ox would be required to submit an "exclusion list"—i.e., a list of such items to be excluded from the sale—within five days of accepting the offer. At the time, the property's furniture, artwork, and other furnishings were valued in the millions of dollars.

The REPC includes an arbitration provision, which Kum Tat initialed. It provides in relevant part:

> ARBITRATION OF DISPUTES: By initialing Paragraph 29B ..., Buyer and Seller agree to submit any disputes between them concerning and/or arising out of this Contract to binding arbitration if those disputes are not resolved by mediation ... Arbitration shall be conducted pursuant to Title 9 of the California Code of Civil Procedure including, but not limited to, the right of discovery under Section 1283.05.

Lam Decl., Ex. A § 29.B. The REPC also contains a choice-of-law provision that states, "This Contract and all other documents referenced in this Contract shall be governed by, and shall be construed according to, the laws of the State of California." *Id.* § 27.I.

Kum Tat sent the offer to Linden Ox on May 19, 2014. Gullixson Decl. ¶ 6 (Dkt. No. 5). On May 21, 2014, Linden Ox responded with a counteroffer to sell the property for $39.5 million. The counteroffer provided that, at the close of escrow, Kum Tat would pay an additional $3.5 million

for the property's furnishings, excluding certain artwork and other items. Although the counteroffer specifically identified several pieces of art and other furnishings for exclusion, it did not enumerate all such items to be excluded from the sale. To that end, the counteroffer required Linden Ox to submit an exclusion list within seven days of Kum Tat's acceptance of the counteroffer; Kum Tat would then approve the list within seven days of receiving it. Linden Ox initialed the REPC's arbitration provision as part of the counteroffer. Lam Decl. ¶ 3, Ex. B.

***2** Kum Tat did not accept the counteroffer. Instead, on May 25, 2014, Kum Tat countered at $41 million for the property and all its furnishings, excluding certain artwork and other personal items. Like Linden Ox's counteroffer, Kum Tat's counteroffer specifically identified several pieces of art and other furnishings for exclusion but did not enumerate all such items to be excluded. It provided instead that Linden Ox would submit an exclusion list to Kum Tat, which Kum Tat would then "review and approve" in order to "fully ratify" the contract. The provision (i.e., the "review and approve clause") states in whole:

> Seller to provide a specific exclusion and inclusion lists the same day signing Counter Offer No. Two (2) as the Record, and Buyer to review and approve in order to Fully Ratify this Purchase Contract.

Lam Decl., Ex. C (grammar and mechanics as in original).

Kum Tat's counteroffer was set to expire on May 30, 2014. *Id.* Linden Ox signed Kum Tat's counteroffer in the space marked "Acceptance," returned it to Kum Tat on May 27, 2014, and emailed its exclusion list to Kum Tat on May 30, 2014. [1]

Kum Tat did not accept the exclusion list. Certain items it had believed would be included in the sale had been marked for exclusion. On May 31, 2014, Kum Tat's real estate agent, Fred Lam, informed Gullixson by telephone that Kum Tat intended to seek a reduction in the purchase price. [2] On June 2, 2014, Lam sent an email to Gullixson stating that Kum Tat was "exercising the review and approve clause," that Kum Tat had "disapproved the exclusion list," and that Kum Tat would request a $500,000 reduction of the purchase price, from $41,000,000 to $40,500,000. [3] Shortly thereafter, Kum Tat submitted to Linden Ox a written addendum to Kum Tat's counteroffer. The addendum provided that Kum Tat accepted Linden Ox's exclusion list "with a purchase price reduction of $500,000—total purchase price to be $40,500,000." The addendum also provided: "Contract to be fully ratified by acceptance of this addendum." [4]

Linden Ox rejected the addendum and terminated negotiations with Kum Tat by email that day. On June 3, 2014, Linden Ox entered an agreement to sell the property to a third party.

II. PROCEDURAL BACKGROUND

***3** Kum Tat filed this action on June 10, 2014 in the Superior Court of California, County of San Mateo, alleging breach of contract and seeking specific performance. Dkt. No. 1, Ex. A. Kum Tat also filed a notice of pendency of action (lis pendens) against the property. Dkt. No. 1, Ex. D. Linden Ox removed the case to federal court on June 20, 2014 and filed a motion to expunge lis pendens shortly thereafter. Dkt. Nos. 1, 4. On September 18, 2014, I issued an order granting the motion to expunge lis pendens on the ground that Kum Tat had not carried its burden of showing, by a preponderance of the evidence, that it was likely to prevail against Linden Ox on its breach of contract claim. Dkt. No. 43. Kum Tat filed the instant motion on October 27, 2014. Dkt. No. 50. I heard argument from the parties on December 3, 2014.

LEGAL STANDARD

Under both federal and state law, the threshold question presented by a motion to compel arbitration is whether the parties agreed to arbitrate. The United States Supreme Court has stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986); *see also, Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."). Likewise, under California law, "[t]he right to arbitration depends on the existence of an agreement to arbitrate, and hence a party cannot be forced to arbitrate in the absence of an agreement to do so." *Frederick v. First Union Sec., Inc.*, 100 Cal.App. 4th 694, 697 (2002); *see also,* Cal. Civ. P.Code § 1281.2.

Accordingly, where a party contests the existence of an arbitration agreement, the court, and not the arbitrator, must decide whether such an agreement exists. *Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 962 (9th Cir.2007); *Sparks v. Vista Del Mar Child & Family Servs.*, 207 Cal.App. 4th 1511, 1517–19 (2012). This rule applies not only to "challenges to the arbitration clause itself, but also [to] challenges to the making of the contract containing the arbitration clause." *Sanford,* 483 F.3d at 962; *see also, Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 296 (2010) ("It is ... well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide."); *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444 n.1 (2006) (distinguishing the generally arbitral issue of a contract's validity from the generally nonarbitral issue of "whether any agreement between the alleged obligor and obligee was ever concluded").

The question of whether the parties entered a contract containing an arbitration agreement is ordinarily decided under state law. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995); *see also, Cheng–Canindin v. Renaissance Hotel Associates,* 50 Cal.App. 4th 676, 683 (1996) ("The question of whether the parties agreed to arbitrate is answered by applying state contract law even when it is alleged that the agreement is covered by the [Federal Arbitration Act]."). In California, the party seeking to compel arbitration has the burden of proving the existence of the agreement to arbitrate by a preponderance of the evidence. *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal.4th 951, 972 (1997).

DISCUSSION

I. WHETHER THE PARTIES ENTERED A BINDING AGREEMENT TO ARBITRATE IS A QUESTION FOR THE COURT, NOT THE ARBITRATOR.

Kum Tat argues that under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), and *Buckeye Check Cashing, Inc. v. Cardegna,* the arbitration provision in the REPC must be enforced. Linden Ox contends that arbitration may only be compelled if the Court first determines that the parties entered a binding agreement to arbitrate, which Linden Ox argues it did not. Linden Ox is right.

***4** In *Prima Paint,* the Supreme Court held that "claims of fraud in the inducement generally"—that is, claims of fraud not going specifically to the arbitration clause—are decided by the arbitrator rather than the court. 388 U.S. at 403–404. In *Buckeye,* the Court reviewed a state supreme court decision refusing to enforce an arbitration clause in a contract challenged as unlawful under state law. 546 U.S. at 442–43. Applying *Prima Paint,* the Court concluded that because the challenge was to the lawfulness of the contract as a whole, and not to the lawfulness of its arbitration provisions specifically, the provisions were enforceable even if the contract was not. *Id.* at 446. The Court stated: "[A]n arbitration provision is severable from the remainder of the contract ... [U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Id.* at 445–46. This "severability doctrine" applies with equal force when a party seeks to compel arbitration under California law. *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.,* 35 Cal.3d 312, 323, (1983); *see also, Bruni v. Didion,* 160 Cal.App. 4th 1272, 1285 (2008).

Kum Tat is thus correct that in certain circumstances, a challenge to the overall agreement as opposed to the arbitration agreement specifically must go to the arbitrator. As noted above, however, arbitration is a matter of contract, and under state and federal law alike, "a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." *Lee v. S. Cal. Univ. for Prof'l Studies,* 148 Cal.App. 4th 782, 786 (2007) (internal quotation marks omitted); *see also, AT & T Technologies,* 475 U.S. at 648. Accordingly, notwithstanding the severability doctrine, "[a] court ... still must consider one type of challenge to the overall contract: a claim that the party resisting arbitration never actually agreed to be bound." *Bruni,* 160 Cal.App. 4th at 1284.

It is for this reason that Kum Tat's reliance on *Prima Paint* and *Buckeye* is misplaced. Those cases stand for the proposition that where a party opposing arbitration challenges the validity of the contract as a whole, and not the validity of the contract's arbitration provision itself, the challenge must be decided by the arbitrator. Challenges to a contract's very existence, however, as opposed to its continued validity, are decided by the court.

The Ninth Circuit has repeatedly recognized this limitation on the severability doctrine. In *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir.1991), the district court sent to the arbitrator the question of whether the signatory to the underlying agreement had the authority to

contractually bind the plaintiffs. *Id.* at 1138. The Ninth Circuit reversed, holding that *Prima Paint* is "limited to challenges seeking to avoid or rescind a contract—not to challenges going to the very existence of a contract that a party claims never to have agreed to." *Id.* at 1140 (emphasis omitted). The Ninth Circuit explained that "because an arbitrator's jurisdiction is rooted in the agreement of the parties, a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate. Only a court can make that decision." *Id.* at 1140–41 (emphasis and footnote omitted). Likewise, in *Sanford v. MemberWorks, Inc.*, the Ninth Circuit rejected the district court's reading of *Prima Paint* "as mandating that the court decide all challenges to an arbitration clause but the arbitrator decide all challenges to the contract as a whole." *Id.* at 963. The Ninth Circuit clarified that "[i]ssues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration." *Id.* at 962 (emphasis in original). The Ninth Circuit vacated the order compelling arbitration and remanded the case to the district court "to determine whether a contract was formed" between the parties. *Id.* at 964; *see also, Olsen v. U.S. ex rel. Fed. Crop Ins. Corp.*, 334 Fed.Appx. 834 (9th Cir.2009).

***5** The distinction between questions regarding a contract's validity, on the one hand, and questions regarding its existence, on the other, is also reflected in *Buckeye*. There, the Supreme Court acknowledged that

> [t]he issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents ..., which hold that it is for courts to decide whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent.

546 U.S. at 444 n.1 (citations omitted). The Supreme Court again emphasized the distinction in *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010), stating that "where the dispute at issue concerns contract formation, the dispute is generally for courts to decide," not arbitrators. *Id.* at 296. Thus, before compelling arbitration, a court must first "resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Id.* at 297. In other words, "courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement nor ... its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, the court must resolve the disagreement." *Id.* at 299–300 (internal quotation marks, citations, and emphasis omitted).

In line with the Supreme Court's analysis in *Buckeye* and *Granite Rock* and the Ninth Circuit's decisions in *Three Valleys* and *MemberWorks*, numerous courts have recognized that "[w]here the very existence of any agreement is disputed, it is for the courts to decide at the outset whether an agreement was reached." *Will–Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 218 (5th Cir.2003); *see also, Solymar Investments, Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 989 (11th Cir.2012) ("[I]ssues concerning contract formation are generally reserved for the courts to decide."); *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 738 (7th Cir.2010) ("[T]he existence of a contract is an issue that the courts must decide prior to staying an action and ordering arbitration."); *Par–Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 55 (3d Cir.1980) ("A party may, in an effort to avoid arbitration, contend that it did not intend to enter into the agreement which contained an arbitration clause."); *Sparks*, 207 Cal.App. 4th at 1517 ("Under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate."); *Frederick*, 100 Cal.App. 4th at 697 ("The right to arbitration depends on the existence of an agreement to arbitrate, and hence a party cannot be forced to arbitrate in the absence of an agreement to do so.").

Linden Ox's dispute with Kum Tat is plainly a challenge to the existence of a binding contract, not to a contract's continued validity. The first sentence of Linden Ox's opposition states: "Arbitration is not required because there was no contract between Kum Tat and Linden Ox." Opp. 1 (Dkt. No. 51). Linden Ox proceeds to argue that "[t]here was never a 'fully ratified' contract" between the parties, and that to the extent the review and approve clause constituted a condition precedent, it was a condition precedent to formation of the contract, the failure of which prevented any contract from

forming. Opp. 1–2, 9–10. These are questions regarding contract formation, not contract enforcement. Accordingly, I must resolve them before compelling arbitration. *Granite Rock,* 561 U.S. at 299–300; *Sanford,* 483 F.3d at 962; *see also, Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, Inc.,* 343 Mont. 392, 401, 185 P.3d 332, 338–39 (2008) ("A challenge to a contract containing an arbitration clause on the ground of a failure of a condition precedent to formation goes directly to whether the parties formed a contract and ... the matter is appropriate for the court to hear, instead of an arbitrator.").

II. THE PARTIES DID NOT ENTER A BINDING AGREEMENT TO ARBITRATE.

***6** As they did in their briefing regarding the motion to expunge lis pendens, the parties dispute the proper characterization of the review and approve clause and its impact on whether a binding agreement exists. I find that under any plausible characterization of the clause, the outcome is the same: the parties did not enter a contract, and there is thus no basis for compelling arbitration. [5]

First, the review and approve clause may be characterized as a simple reflection of Kum Tat and Linen Ox's failure to reach a final agreement. Under California law, "contract formation requires mutual consent, which cannot exist unless the parties agree upon the same thing in the same sense." *Bustamante v. Intuit, Inc.,* 141 Cal.App. 4th 199, 208 (2006) (internal quotation marks omitted). "Mutual consent is determined under an objective standard applied to the outward manifestations ... of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." *Id.* "In other words, mutual assent exists when a reasonable person would conclude from the outward conduct of the parties that there was mutual agreement regarding their intent to be bound." *Burch v. Premier Homes, LLC,* 199 Cal.App. 4th 730, 746 (2011). If the outward manifestations of the parties do not demonstrate agreement upon the same thing in the same sense, "then there is no mutual consent to contract and no contract formation." *Weddington Prods., Inc. v. Flick,* 60 Cal.App. 4th 793, 811 (1998).

The outward manifestations of the parties in this case do not indicate mutual consent. Although Linden Ox "accepted" Kum Tat's counteroffer on May 27, 2014, that counteroffer required Kum Tat to "review and approve" Linden Ox's exclusion list for the agreement to be "fully ratified." Lam Decl., Ex. C. The reasonable meaning of this language is not that the parties had reached a final agreement as to which property would be exchanged for what amount of money, but that such an agreement would be reached, in the future, if Kum Tat approved Linden Ox's exclusion list. This is not enough to show mutual consent under California law. *See Bustamante,* 141 Cal.App. 4th at 213 ("There is no contract where the objective manifestations of intent demonstrate that the parties chose not to bind themselves until a subsequent agreement was made.") (internal modifications and quotation marks omitted); Witkin, Summary of California Law, Contracts § 137 (10th ed. 2005) ("The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.") (internal quotation marks omitted); *see also, Rennick v. O.P.T.I.O.N. Care, Inc.,* 77 F.3d 309, 315 (9th Cir.1996) ("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.").

***7** Second, and similarly, the review and approve clause may be characterized as an agreement to agree. [6] The general rule in California is that "if an essential element of a promise is reserved for the future agreement of both parties, the promise gives rise to no legal obligation until such future agreement is made." *City of Los Angeles v. Superior Court of Los Angeles Cnty.,* 51 Cal.2d 423, 433 (1959) (internal quotation marks omitted); *see also,* Witkin, Contracts § 147 ("A contract that leaves an essential element for future agreement of the parties is usually held fatally uncertain and unenforceable."). The exception to this general rule is where the agreement is "definite in its essential elements" and the agreement to agree concerns only "some minor, nonessential detail." Witkin, Contracts § 146. Thus, "[t]he enforceability of a contract containing a promise to agree depends upon the relative importance and the severability of the matter left to the future." *City of Los Angeles,* 51 Cal.2d at 433. The key inquiry is "whether the indefinite promise is so essential to the bargain that inability to enforce that promise strictly according to its terms would make unfair the enforcement of the remainder of the agreement." *Id.*

Characterizing the review and approve clause as an agreement to agree does not help Kum Tat. This is because the review and approve clause concerns an essential element of the alleged agreement between Kum Tat and Linden Ox, not

"some minor, nonessential detail." Witkin, Contracts § 146. As I explained in the order on the motion to expunge lis pendens,

> [t]he subject matter of the review and approve clause—i.e., the items that would either be excluded from or included in the sale of the property—was central to the negotiations between Kum Tat and Linden Ox. Indeed, much of the back and forth between the parties was dedicated to the disposition of the property's immensely valuable collection of furniture, artwork, and other furnishings. Kum Tat's initial offer included all furniture, artwork, and other furnishings. Linden Ox's counteroffer included all the property's furniture but excluded a number of pieces of artwork and other items, and required Linden Ox to submit an exclusion list for Kum Tat's review and approval. Kum Tat's counteroffer likewise required the review and approval of Linden Ox's exclusion list in order to "fully ratify" the contract. Kum Tat does not explain why, if the items included in the sale constituted a nonessential element of the agreement, the parties spent so much time and energy negotiating precisely which items would and would not be included in the sale. Nor does Kum Tat explain why it felt compelled to request a $500,000 price reduction on account of a matter which Kum Tat now describes as nonessential.

Dkt. No. 143 at 10 (internal citations omitted). If the review and approve clause is characterized as an agreement to agree, the purported contract between the parties is too indefinite to be enforceable and may not serve as a basis for compelling arbitration. *See Roth v. Garcia Marquez,* 942 F.2d 617, 627–28 (9th Cir.1991) (holding that where alleged agreement did not include all essential terms and "there were still many items to be worked out between the parties, ... no binding contract existed").

Finally, the review and approve clause may be characterized as a condition precedent requiring Kum Tat's approval of Linden Ox's exclusion list. This characterization would not change the outcome here. Like most states, California recognizes two types of conditions precedent: conditions precedent to performance and conditions precedent to formation. *See, e.g., Jacobs v. Freeman,* 104 Cal.App.3d 177, 189 (1980) (distinguishing between conditions precedent to performance and conditions precedent to formation); *Kadner v. Shields,* 20 Cal.App.3d 251, 258 (1971) (same); Williston on Contracts § 38:4 (4th ed. 2014) ("[T]here may be conditions to the formation of a contract or conditions to performance of the contract."). Where a condition precedent to formation is not satisfied, the proposed bargain between the parties does not become a binding contract. *See Taylor Bus Serv., Inc. v. San Diego Bd. of Educ.,* 195 Cal.App.3d 1331, 1345 (1987) (where "condition precedent to formation of the contract" was not satisfied, "no contract was formed"); Williston on Contracts § 38:7 ("When the parties to a proposed contract have agreed that the contract is not to be effective or binding until certain conditions are performed or occur, no binding contract will arise until the conditions specified have occurred or been performed.").

***8** Assuming the review and approve clause was a condition precedent, it was a condition precedent to formation, not to performance. "The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract." *Barroso v. Ocwen Loan Servicing, LLC,* 208 Cal.App. 4th 1001, 1009 (2012). The words employed in the alleged agreement here —i.e., that Kum Tat would review and approve Linden Ox's exclusion list in order to "fully ratify" the contract—indicate that the parties intended the May 27 agreement to become binding only upon Kum Tat's approval of the exclusion list. *See Roth,* 942 F.2d at 626–27 (language providing that contract "shall commence upon signature by [certain individual]" was a condition precedent to formation, and the individual's "signature was required for the contract to be binding"); *Los Angeles Rams Football Club v. Cannon,* 185 F.Supp. 717, 721 (S.D.Cal.1960) (where contract contained provision that it "shall become valid and binding ... only when ... and if it shall be approved by the Commissioner," approval by the Commissioner was "essential to the formation of a contract"). That Kum Tat itself inserted the "fully ratify" language further supports this conclusion. The reasonable meaning of this outward manifestation of Kum Tat's intent is that Kum Tat did not intend to enter a final, binding contract until and unless it had approved Linden Ox's exclusion list.

Because Kum Tat rejected the list instead of approving it, no contract was formed between the parties. *See Taylor,* 195 Cal.App.3d at 1345. Linden Ox may not be compelled to arbitrate if it did not enter a binding agreement to do so.

CONCLUSION

For the foregoing reasons, the motion to compel arbitration is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 6882421

Footnotes

1 Kum Tat contends that an enforceable contract was formed on May 27, 2014. Mot. 2 (Dkt. No. 50).

2 The parties dispute the proper characterization of this telephone communication and the emails that followed. Lam's declaration states: "Prior to my submission of [the addendum], I had a telephone conversation and exchanged a number of emails with Gullixson in which she repeatedly attempted to persuade me to characterize [the addendum] as a counteroffer. I declined to do so." Lam Decl. ¶ 8. Gullixson's declaration states: "On May 31, 2014, I spoke with Mr. Lam on the telephone, and he indicated that Kum Tat would be making a counteroffer at a lower price." Gullixson Decl. ¶ 13.

3 The relevant portion of the email states in whole: "The buyer is now exercising the 'review and approve' clause and disapproved the exclusion list by requesting a small reduction of Purchase Price. Consequently, the buyer is making correction to the Purchase Price in Counter Offer No. 2, therefore I believe an Addendum to reduce the Purchase Price from $41,000,000 in Counter Offer No. Two (2) to $40,500,000 is a better way than counting his own Counter Offer." Gullixson Decl., Ex. J (grammar and mechanics as in original).

4 The addendum states in whole: "Buyers accepts seller's exclusion list delivered on 5/30/2014, with a purchase price reduction of $500,000.00—total purchase price to be $40,500,000.00. Contract to be fully ratified by acceptance of this addendum." Lam Decl., Ex. E (grammar and mechanics as in original).

5 Kum Tat contends that I have already held that the parties entered a binding contract. Mot. 4; Reply 4–5. Kum Tat is wrong. I previously held that there was no enforceable contract, regardless of whether a contract was formed. The issue of contract formation was not squarely before me. It is now. For the reasons stated below, I conclude that no contract was formed.

6 In its briefing on the motion to expunge lis pendens, Kum Tat argued the review and approve clause was properly characterized as an agreement to agree. *See* Dkt. No. 27 at 8–10. Although Kum Tat does not renew this argument in the instant motion, an agreement to agree remains a plausible characterization of the review and approve clause.

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2014 WL 2903752
Only the Westlaw citation is currently available.
United States District Court, N.D. California.
San Jose Division

David Tompkins, an individual, on behalf of himself and others similarly situated, Plaintiffs,
v.
23andMe, Inc., Defendant.

Case Nos. 5:13-CV-05682-LHK, 5:14-CV-00294-LHK, 5:14-CV-00429-LHK, 5:14-CV-01167-LHK, 5:14-CV-01191-LHK, 5:14-CV-01258-LHK, 5:14-CV-01348-LHK, 5:14-CV-01455-LHK | Signed June 25, 2014

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ORDER GRANTING OMNIBUS MOTION TO COMPEL ARBITRATION

LUCY H. KOH, United States District Judge

***1** This case involves putative class action claims related to Defendant 23andMe, Inc.'s ("23andMe") advertising and marketing of its Personal Genome Service. 23andMe filed an Omnibus Motion to Compel Arbitration and to Dismiss or Alternatively Stay the Action in Favor of Arbitration. ECF Nos. 69, 69–1 ("Mot."). Plaintiffs oppose the Motion. ECF No. 103 ("Opp'n"). 23andMe filed a Reply in support of the Motion. ECF No. 104 ("Reply").

Having considered the parties' arguments, the Court found this matter appropriate for resolution without a hearing pursuant to Civil Local Rule 7–1(b). Because the Court determines that Plaintiffs' claims must be arbitrated, the Court hereby GRANTS 23andMe's motion to compel arbitration and DISMISSES all of Plaintiffs' claims without prejudice.

I. BACKGROUND

A. Factual Allegations

1. Personal Genome Service ("PGS") and the FDA Warning Letter

23andMe is a personal genetics company founded in 2006 that offers to provide customers hereditary information from a genetic sample. *See* ECF No. 23–1. The product at issue in the instant case is 23andMe's Personal Genome Service ("PGS"). PGS is a service that consists of a DNA saliva collection kit ("DNA kit") and DNA test results with certain genetic information derived from a customer's saliva sample. To use PGS, customers first purchase DNA kits online at 23andMe's website, http://www.23andMe.com. [1] The price of a DNA kit is currently $99, not including shipping fees. Upon purchase, 23andMe ships the DNA kit to the customer with a pre-addressed return box and instructions on how to return a saliva sample to 23andMe. *Id.* 23andMe then receives the saliva sample and has the DNA tested at a certified laboratory. When 23andMe receives the DNA results from the laboratory,

23andMe posts the customer's DNA information online to the customer's personal genome profile. The customer receives an e-mail notification when DNA results are ready to view. *Id.*

*2 The DNA results from PGS have had two components: the health component and the ancestry component. ECF No. 23–8. The health component informs customers about how their genetics impact their health by providing data on health risks, inherited conditions, drug responses, and genetic traits. *Id.* The ancestry component offers a variety of features such as tracing ancestry and identifying relatives, including a DNA comparison to other 23andMe users. *Id.*

On November 22, 2013, the Food and Drug Administration ("FDA") sent a "Warning Letter" to 23andMe. ECF No. 103–2. The letter informed 23andMe that the company was violating the Food, Drug and Cosmetic Act by selling PGS without marketing clearance or approval. The FDA detailed a number of concerns with the health component of PGS. The letter further noted that 23andMe had expanded the uses of PGS beyond those submitted to the FDA and broadened its marketing campaigns without FDA authorization. *Id.* The FDA required 23andMe to discontinue marketing PGS until 23andMe received marketing clearance and approval for the product. *Id.* On December 6, 2013, 23andMe stopped offering the health component of PGS to new customers. *See* Tompkins Compl. (ECF No. 1) ¶ 1. The FDA allowed 23andMe to continue to provide new customers with the ancestry component of PGS in addition to raw genetic data. *See* Mot. at 2. Customers who purchased PGS before November 22, 2013 could receive their initial health results without updates. *Id.* at 3. According to the company's website, 23andMe now provides full refunds to anyone who purchased a DNA kit between November 22, 2013 and December 5, 2013.

2. 23andMe's Terms of Service

The present dispute about arbitration of the Plaintiffs' claims turns on a purported agreement between the parties. The last section of 23andMe's online Terms of Service ("TOS") is a "Miscellaneous" section numbered 28. Section 28b of this Miscellaneous section is an arbitration provision that reads as follows:

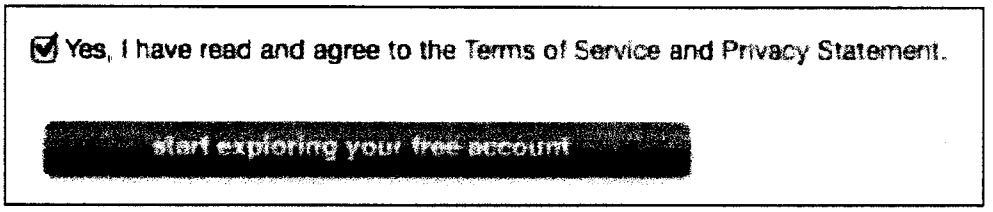
> **Applicable law and arbitration.** Except for any disputes relating to intellectual property rights, obligations, or any infringement claims, any disputes with 23andMe arising out of or relating to the Agreement ("**Disputes**") shall be governed by California law regardless of your country of origin or where you access 23andMe, and notwithstanding of any conflicts of law principles and the United Nations Convention for the International Sale of Goods. Any Disputes shall be resolved by final and binding arbitration under the rules and auspices of the American Arbitration Association, to be held in San Francisco, California, in English, with a written decision stating legal reasoning issued by the arbitrator(s) at either party's request, and with arbitration costs and reasonable documented attorneys' costs of both parties to be borne by the party that ultimately loses. Either party may obtain injunctive relief (preliminary or permanent) and orders to compel arbitration or enforce arbitral awards in any court of competent jurisdiction.

ECF No. 70–10 § 28b (the "arbitration provision"). At all relevant times, the TOS have been accessible via hyperlink at the bottom of 23andMe's homepage under the heading "LEGAL." ECF No. 22–3. The user must scroll through a significant amount of information to view the TOS hyperlink at the bottom of the homepage. Other pages such as "Refund Policy" and "Privacy Policy" also include the TOS hyperlink, but reference to the TOS never appears in the text, sidebar, or at the top of the webpage prior to purchase of a DNA kit. The TOS hyperlink appears at the bottom of many, but not all, of 23andMe's website pages. The words always appear in standard font size, in blue or gray font, on a white background.

*3 When customers buy and obtain PGS, they perform two steps on 23andMe's website. First, a customer must order and pay for a DNA kit. The ordering webpage has no requirement that customers view the TOS or click to accept the TOS. In other words, customers can enter their payment information and purchase DNA kits online without seeing the TOS. *See* Opp'n at 4. The only opportunity for a full refund is a 60–minute cancellation window after purchase. *See* ECF 103–2 Ex. 4 ("The cancellation option is available for 60 minutes after you place your order from both the order confirmation page and the order confirmation email."). Customers can receive partial refunds within 30 days of purchase, provided they have not already sent their saliva to the laboratory. *Id.* Customers have 12 months from the date of purchase to use the DNA kit.

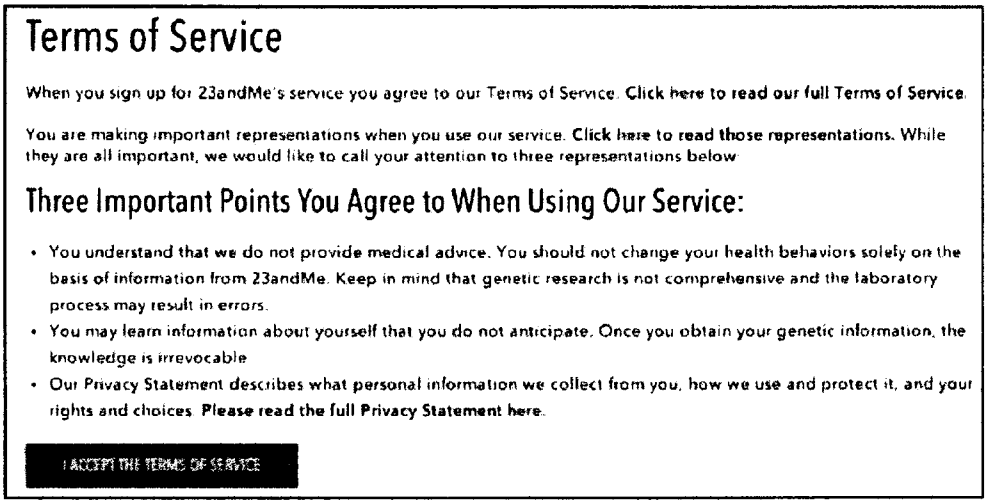
Second, after purchase of a DNA kit, in order to send in a DNA sample to the laboratory and receive genetic information, customers must both create accounts and register their DNA kits online. *See* Hillyer Decl. (ECF No. 71) ¶ 3. The account creation page requires customers to check a box

next to the line, "Yes, I have read and agree to the Terms of Service and Privacy Statement." The TOS and Privacy Statement appear in blue font and are hyperlinks to the full terms:



Hillyer Decl. ¶ 4, Ex. A.

Similarly, during the registration process, customers must view a page with the title "To continue, accept our terms of service" written in large font at the top of the page. The registration page provides a hyperlink to the full TOS next to the line: "When you sign up for 23andMe's service you agree to our Terms of Service. Click here to read our full Terms of Service." Customers must then click a large blue icon that reads "I ACCEPT THE TERMS OF SERVICE" before finishing the registration process and receiving their DNA information:



Hillyer Decl. ¶ 5, Ex. B. As explained below, all named Plaintiffs in the instant action created accounts and registered their DNA kits online. *See* ECF No. 105 ¶ 2. However, it is possible for a customer to buy a DNA kit, for example, as a gift for someone else, so that the purchasing customer never needs to create an account or register the kit, and thus is never asked to acknowledge the TOS.

B. Procedural History

Following the FDA letter, between November 27, 2013 and March 27, 2014, multiple Plaintiffs filed class action complaints against 23andMe across several venues, alleging a variety of claims related to false advertising, unfair competition, and consumer protection. All pending litigations in federal district courts have been transferred to this Court and consolidated for pretrial purposes. *See* ECF Nos. 28, 33, 45 (orders consolidating cases). Additionally, according to the parties, there are at least three arbitrations pending before the American Arbitration Association ("AAA") involving class claims. *See* ECF No. 53 at 8 (listing proceedings); Mot. at 4.

On February 25, 2014, in the case involving Plaintiff David Tompkins (No. 13–CV–05682), 23andMe moved to compel arbitration. ECF No. 20. The parties agreed to postpone briefing and resolution of that motion pending transfer and consolidation of the other co-pending litigations. ECF No. 25. 23andMe subsequently withdrew its initial motion regarding arbitration and, on April 28, 2014, filed the current "omnibus" motion to compel all Plaintiffs to arbitrate all claims. ECF No. 69. On May 28, 2014, Plaintiffs filed an Opposition. ECF No. 103. On June 4, 2014, 23andMe filed a reply. ECF No. 104. Additionally, following briefing and argument, the Court

appointed interim class counsel on May 14, 2014. ECF No. 100.

II. LEGAL STANDARDS

A. Federal Arbitration Act

*4 The Federal Arbitration Act ("FAA") applies to arbitration agreements in any contract affecting interstate commerce. *See Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 119 (2001); 9 U.S.C. § 2. Enacted for the purpose of making valid and enforceable written agreements to arbitrate disputes, the FAA embodies "the basic precept that arbitration 'is a matter of consent, not coercion.' " *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S.Ct. 1758, 1773 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 479 (1989)). In accordance with this principle, the Supreme Court has held that parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 628 (1985); to arbitrate according to specific rules, *Volt,* 489 U.S. at 479; and to limit with whom a party will arbitrate its disputes, *Stolt–Nielsen,* 130 S.Ct. at 1773. Section 4 of the FAA ensures that " 'private agreements to arbitrate are enforced according to their terms,' " *id.* (quoting *Volt,* 489 U.S. at 479), by expressly authorizing a party to an arbitration agreement to petition a U.S. District Court for an order directing that "arbitration proceed in the manner provided for in such agreement," 9 U.S.C. § 4. In addition, the FAA contains a mandatory stay provision. *Id.* § 3.

Under the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Arbitration is a matter of contract, and the FAA places arbitration agreements "on an equal footing with other contracts." *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. 63, 67 (2010). The interpretation of an arbitration agreement is therefore generally a matter of state law, *see Arthur Andersen LLP v. Carlisle,* 129 S.Ct. 1896, 1901–02 (2009), unless application of state-law rules would "stand as an obstacle to the accomplishment of the FAA's objectives," *AT & T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1748 (2011).

B. Arbitrability

Parties can agree to delegate arbitrability—or "gateway" issues concerning the scope and enforceability of the arbitration agreement, and whether the dispute should go to arbitration at all—to the arbitrator. The Supreme Court has held that the question of "who has the power to decide arbitrability," the court or the arbitrator, "turns upon what the parties agreed about *that* matter." *First Options of Chicago v. Kaplan,* 514 U.S. 938, 943 (1995) (emphasis in original). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent –A–Center,* 561 U.S. at 70. The Supreme Court recognizes a heightened standard for an arbitrator to decide arbitrability issues. *See AT & T Techs. v. Commc'ns Workers,* 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."); *Kaplan,* 514 U.S. at 944 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."). *Rent–A–Center* acknowledges that while courts may consider enforceability challenges that are specific to the delegation clause in an arbitration agreement, the arbitrator is to consider challenges to the arbitration agreement as a whole. 561 U.S. at 73. In cases where the parties "clearly and unmistakably intend to delegate the power to decide arbitrability to an arbitrator," the Court's inquiry is "limited ... [to] whether the assertion of arbitrability is 'wholly groundless.' " *Qualcomm Inc. v. Nokia Corp.,* 466 F.3d 1366, 1371 (Fed.Cir.2006) (applying Ninth Circuit law).

C. Unconscionability

*5 When evaluating defenses to arbitration agreements, such as unconscionability, courts generally apply state contract law. *See Arthur Andersen,* 129 S.Ct. at 1901–02; 9 U.S.C. § 2. In this case, California law governs 23andMe's arbitration agreement. *See* TOS § 28b ("any disputes ... shall be governed by California law"). Under California law, "unconscionability has both a 'procedural' and a 'substantive' element." *Armendariz v. Found. Health Psychcare Servs., Inc.,* 24 Cal.4th 83, 114 (2000) (citation omitted). California courts have explained the interplay between procedural and substantive unconscionability as follows:

> The procedural component focuses on the factors of oppression and surprise. Oppression results where there is no real negotiation of contract terms because of unequal bargaining power. "Surprise" involves the extent

> to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. The substantive component of unconscionability looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner. To be unenforceable there must be both substantive and procedural unconscionability, though there may be an inverse relation between the two elements.

Patterson v. ITT Consumer Fin. Corp., 14 Cal.App. 4th 1659, 1664 (1993) (citations omitted).

III. DISCUSSION

The parties dispute several issues regarding the TOS. The Court addresses these in turn, starting with whether a contract between the parties exists at all.

A. Existence of Agreement

Plaintiffs contend that there is no valid arbitration agreement because (1) they did not agree to the TOS when they purchased the DNA kits, and (2) they received no consideration for agreeing to the TOS when they subsequently created accounts or registered their kits. *See* Opp'n at 14–16. 23andMe responds that the TOS are valid and enforceable clickwrap agreements that each named Plaintiff accepted by clicking a box or button on the website. *See* Reply at 13–15. The Court agrees with Plaintiffs that they did not agree to the TOS at the purchasing stage, but agrees with 23andMe that the TOS took effect upon account creation and/or registration.

1. Agreement Upon Purchase

Plaintiffs first argue that they never agreed to the TOS when they purchased PGS. As explained above, Plaintiffs' reference to the "PGS" conflates two items: the physical DNA kits and the subsequent provision of genetic information. Customers perform a bifurcated transaction in which they purchase the DNA kit online, and then obtain hereditary data after creating an account, registering the kit, and submitting a saliva sample. Here, Plaintiffs contend that 23andMe did not provide the TOS "as part of the checkout process" (Opp'n at 16), which implicates the step of buying the DNA kits. The Court agrees that the TOS were not effective upon purchase of the kits.

The existence of an agreement between 23andMe and its customers implicates the law of Internet-based contract formation. An increasing number of courts and commentators have addressed the circumstances under which parties may form contracts online. In particular, "shrinkwrap," "clickwrap," and "browsewrap" agreements are relevant here. A shrinkwrap agreement generally refers to a situation where a customer buys and receives a product, the written agreement is presented with the product after purchase, and the customer implicitly accepts by opening and keeping the product. *See Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 32 (2d Cir.2002). A clickwrap agreement "presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon." *Id.* at 22 n.4 (quotation and citation omitted). By contrast, as this Court recently explained:

> *6 Browsewrap agreements are those that purport to bind the users of websites to which the agreements are hyperlinked. Generally, the text of the agreement is found on a separate webpage hyperlinked to the website the user is accessing. The browsewrap agreements are generally entitled "Terms of Use" or "Terms of Service." The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists.

Be In, Inc. v. Google Inc., No. 12–CV–03373–LHK, 2013 U.S. Dist. LEXIS 147047, at *23 (N.D.Cal. Oct. 9, 2013). Courts have enforced certain clickwrap and browsewrap agreements, depending on the nature of the parties, type of notice provided, and other factors. *See generally* Mark A. Lemley, *Terms of Use*, 91 Minn. L.Rev. 459, 459–60 (2006). In general, courts enforce inconspicuous browsewrap agreements only when there is evidence that the user has actual or constructive notice of the site's terms. *See Sw. Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06–CV0891–B, 2007 WL 4823761 (N.D.Tex. Sept. 12, 2007); *see also* Lemley, *supra*, at 477 ("Courts may be willing to overlook the

utter absence of assent only when there are reasons to believe that the defendant is aware of the plaintiff's terms.").

Here, at the purchase stage, the TOS on 23andMe's website closely resembled a browsewrap agreement and provided insufficient notice to customers who bought DNA kits. There is no dispute that 23andMe's website did not require customers to acknowledge the TOS during purchase. 23andMe does not specifically argue that Plaintiffs accepted the TOS upon purchasing the kits, but does argue that it was "impossible to register for and receive the Service without clicking **'I ACCEPT'** to the TOS." Reply at 15. However, 23andMe uses the term "Service" ambiguously in its briefs and in the TOS. The TOS provides the following definition:

> "Service" or "Services" means 23andMe's *products,* software, services, *and website* (including but not limited to text, graphics, images, and other material and information) as accessed from time to time by the user, *regardless if the use is in connection with an account or not.*

TOS § 1 (emphases added). The TOS also states: "You can accept the TOS by ... *actually using the Services.*" *Id.* § 2 (emphasis added). Thus, according to the plain language of the TOS, a customer accepted the terms merely by using a product (such as the DNA kit) or visiting the website, even without creating an account. As a result, 23andMe's contention in its Reply that it was "impossible to ... receive *the Service* without clicking **'I ACCEPT'**" (italics added) is misleading.

23andMe cannot rely on purported acceptance of the TOS upon purchase to demonstrate a valid agreement. As explained above, during checkout, the website did not present or require acceptance of the TOS. Rather, the only way for a customer to see the TOS at that stage was to scroll to the very bottom of the page and click a link under the heading "LEGAL." *See* Hillyer Decl. ¶ 6, Ex. C. Such an arrangement provided insufficient notice to customers and website visitors. For example, in *Be In,* this Court held that "mere use of a website" could not demonstrate users' assent, and that the "mere existence of a link" failed to notify users of terms of service. 2013 U.S. Dist. LEXIS 147047, at *33. Other courts have held that similar browsewrap-style agreements are ineffective. *E.g., Specht,* 306 F.3d at 20, 32 (finding that a "reasonably prudent Internet user" would not have seen "a reference to the existence of license terms on a submerged screen"); *Jerez v. JD Closeouts, LLC,* 943 N.Y.S.2d 392, 398 (Dist.Ct.2012) ("[E]-commerce merchants cannot blithely assume that the inclusion of sale terms, listed somewhere on a hyperlinked page on its website, will be deemed part of any contract of sale."); *Hines v. Overstock.com, Inc.,* 668 F.Supp.2d 362, 367 (E.D.N.Y.2009) *aff'd,* 380 F. Fed.Appx. 22 (2d Cir.2010) (holding online retail store did not provide adequate notice when the website did not prompt customer to review the site's "Terms and Conditions" and the link to the terms was not prominently displayed). 23andMe's customers may have been unfamiliar with the website, and the website's layout never directed customers to view the TOS prior to purchase. Thus there is no evidence that Plaintiffs had or should have had knowledge of the TOS when they purchased their DNA kits online.

*7 Accordingly, 23andMe's TOS would have been ineffective to bind website visitors or customers who only purchased a DNA kit without creating an account or registering a kit. The Court finds that 23andMe's practice of obscuring terms of service until after purchase—and for a potentially indefinite time—is unfair, and that a better practice would be to show or require acknowledgement of such terms at the point of sale.

2. Post–Purchase Agreement

Plaintiffs next argue that any acceptance of the TOS after the purchasing stage was also ineffective for multiple reasons. The Court addresses each of these arguments.

Initially, Plaintiffs imply that none of the named Plaintiffs ever clicked "I ACCEPT" to the TOS, claiming that "23andMe has not submitted competent evidence that plaintiffs ever agreed to the Terms of Service." Opp'n at 16. This argument is unavailing. Plaintiffs rely on *Comb v. PayPal, Inc.,* but in that case, the parties disputed whether the relevant agreement contained an arbitration provision at certain times, which is not at issue here. 218 F.Supp.2d 1165, 1171–72 (N.D.Cal.2002). Plaintiffs do not dispute that the 23andMe website requires each person who creates an account or registers a kit to indicate acceptance of the TOS before receiving any test results, nor do Plaintiffs dispute that the TOS contained the same arbitration provision at all relevant times. Various Plaintiffs have alleged that they received test results after purchasing kits. *See, e.g.,* Tompkins Compl. ¶ 15; Dilger Decl. (ECF No. 103–3) ¶¶ 5–6. Thus, these Plaintiffs must have clicked "I ACCEPT

THE TERMS OF SERVICE" when creating an account and registering. Plaintiffs also submit a declaration from named Plaintiff Vernon Stanton stating that he in fact agreed to the TOS. *See* Stanton Decl. (ECF No. 103–4) ¶¶ 4–5. Moreover, 23andMe has submitted records with its Reply showing that each named Plaintiff created an account and registered a kit. *See* Hillyer Supp. Decl. (ECF No. 105) ¶ 2, Exs. A–M; Reply at 14 n.20. Other courts have found that user access to portions of websites that require indicating assent to be sufficient evidence that the user clicked "I Accept." *See Feldman v. Google, Inc.*, 513 F.Supp.2d 229, 237 (E.D.Pa.2007) ("Clicking 'Continue' without clicking the 'Yes' button would have returned the user to the same webpage. If the user did not agree to all of the terms, he could not have activated his account, placed ads, or incurred charges."). Thus, Plaintiffs cannot credibly claim ignorance as to whether they actually clicked the appropriate checkboxes.

Next, Plaintiffs argue that any post-purchase acceptance of the TOS (during account creation or registration) was ineffective because customers had by then already paid for the DNA kits and received no additional consideration for accepting the TOS. *See* Opp'n at 17. Plaintiffs contend that the TOS was either a clickwrap agreement that lacked adequate consideration, or a shrinkwrap agreement that provided "no adequate right to return the product." *Id.* 23andMe responds that customers received adequate consideration in the form of 23andMe's agreement to arbitrate and certain intellectual property concessions. *See* Reply at 14–15. The parties also disagree as to whether post-purchase agreement to the TOS constituted a clickwrap or browsewrap agreement, as courts have tended to enforce the former but not the latter. *Compare* Opp'n at 17 *with* Reply at 15; *see also* Lemley, *supra,* at 459–60.

***8** The Court concludes that there was adequate consideration for customers' acceptance of the TOS post-purchase. Under California contract law (which governs under the TOS and is not disputed by the parties), "[a] written instrument is presumptive evidence of a consideration," Cal. Civ.Code § 1614, and "all the law requires for sufficient consideration is the proverbial 'peppercorn,' " *San Diego City Firefighters, Local 145 v. Bd. of Admin.*, 206 Cal.App. 4th 594, 619 (2012). The Ninth Circuit has held, in the employment context and under California law, that a "promise to be bound by the arbitration process itself serves as adequate consideration." *Circuit City Stores, Inc. v. Najd,* 294 F.3d 1104, 1108 (9th Cir.2002). Under this precedent, 23andMe's agreement to accept arbitration provided acceptable consideration to its customers. The TOS also provided certain rights to customers, such as a "limited license" to use 23andMe's "Services" as defined in the agreement. *See* TOS ¶ 9. Furthermore, in exchange for clicking "I ACCEPT," customers received the health and ancestry results from their DNA samples. Accordingly, Plaintiffs received sufficient consideration for agreeing to the TOS.

The Court also determines that Plaintiffs received adequate notice regarding the TOS. As noted above, during the account creation and registration processes, each named Plaintiff clicked a box or button that appeared near a hyperlink to the TOS to indicate acceptance of the TOS. In this respect, the TOS resemble clickwrap agreements, where an offeree receives an opportunity to review terms and conditions and must affirmatively indicate assent. *See Specht,* 306 F.3d at 22 n.4. The fact that the TOS were hyperlinked and not presented on the same screen does not mean that customers lacked adequate notice. For example, in *Fteja v. Facebook, Inc.*, the court dealt with a similar website agreement that required users to click "Sign Up" and presented only a link to the relevant terms and conditions. 841 F.Supp.2d 829, 834–35 (S.D.N.Y.2012). The court noted that the agreement possessed characteristics of both clickwrap and browsewrap agreements: "Thus Facebook's Terms of Use are somewhat like a browsewrap agreement in that the terms are only visible via a hyperlink, but also somewhat like a clickwrap agreement in that the user must do something else—click 'Sign Up'—to assent to the hyperlinked terms. Yet, unlike some clickwrap agreements, the user can click to assent whether or not the user has been presented with the terms." *Id.* at 838. Nevertheless, *Fteja* concluded that the website provided adequate notice because courts have long upheld contracts where "the consumer is prompted to examine terms of sale that are located somewhere else." *Id.* at 839; *see also Swift v. Zynga Game Network, Inc.*, 805 F.Supp.2d 904, 911–12 (N.D.Cal.2011) (enforcing arbitration clause where "Plaintiff was provided with an opportunity to review the terms of service in the form of a hyperlink immediately under the 'I accept' button").

Plaintiffs' analogy to a typical shrinkwrap agreement—and a supposed requirement to provide a full refund—is misplaced here. Plaintiffs argue that the TOS resemble a shrinkwrap agreement because the customer received terms only after paying for the product. In *ProCD, Inc. v. Zeidenberg,* one of the seminal cases on shrinkwrap contracts, the Seventh

Circuit upheld such contracts in part because the customers there had "a right to return the software for a refund if the terms are unacceptable." 86 F.3d 1447, 1451 (7th Cir.1996). Here, 23andMe's Refund Policy was restrictive: customers could "cancel" (receive a full refund) only within 60 minutes of purchasing a DNA kit, and could obtain a partial refund "subtracting a) $25 per kit and b) your original shipping and handling charges" only within 30 days of purchase and before the laboratory received a DNA sample. ECF No. 103–2 Ex. 4. However, the shrinkwrap analogy does not apply here because 23andMe does not argue that the TOS took effect when customers failed to return the DNA kits after a certain period. In typical shrinkwrap cases, the customer tacitly accepts contractual terms by not returning the product within a specified time. *E.g., Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir.1997) (upholding contract that became effective when customer did not return product within 30 days). In this case, each named Plaintiff actually agreed to the TOS by affirming "I ACCEPT THE TERMS OF SERVICE," not by keeping the DNA kit beyond a certain time.[2] Thus, Plaintiffs' argument that 23andMe's refund policy was too restrictive does not negate their affirmative assent to the TOS. Certain named Plaintiffs claim not to remember seeing the TOS or Section 28b (the arbitration agreement). *See* Stanton Decl. ¶¶ 5–6; Dilger Decl. ¶¶ 5–6. Even if true, that does not change the fact that they received adequate notice of the relevant terms and clicked the "I ACCEPT THE TERMS OF SERVICE" button. *See, e.g., Merkin v. Vonage Am. Inc.*, No. 2:13–cv–08026, 2014 U.S. Dist. LEXIS 14055, at *8 (C.D.Cal. Feb. 3, 2014) ("But plaintiffs' failure of recollection as to whether or not they agreed to the TOS does not create a genuine dispute in light of Vonage's evidence that agreeing to the TOS is required during the registration process."). Furthermore, California contract law is clear that "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 89 Cal.App. 4th 1042, 1049 (2001).

***9** For the reasons above, the Court concludes that the named Plaintiffs accepted the TOS when they created accounts or registered their DNA kits, and rejects Plaintiffs' argument that no arbitration agreements exist with 23andMe.

B. Arbitrability

Plaintiffs argue that the arbitration provision in the TOS is unconscionable and cannot be enforced. However, 23andMe contends that this Court cannot decide unconscionability because the arbitration provision delegates those issues to an arbitrator, such that questions of arbitrability must themselves be arbitrated. *See* Mot. at 1–6. The Court concludes that the arbitration provision fails to show that the parties clearly and unmistakably consented to delegate arbitrability, and that the Court must decide Plaintiffs' unconscionability defense.

1. Applicable Law

The parties dispute even the threshold question of what law applies to determine if questions of arbitrability must go to a court or an arbitrator. Plaintiffs' position is that California law applies to this issue because the arbitration provision says that "any disputes with 23andMe arising out of or relating to the Agreement (**"Disputes"**) shall be governed by California law." *See* Opp'n at 6 (emphasis in original). 23andMe responds that federal law applies because federal courts have resolved the issue of delegation of arbitrability without expressly relying on state law. *See* Reply at 1–2.

The Court concludes that the federal law of arbitrability applies in these circumstances. Interpretation of arbitration agreements generally turns on state law. *See Arthur Andersen*, 129 S.Ct. at 1901–02. However, the U.S. Supreme Court has held that "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute," and that "[t]he court is to make this determination by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Mitsubishi*, 473 U.S. at 626. In the Ninth Circuit, parties may agree "to have arbitrability governed by nonfederal arbitrability law," but this requires "clear and unmistakable evidence" of the parties' intent to do so. *Cape Flattery Ltd. v. Titan Maritime*, 647 F.3d 914, 921 (9th Cir.2011) ("Courts should apply federal arbitrability law absent 'clear and unmistakable evidence' that the parties agreed to apply non-federal arbitrability law.").

In this case, federal arbitrability law applies presumptively because the parties agree that the FAA covers the TOS arbitration provision. *See* 9 U.S.C. § 2 (FAA applies to "a contract evidencing a transaction involving commerce"). The TOS arbitration provision does not clearly and unmistakably show that California law of arbitrability should apply because it states only that disputes "arising out of or relating to the Agreement" are governed by California law. In *Cape Flattery*, the Ninth Circuit held that nearly identical language—a provision that "[a]ny dispute arising under this

Agreement shall be settled by arbitration ... in accordance with the English Arbitration Act 1996"—was "ambiguous concerning whether English law also applies to determine whether a given dispute is arbitrable in the first place." 647 F.3d at 921. By the same token, the 23andMe provision is similarly "ambiguous" because it does not expressly designate the law that governs arbitrability, and thus federal arbitrability law applies by default. [3]

2. Incorporation of AAA Rules

*10 23andMe's primary argument is that any challenges to the validity of the TOS arbitration provision—including Plaintiffs' unconscionability theories—are questions that the parties delegated to an arbitrator, and not the courts. 23andMe bases this argument on the reference to the AAA rules in Section 28b (the arbitration provision) of the TOS.

The TOS arbitration provision refers to the "rules and auspices of the American Arbitration Association." TOS § 28b. However, there are multiple layers of ambiguity about which AAA rules govern. The AAA maintains multiple sets of rules for different types of disputes, such as commercial, consumer, and employment. *See* https://www.adr.org/aaa/faces/rules. Section 28b does not identify any of these specific rules. Even 23andMe's counsel is inconsistent about which AAA rules apply. In its opening brief, 23andMe takes the position that the AAA Commercial Arbitration Rules apply to Plaintiffs' claims. *See* Mot. at 7 n.4. However, in its Reply, 23andMe states that the Commercial Arbitration Rules would be "supplemented by the AAA's Supplementary Procedures for Consumer–Related Disputes." Reply at 3 n.4, 12.

The AAA rules themselves indicate that one or more sets of rules may apply, at the AAA's discretion. Rule R–1(a) of the AAA's Commercial Arbitration Rules and Mediation Procedures ("Commercial Rules") states that the Commercial Rules apply when the parties refer generically to AAA rules but do not specify a particular ruleset:

> The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules.

AAA, "Commercial Arbitration Rules and Mediation Procedures" at 10 (effective Oct. 1, 2013), *available at:* http://go.adr.org/LP=307. However, Rule C–1(a) of the AAA's Supplementary Procedures for the Resolution of Consumer–Related Disputes ("Consumer Rules") states that both the Commercial and Consumer Rules apply to "an agreement between a consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers." AAA, "Supplementary Procedures for the Resolution of Consumer–Related Disputes" at 8 (effective Mar. 1, 2013), *available at:* https:// www.adr.org/aaa/faces/aoe/gc/consumer. However, Rule C–1(a) further states that "[t]he AAA will have the *discretion to apply or not to apply* the Supplementary Procedures." *Id.* (emphasis added). Accordingly, in the instant case, there are at least two ambiguities in the arbitration provision's reference to the AAA rules: lack of identification of specific AAA rules, and uncertainty as to whether the Consumer Rules apply in addition to the Commercial Rules.

Under the AAA's Commercial Rules, Rule R–7(a) states that the arbitrator decides questions of arbitrability: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." *Id.* at 13. Based on these rules, 23andMe claims that the TOS require an arbitrator to decide arbitrability.

*11 In recent years, case law has developed regarding how courts should determine if questions of arbitrability should go to an arbitrator. The default rule is that courts adjudicate arbitrability: "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT & T Techs.*, 475 U.S. at 649. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Kaplan*, 514 U.S. at 944 (citation omitted). However, parties can agree to arbitrate arbitrability through a so-called delegation provision in a contract. "The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent–A–Center*, 561 U.S. at 68.

More specifically, an arbitration agreement can incorporate a delegation provision by referencing separate arbitration rules that provide for delegation. Generally, when the

contracting parties are commercial entities, incorporation of AAA rules in an arbitration agreement constitutes "clear and unmistakable evidence" that the parties intended to arbitrate arbitrability because—as explained above—Rule R–7(a) of the Commercial Arbitration Rules transfers that responsibility to the arbitrator. *E.g., Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir.2005).

However, Plaintiffs advocate a different result in the consumer context. Plaintiffs contend that "nearly all" cases finding that an arbitrator must decide arbitrability as a result of the AAA rules "involve transactions between sophisticated commercial entities," while none involves "a consumer who has no understanding of the 'rules and auspices of the American Arbitration Association.' " Opp'n at 13–14. Plaintiffs also point out that the arbitration provision lacks an express delegation provision on its face, so a consumer would have to look up the AAA rules to find Rule R–7(a). *See id.* at 10. In response, 23andMe argues that there is no recognized exception for consumers. *See* Reply at 3.

In this case, the Court agrees with Plaintiffs that a bare reference to the AAA rules in 23andMe's online contract does not show that the parties clearly and unmistakably intended to delegate arbitrability. Less than a year ago, the Ninth Circuit indicated that the principle of incorporating a delegation provision by citing third-party arbitration rules may not apply to consumers. In *Oracle America, Inc. v. Myriad Group A.G.*, the Ninth Circuit addressed the question of whether incorporation of the UNCITRAL (United Nations Commission on International Trade Law) arbitration rules served to delegate arbitrability. 724 F.3d 1069 (9th Cir.2013). Noting that this was "an issue of first impression in the Ninth Circuit," the court surveyed other Circuits' holdings regarding incorporation of both the UNCITRAL and AAA rules, and concluded that incorporation in the contract at issue was effective. *Id.* at 1073–75. However, *Oracle* expressly limited its holding: "We hold that as long as an arbitration agreement is between sophisticated parties to commercial contracts, those parties shall be expected to understand that incorporation of the UNCITRAL rules delegates questions of arbitrability to the arbitrator." *Id.* at 1075. Moreover, the court stated: "We express no view as to the effect of incorporating arbitration rules into consumer contracts." *Id.* at 1075 n.2. Thus, the Ninth Circuit declined to hold that incorporation of arbitration rules shows "clear and unmistakable evidence" of an agreement to delegate arbitrability when consumers are involved.

There is good reason not to extend this doctrine from commercial contracts between sophisticated parties to online click-through agreements crafted for consumers. While incorporation by reference is generally permissible under ordinary contract principles, *see Williams Constr. Co. v. Standard–Pacific Corp.*, 254 Cal.App.2d 442, 454 (1967), incorporation of the AAA rules does not necessarily amount to "clear and unmistakable" evidence of delegation, particularly when the party asked to accept the agreement is a consumer. Indeed, the Supreme Court held that by default, courts should decide arbitrability because the question of "who (primarily) should decide arbitrability" is "rather arcane," and "[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *Kaplan*, 514 U.S. at 945. The "clear and unmistakable" test thus established a "heightened standard" to evince delegation. *Rent–A–Center*, 561 U.S. at 69 n.1.[4]

***12** The California Court of Appeal has expressed strong doubts about whether mere reference to AAA rules provides adequate notice to an individual employee: "In our view, while the incorporation of AAA rules into an agreement might be sufficient indication of the parties' intent in other contexts, we seriously question how it provides clear and unmistakable evidence that an employer and an employee intended to submit the issue of the unconscionability of the arbitration provision to the arbitrator, as opposed to the court." *Ajamian*, 203 Cal.App. 4th at 790. Moreover, "[t]here are many reasons for stating that the arbitration will proceed by particular rules, and doing so does not indicate that the parties' motivation was to announce who would decide threshold issues of enforceability." *Id.*; *see also Patterson*, 14 Cal.App. 4th at 1666 ("While [the National Arbitration Forum]'s rules and fees might be fairly applied to business entities or sophisticated investors and to claims for substantial dollar amounts, those same procedures become oppressive when applied to unsophisticated borrowers of limited means in disputes over small claims."); *A & M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 489 (1982) (noting that businessmen generally have "substantially more economic muscle than the ordinary consumer"). Although California law regarding arbitrability does not control here, the Court finds this reasoning persuasive in the current context, particularly because California courts have indicated that California and federal arbitrability law are congruent. *See supra* n.3.

In other contexts, courts have required specificity when incorporating external arbitration rules to ensure adequate notice. For example, at least one other court in this district has refused to apply Rule R–7(a) in a case involving franchise agreements where the "agreements themselves do not quote this portion of Rule 7, nor do they even refer specifically to Rule 7." *Moody v. Metal Supermarket Franchising Am., Inc.*, No. 13–CV–5098–PJH, 2014 U.S. Dist. LEXIS 31440, at *10 (N.D.Cal. Mar. 10, 2014). The *Moody* Court determined that a reference to the "then current commercial arbitration rules of the AAA" was insufficient evidence of "clear and unmistakable" intent to delegate arbitrability, contrasting this language with an express delegation provision. *Id.* at *1 1. [5]

In addition, a generic reference to the AAA rules does not necessarily incorporate all *future* versions of the rules. In *Gilbert Street Developers, LLC v. La Quinta Homes, LLC,* the disputed arbitration agreement incorporated the AAA rules, but the AAA rule delegating arbitrability did not exist when the agreement was signed. 174 Cal.App. 4th 1185, 1189 (2009). The court refused to enforce the delegation provision because the agreement merely incorporated "the *possibility* of a *future* rule by reference." *Id.* at 1193–94. Thus, courts have recognized that a plain recitation of the AAA rules does not always suffice to delegate arbitrability, even between relatively sophisticated parties.

Returning to the facts here, 23andMe's arbitration provision does not amount to clear and unmistakable evidence of delegation. The agreement states only that "[a]ny Disputes shall be resolved by final and binding arbitration under the rules and auspices of the American Arbitration Association." TOS § 28b. As explained above, 23andMe's website provided minimal notice of the TOS to customers. Critically, the arbitration provision contains no express delegation language, and its mention of the "rules and auspices" of the AAA creates multiple ambiguities about which rules ultimately apply. This language forces a customer to comprehend the import of the "rules and auspices" of the AAA; locate those rules independently; determine that the AAA's Commercial Rules apply by operation of Rule R–1(a); and then specifically identify Rule R–7(a) to learn of the delegation provision. The possibility that the Consumer Rules might also apply creates an additional ambiguity. The problem is further compounded by the fact that the TOS purport to bind users who are never asked to view the TOS and click "I ACCEPT." For example, as noted above, the TOS purport also to bind users who merely visit 23andMe's website even if the user lacks an account. *See* TOS §§ 1, 2, (states that users accept by "actually using the Services," and defining "Services" to include use of the website "regardless if the use is in connection with an account or not").

***13** If it wanted to avoid any doubt about delegation, 23andMe certainly could have included explicit delegation language, or simply reproduced or cited Rule R–7(a). For example, in *Rent–A–Center,* the disputed arbitration agreement had an express delegation clause that stated: " ' [t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.' " 561 U.S. at 66. Although case law holds in the commercial context that express language is not required for the AAA's delegation rules to take effect, *Oracle* declined to extend this result to consumers. 23andMe's arbitration provision does not refer to Rule R–7(a), or even a specific version of the Commercial Rules (as opposed to numerous other AAA rulesets). *See Moody,* 2014 U.S. Dist. LEXIS 31440, at * 10 (finding no delegation even where agreement referred to "then current commercial" rules). Therefore, nothing puts consumers on notice that such a vague reference in the arbitration provision demonstrates their "clear and unmistakable" intent to delegate arbitrability to an arbitrator.

Some jurisdictions have held that incorporation of the AAA rules in a consumer arbitration agreement satisfies the "clear and unmistakable" test for a delegation provision. In *Fallo v. HighTech Institute,* students sued their for-profit vocational school, which sought to enforce an arbitration agreement that incorporated the AAA Commercial Rules. 559 F.3d 874, 877 (8th Cir.2009). The Eighth Circuit held that reference to the AAA rules effectively incorporated Rule R7(a)'s delegation provision. *Id.* at 878. However, *Fallo* is not binding authority and was decided before the Ninth Circuit's *Oracle* decision. Moreover, in *Oracle,* the Ninth Circuit cited *Fallo* when surveying authority from other Circuits; nonetheless, the Ninth Circuit declined to follow *Fallo* and declined to extend the *Oracle* holding to consumers. *See* 724 F.3d at 1074. If the Ninth Circuit had found *Fallo* dispositive in the consumer context, the Ninth Circuit would not have left open the question of whether incorporation of AAA rules delegates arbitrability to an arbitrator. *Id.* at 1075 n.2.

23andMe argues that two of this Court's previous decisions compelling arbitration of arbitrability control the outcome here. *See* Mot. at 7. However, neither case involved consumer

contracts, and both pre-date *Oracle*. In *Guidewire Software, Inc. v. Chookaszian,* this Court addressed an arbitration clause in a letter agreement for a corporate board member to purchase stock options, finding a delegation provision incorporated by reference. No. 12–CV–03224–LHK, 2012 WL 5379589 (N.D.Cal. Oct. 31, 2012). In reaching its holding, this Court relied exclusively on precedent involving arbitration agreements in commercial contract disputes. *See id.* at *4. In *Yahoo! Inc. v. Iversen,* this Court held that an employment agreement's reference to "the then current American Arbitration Association ('AAA') National Rules for the Resolution of Employment Disputes" effectively incorporated a delegation provision requiring an arbitrator to decide arbitrability. 836 F.Supp.2d 1007, 1009 (N.D.Cal.2011). *Guidewire* and *Yahoo!* did not address the consumer context and were issued before the Ninth Circuit in *Oracle* explicitly left open the question of whether the principle that incorporation of AAA rules "clearly and unmistakably" delegates arbitrability to an arbitrator should apply to consumers.

For the foregoing reasons, the Court determines in this case that 23andMe's arbitration provision fails to provide clear and unmistakable proof that the parties agreed to delegate arbitrability. Because the purported delegation provision is ineffective, the Court need not reach the parties' remaining arguments regarding the delegation provision. Accordingly, the Court must decide questions of arbitrability.

3. Unconscionability

Plaintiffs' remaining defense to arbitration is that the arbitration provision is unconscionable under California law. *See* Opp'n at 18–24. As explained above, California contract law governs such defenses to arbitration agreements. [6] "[T]he core concern of unconscionability doctrine is the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Sonic-Calabasas A, Inc. v. Moreno,* 57 Cal.4th 1109, 1145 (2013) (quotations and citations omitted). "[T]he party opposing arbitration bears the burden of proving any defense, such as unconscionability." *Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC,* 55 Cal.4th 223, 236 (2012). For unconscionability, California requires a showing of both procedural and substantive unconscionability, balanced on a sliding scale. *See Patterson,* 14 Cal.App. 4th at 1664 (noting analytical approaches to unconscionability). The Court examines both prongs of unconscionability and determines that overall, the arbitration provision is not unconscionable.

***14** As an initial matter, 23andMe claims that any TOS provisions outside the arbitration provision are irrelevant to unconscionability because they are not part of the arbitration provision itself. *See* Reply at 6; Mot. at 10. The Supreme Court has held that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 445–46 (2006); *see also Rent–A–Center,* 561 U.S. at 71 ("we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene"). California has followed this principle, requiring "a focused challenge to the arbitration provision." *Phillips v. Sprint PCS,* 209 Cal.App. 4th 758, 774 (2012). Accordingly, the Court considers only arguments that apply to the arbitration provision.

a. Procedural Unconscionability

Plaintiffs contend that the arbitration provision is procedurally defective because it is buried at the end of the TOS, 23andMe did not provide customers a copy of the AAA rules, and the TOS give 23andMe the ability to modify the terms unilaterally. *See* Opp'n at 19–20. 23andMe disagrees, arguing that the arbitration provision "was not hidden or difficult to understand," and that customers had a choice of other DNA services. Reply at 8–10. After weighing these arguments, the Court concludes that the provision is procedurally unconscionable.

"Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion." *Armendariz,* 24 Cal.4th at 113. An adhesive contract "signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Id.* (citation omitted). "If the contract is adhesive, the court must then determine whether other factors are present which, under established legal rules—legislative or judicial —operate to render it unenforceable." *Id.* (quotation and citation omitted). California courts also examine the factors of "surprise" and "oppression." "The procedural element of unconscionability ... focuses on two factors: oppression and surprise. Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of

meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." *Tiri,* 226 Cal.App. 4th at 245 (quotations and citations omitted); *see also id.* at 245 n.8 (noting interplay of adhesion and unconscionability).

Under California law, 23andMe's arbitration provision is procedurally unconscionable. As explained above, 23andMe's website provides minimal notice of the TOS to customers. Under the TOS, the arbitration provision supposedly binds any user who visits 23andMe's website or purchases a DNA kit—even though the website does not require those users to acknowledge the TOS. Customers who purchase DNA kits have only a 60–minute window to cancel their orders and receive a full refund. By the time those customers create accounts and register their DNA kits —when 23andMe first requires them to acknowledge the arbitration provision—they have already paid 23andMe, and the cancellation period may have long expired. Furthermore, even if customers locate and click a hyperlink to the TOS, they must hunt for the arbitration provision because the terms appear at the very end of the TOS as a subparagraph to the final section titled "Miscellaneous." *See* TOS § 28. A customer who notices the provision's reference to the "rules and auspices of the American Arbitration Association" must still determine the scope of the provision by searching for those rules, ascertain that the Commercial Rules apply, determine that the Consumer Rules may or may not apply (depending on the AAA's discretion), and identify any objectionable provisions. This opaque arrangement undermines 23andMe's characterization of the arbitration provision as "not hidden or difficult to understand."

***15** These facts render the arbitration provision procedurally unconscionable. The arbitration provision is a contract of adhesion because it is a standardized clause drafted by 23andMe (who has superior bargaining strength relative to consumers) and presented as a take-it-or-leave-it agreement, giving consumers no opportunity to negotiate any terms. *See Gutierrez v. Autowest, Inc.,* 114 Cal.App. 4th 77, 89 (2003) (finding similar terms in consumer car leases indicative of adhesion). The arbitration provision also involves substantial surprise and oppression. Customers received minimal notice of the arbitration provision, and only after handing over their money. Where an arbitration provision is part of a larger contract, California courts have relied on the degree of notice surrounding the contract to assess the procedural unconscionability of the arbitration provision. *E.g., Ajamian,* 203 Cal.App. 4th at 796 ("The finding that the arbitration provision was part of a nonnegotiated employment agreement establishes, *by itself,* some degree of procedural unconscionability." (emphasis added)).

23andMe's arguments are unconvincing. 23andMe contends that the arbitration provision cannot be procedurally unconscionable because the named Plaintiffs actually agreed to the TOS. *See* Reply at 8–9. This conflates the requirements for contract formation with the question of unconscionability. "A contract term may be held to be unconscionable even if the weaker party knowingly agreed to it." *Bruni v. Didion,* 160 Cal.App. 4th 1272, 1289 (2008) (overruled on other grounds). If 23andMe were correct that notice is "legally irrelevant" to procedural unconscionability when the customer in fact agrees (Reply at 8), then no disputed agreement could ever be procedurally unconscionable. Next, 23andMe claims Plaintiffs "had meaningful market alternatives" because there are other DNA testing services. *Id.* at 8 & n.11. However, the court in *Gutierrez* rejected a similar argument that "alternative sources of vehicles were available" because "no evidence was introduced below that other dealers offered automobile lease contracts *without similar arbitration provisions.*" 114 Cal.App. 4th at 89 n.8 (emphasis added); *see also Dean Witter Reynolds v. Sup.Ct.,* 211 Cal.App.3d 758, 772 (1989) (referring to "reasonably available alternative sources of supply from which to obtain the desired goods and services *free of the terms claimed to be unconscionable*" (emphasis added)). 23andMe has not shown that the available alternative services did not also mandate arbitration.

The parties' remaining arguments provide little guidance here. Plaintiffs claim that 23andMe's failure to provide the AAA rules contributes to procedural unconscionability. *See* Opp'n at 20. However, California courts are divided on this issue. *See Lane v. Francis Capital Mgmt. LLC,* 224 Cal.App. 4th 676, 690–92 (2014) (collecting cases); *Tiri,* 226 Cal.App. 4th at 246 n.9 (declining to resolve "whether the failure to attach the AAA rules supports a finding of procedural unconscionability"). Plaintiffs also note that Sections 26 and 28h of the TOS allow 23andMe to unilaterally modify the arbitration provision. *See* Opp'n at 20. Because those provisions are not specific to arbitration, an arbitrator should address them. *See Phillips,* 209 Cal.App. 4th at 774. Even setting aside these arguments, the Court concludes that the arbitration provision was procedurally unconscionable.

b. Substantive Unconscionability

The arbitration provision must also be substantively unconscionable to be deemed unenforceable. Substantive unconscionability arises when a provision is so "overly harsh or one-sided" that it falls outside the "reasonable expectations" of the non-drafting party. *See Gutierrez,* 114 Cal.App. 4th at 88 (quoting *Armendariz,* 24 Cal.4th at 113–14). It is not enough that the terms are slightly one-sided or confer more benefits on a particular party; a substantively unconscionable term must be so unreasonable and one-sided as to "shock the conscience." *Am. Software, Inc. v. Ali,* 46 Cal.App. 4th 1386, 1391 (1996); *see also Malone v. Sup.Ct.,* No. B253891, 2014 Cal.App. LEXIS 524, at *13–14 (June 17, 2014). The Court finds that, although Plaintiffs have established substantial procedural unconscionability, the terms of the arbitration provision as a whole are not substantively unconscionable.

***16** Plaintiffs focus on five arguments: the choice of 23andMe's headquarters (San Francisco) as the arbitration forum; a carve out for any claims by 23andMe, including intellectual property claims; a shortened statute of limitations; 23andMe's right to alter or terminate the arbitration provision without consent or notice; and limitations on the legal remedies available to consumers. *See* Opp'n at 22–23. The Court addresses these in turn and finds that the terms are not so unduly harsh or one-sided that they are substantively unconscionable.

Forum selection: The Court disagrees with Plaintiffs' argument that the choice of San Francisco, California places too heavy a burden on consumers. The Ninth Circuit has held that requiring arbitration "at the location of a defendant's principal place of business" is "presumptively enforceable." *Polimaster Ltd. v. RAE Sys., Inc.,* 623 F.3d 832, 837 (9th Cir.2010). California courts have also held that a forum selection clause should be given effect so long as the choice is reasonable and has "some logical nexus to one of the parties or the dispute." *Am. Online, Inc. v. Sup.Ct.,* 90 Cal.App. 4th 1, 11–12 (2001) (confirming that "California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable"); *see also Intershop Commc'ns, AG v. Sup.Ct.,* 104 Cal.App. 4th 191, 196 (2002). Here, 23andMe is headquartered in Northern California. Although Plaintiffs are a dispersed putative class from across the country who purchased PGS online, they have failed to prove that arbitrating in San Francisco "will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court." *Mitsubishi,* 473 U.S. at 632. Forum selection clauses are ubiquitous in online contracts and have the economic benefits of "favoring both merchants and consumers, including reduction in the costs of goods and services and the stimulation of e-commerce." *Am. Online,* 90 Cal.App. 4th at 12. Additionally, Plaintiffs filed six of the nine related cases in California and voluntarily transferred all cases to San Jose, California. Other plaintiffs with similar claims initiated three arbitration proceedings with the AAA in San Francisco. The fact that numerous plaintiffs chose to assert their claims in Northern California suggests that the stated forum is not overly burdensome or unreasonable.

Plaintiffs rely on *Comb v. PayPal Inc.* to contest the forum-selection clause. 218 F.Supp.2d at 1177. *PayPal* involved a substantively unconscionable contract that mandated arbitration in Santa Clara County, California. However, the court cited forum selection as only one among multiple factors that contributed to substantive unconscionability (including the inability of customers to join or consolidate their claims, which is not at issue here), while acknowledging that "forum selection clauses generally are presumed *prima facie* valid" under California law. *Id.* The plaintiffs there also presented specific information regarding the costs of arbitration. *See id.* at 1176. In this case, given the presumption that forum selection clauses are enforceable, the reality that multiple claims may require arbitration in a common location, and the lack of specific evidence regarding Plaintiffs' likely costs of arbitrating in San Francisco (particularly relative to the costs of litigating in federal court in San Jose), the Court cannot say that San Francisco lacks any "logical nexus to one of the parties or the dispute." *Am. Online,* 90 Cal.App. 4th at 12; *see also King v. Hausfeld,* No. 13–CV–00237–EMC, 2013 WL 1435288, at *15 (N.D.Cal. Apr. 9, 2013) ("Given the location of the firm's headquarters, there is a rational basis for selecting a Washington, D.C. forum.").

***17 Restrictions on claims:** Plaintiffs' second assertion —that the arbitration restrictions do not apply to any claims by 23andMe—is unavailing. Plaintiffs posit that the phrase "any disputes *with* 23andMe" includes only claims *against* 23andMe, so that 23andMe's affirmative claims are not subject to arbitration. This argument is baseless. The arbitration provision plainly applies equally to both parties, and 23andMe does not take the position that this clause is a one-way street. *See, e.g., Bigler v. Harker Sch.,* 213 Cal.App.

4th 727, 737–38 (2013) (rejecting argument that " 'any dispute involving the School' " was a nonmutual restriction). Contrary to Plaintiffs' contention, the arbitration provision is distinguishable from the improper agreement in *Armendariz* that exempted claims by an employer. *See* 24 Cal.4th at 92, 120 ("I agree as a condition of my employment, that in the event my employment is terminated, and *I* contend that such termination was wrongful ...." (emphasis added)). Plaintiffs also argue that the exclusion for intellectual property disputes ("Except for any disputes relating to intellectual property disputes") unfairly favors 23andMe. As explained above, the TOS allows consumers to retain certain intellectual property rights to their genetic and self-reported information. *See* TOS §§ 9, 13. Therefore, consumers may avail themselves of the carve out for intellectual property disputes.

Limitations period and unilateral modification: Plaintiffs' third and fourth arguments depend on contract provisions outside the arbitration provision: the one-year limitations period (TOS § 28d), and 23andMe's ability to "modify, supplement or replace" the terms unilaterally (TOS §§ 26, 28h). However, these provisions are separate from the arbitration provision, and Plaintiffs have not shown how those clauses specifically render the arbitration provision substantively unconscionable. *See Buckeye,* 546 U.S. at 445–46; *Phillips,* 209 Cal.App. 4th at 774.

Fees and costs: Finally, Plaintiffs argue that the agreement unfairly restricts consumers' available remedies because of a fee-shifting provision. *See* TOS § 28b ("with arbitration costs and reasonable documented attorneys' costs of both parties to be borne by the party that ultimately loses"). Plaintiffs argue that this "loser pays" provision disproportionately affects Plaintiffs' costs of arbitration. However, 23andMe represents that it has formally waived any right to recover attorneys' fees and costs at the request of the AAA. *See* Reply at 11.[7] Accordingly, the Court declines to consider whether or not this provision is substantively unconscionable.

The Court has considered the parties' remaining arguments and identifies no additional basis for substantive unconscionability. Plaintiffs challenge the costs of arbitration and the fairness of AAA discovery rules. *See* Opp'n at 21; Reply at 11–12. For purposes of this motion, the Court accepts Plaintiffs' assertion that the filing fee is $975 under the AAA Commercial Rules. However, Plaintiffs fail to show that this fee "shocks the conscience," particularly relative to litigation expenses. Rather, Plaintiffs rely on cases where arbitration fees were orders of magnitude higher. *See Gutierrez,* 114 Cal.App. 4th at 89–91 (administrative fee of $8,000 exceeded plaintiffs' ability to pay); *Parada,* 176 Cal.App. 4th at 1581 ("To arbitrate a claim, each party thus would have to pay at least $20,800, and would have to deposit that amount before the arbitration hearing."). Plaintiffs also fail to show that any discovery limitations would impose a great hardship here. *See Coast Plaza Doctors Hosp. v. Blue Cross of Cal.,* 83 Cal.App. 4th 677, 689 (2000) ("We are not aware of any case that has ever held that an arbitration provision is substantially unconscionable merely because a party's discovery rights are limited in arbitration."). Additionally, Plaintiffs suggest that the delegation provision incorporated from Rule R–7(a) is substantively unconscionable under California law. *See* Opp'n at 7–8. Plaintiffs rely on two California cases that rejected arbitration agreements as unconscionable to the extent they purported to delegate arbitrability via incorporation of the AAA rules. *See Murphy v. Check 'N Go of Cal., Inc.,* 156 Cal.App. 4th 138, 145 (2007); *Ontiveros v. DHL Express (USA), Inc.,* 164 Cal.App. 4th 494, 508 (2008). To the extent Plaintiffs contend that the delegation provision contributes to the unconscionability of the entire arbitration provision, those arguments are misplaced. The California Court of Appeal has recently acknowledged that intervening Supreme Court precedent has overruled *Murphy* and *Ontiveros. See Tiri,* 226 Cal.App. 4th at 248–49; *Malone,* 2014 Cal.App. LEXIS 524, at *32–33.

***18** For these reasons, the Court concludes that the arbitration provision is not substantively unconscionable. Therefore, while the arbitration provision is procedurally defective, Plaintiffs have not met their burden to demonstrate that the provision is both procedurally and substantively unconscionable, as California law requires. Accordingly, the Court enforces the arbitration provision and grants 23andMe's motion.

C. Stay or Dismiss

When arbitration is mandatory, courts have discretion to stay the case under 9 U.S.C. § 3 or dismiss the litigation entirely. *See Sparling v. Hoffman Constr. Co.,* 864 F.2d 635, 638 (9th Cir.1988); *see also Hopkins & Carley, ALC v. Thomson Elite,* No. 10–CV–05806–LHK, 2011 U.S. Dist. LEXIS 38396, at *28 (N.D.Cal. Apr. 6, 2011) ("Where an arbitration clause is broad enough to cover all of a plaintiff's claims, the court may compel arbitration and dismiss the action."). 23andMe has requested dismissal of all claims and does not object to Plaintiffs joining the existing arbitration proceedings. *See* Mot. at 11–12. Plaintiffs are silent as to whether a stay or dismissal would be appropriate.

This Court has previously stayed litigation pending arbitration—instead of dismissing—by agreement of the parties in light of potential concerns about statutes of limitation. *Hopkins & Carley*, 2011 U.S. Dist. LEXIS 38396, at *28–29. Because the parties have identified no such concerns here, and dismissal would render this decision immediately appealable (*see MediVas, LLC v. Marubeni Corp.*, 741 F.3d 4, 7 (9th Cir.2014) ("[A]n order compelling arbitration may be appealed if the district court dismisses all the underlying claims, but may not be appealed if the court stays the action pending arbitration.")), the Court concludes that dismissal is appropriate.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion to Compel Arbitration and dismisses all claims without prejudice. The Clerk shall close the following case files: Nos. 5:13–CV–05682–LHK, 5:14–CV–00294–LHK, 5:14–CV–00429–LHK, 5:14–CV–01167–LHK, 5:14–CV–01191–LHK, 5:14–CV–01258–LHK, 5:14–CV–01348–LHK, and 5:14–CV–01455–LHK.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2014 WL 2903752

Footnotes

1 The parties do not dispute that the key portions of the website have not changed since the relevant times when Plaintiffs allegedly performed the transactions at issue. 23andMe relies on excerpts from a February 2014 version of the website (*see* ECF No. 70–9), while Plaintiffs use excerpts dated April 2014 (*see* ECF No. 103–2). However, the Court takes judicial notice of the Internet Archive (http:// archive.org) version of 23andMe's website as of November 20, 2013, the full version of the website archived right before the FDA warning letter of November 22, 2013 (discussed below). The Court applies the doctrine of incorporation by reference to the instant case. *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994) ("[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss."); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.2005) (taking judicial notice of linked webpages because "a computer user necessarily views web pages in the context of the links through which the user accessed those pages").

2 The result may differ for putative unnamed plaintiffs who only purchased a DNA kit without creating an account or registering the product. As noted above, any such customers were not required to accept the TOS, and did not otherwise receive adequate notice of the TOS, before giving 23andMe their money.

3 Additionally, the recent decision in *Tiri v. Lucky Chances, Inc.*, 226 Cal.App. 4th 231 (2014), suggests that arbitrability should be analyzed similarly under both California and federal law. The California Court of Appeal addressed the issue of delegating arbitrability to the court or an arbitrator, and the question of whether state or federal law applies to that issue. *Id.* at 239. The court stated that "the FAA's applicability is immaterial because our decision in this case would be the same under either the FAA or the CAA [California Arbitration Act]," and noted that California courts "have specifically looked to the FAA when considering delegation clauses and have long held that the rules governing these clauses are the same under both state and federal law." *Id.* at 239–40 (citations omitted).

4 The Supreme Court has not decided whether incorporation by reference of the AAA rules always meets this heightened standard. In *Rent–A–Center*, the employment arbitration agreement contained an express delegation provision, and the parties did not dispute the existence of the delegation provision. Therefore, *Rent–A–Center* did not address whether invocation of AAA rules effectively incorporates a delegation provision by reference, or whether such a provision would bind consumers.

5 Other courts in this district have analyzed this issue in different ways. *See Bernal v. Sw. &* Pac. Specialty Fin., Inc., No. 12–CV–05797–SBA, 2014 U.S. Dist. LEXIS 63338, at *14 (enforcing Rule R–7(a) in an online loan agreement); *Crook v. Wyndham Vacation Ownership, Inc.*, No. 13–CV–03669–WHO, 2013 U.S. Dist. LEXIS 160705, at *4, 16 (N.D.Cal. Nov. 8, 2013) (same, in a time share agreement); *Kimble v. Rhodes Coll., Inc.*, No. 10–CV–05786–EMC, 2011 U.S. Dist. LEXIS 59628, at *7–8 (N.D. Cal. June 2, 2011) (same, in a college enrollment agreement).

6 There are multiple cases pending before the California Supreme Court that may affect California's law on enforceability of arbitration agreements. *See Tiri*, 226 Cal.App. 4th at 243 n.6.

7 A district court has found that as long as fee-shifting provisions apply equally to both parties, as is the case here, the term is enforceable. *See King*, 2013 WL 1435288, at *18 ("[T]he point of a fee shifting clause is that if Plaintiff's claim

proves meritorious, *his* fees would be reimbursed by Defendant. The clause could thus facilitate his ability to vindicate his rights." (emphasis in original)).

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2015 WL 4463672
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Switch, LLC, Plaintiff,
v.
ixmation, Inc., Defendant.

Case No. 15-cv-01637-MEJ | Signed 07/21/2015

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ORDER DENYING MOTION TO COMPEL ARBITRATION

MARIA-ELENA JAMES, United States Magistrate Judge

INTRODUCTION

*1 Pending before the Court is Defendant ixmation, Inc.'s Motion to Compel Arbitration and to Dismiss or Stay Action pursuant to Federal Rule of Civil Procedure 12(b)(1).[1] Dkt. No. 6. Plaintiff Switch (Assignment for the Benefit of Creditors), LLC ("Switch") filed an Opposition (Dkt. No. 17), and ixmation filed a Reply (Dkt. No. 19). The Court finds this matter suitable for disposition without oral argument and VACATES the July 30, 2015 hearing. *See* Fed.R.Civ.P. 78(b); Civ. L.R. 7-1(b). Having considered the parties' positions, relevant legal authority, and the record in this case, the Court **DENIES** ixmation's Motion for the reasons set forth below.

BACKGROUND

Switch is the successor-in-interest to Switch Bulb Company, Inc.[2] Compl. ¶ 1, Dkt. No. 1-1. Switch's business related to the design, manufacture, and sale of light-emitting diode (LED) light bulbs. *Id.* ixmation is in the business of designing and building production machinery and automation systems. *Id.* ¶ 2.

In July 2013, ixmation provided a proposal to Switch to design and manufacture production machinery for Switch for $3,908,000 (the "Proposal"). A copy of ixmation's Proposal to Switch is attached as Exhibit A to Switch's September 9, 2014 Notice of Removal in *ixmation, Inc. v. Switch Bulb Co., Inc.*, No. 14-cv-6993, filed in the United States District Court for the Northern District of Illinois, Eastern Division (the "Illinois Action").[3] The Proposal includes a provision that requires "any dispute, claim, question, or disagreement arising from or relating to this agreement or any claim breach thereof" that the parties cannot resolve on their own to be adjudicated by arbitration in Illinois. Illinois Action, Dkt. No. 1; Glass Decl., Ex. 1, Dkt. No. 8.

On or about July 17, 2013, Switch submitted a written purchase order to ixmation for the design, manufacture, and delivery of a light bulb manufacturing machine. Compl. ¶ 4 & Ex. A ("Purchase Order"). The Purchase Order contains Switch's terms and conditions of purchase, titled "Standard Conditions of Purchase," and does not include an arbitration provision, but instead provides that acceptance of the Purchase Order "shall be construed and governed in accordance with the laws of the state of California," with jurisdiction and venue in "the Superior Court of California for the County of Sonoma, or the United States District Court for the Northern District of California." *Id.*, Ex. A. Switch alleges that ixmation agreed to Switch's terms and conditions of purchase by its performance under the Purchase Order. *Id.* ¶ 5. In the following months, Switch proposed and ixmation accepted various change orders that modified the purchase price. *Id.* Copies of the change orders are attached as Exhibit A to Switch's Notice of Removal in the Illinois Action. *See also* Glass Decl., Ex. 3. In order to secure payment for the machinery, Switch opened a letter of credit (the "Letter of Credit") with Wells Fargo Bank, N.A. ("Wells Fargo") in August 2013. Glass Decl., Ex. 1 (Ex. D to Switch's Notice of Removal in the Illinois Action).

*2 In 2014, Switch alleges ixmation failed to adhere to the parties' agreed timetable for delivery of the machinery, after which Switch gave notice of termination of its order to ixmation. Compl. ¶ 6. In April 2014, ixmation

initiated an American Arbitration Association ("AAA") arbitration proceeding in Illinois under the arbitration provision contained in its Proposal. Mot. at 6; Opp'n at 2.

On September 5, 2014, after it had initiated the AAA arbitration proceeding, ixmation filed suit against Switch and Wells Fargo in Illinois state court. Illinois Action, Dkt. No. 1. In that case, ixmation requested that Wells Fargo be enjoined from terminating the Letter of Credit pending resolution of the arbitration proceedings. *Id.* On September 9, 2014, Switch removed ixmation's lawsuit to the Illinois District Court. *Id.*

Thereafter, on September 12, 2014, Switch filed a Motion to Dismiss, and in the Alternative, Motion to Compel Arbitration. Illinois Action, Dkt. No. 7. In that motion, Switch states it accepted ixmation's July 2013 Proposal, issued Purchase Order M00000016, and the two documents together became the parties' "Agreement." *Id.* at 2. Switch further argues ixmation's "dispute with Switch is subject to an arbitration agreement between the parties," and there "is no dispute that the Agreement contains a valid arbitration provision because the Agreement's terms expressly mandate arbitration." *Id.* at 1, 4. In a minute order dated September 17, 2014, the Illinois District Court denied Switch's motion on grounds related to ixmation's pending request for preliminary injunctive relief related to the Letter of Credit. Illinois Action, Dkt. No. 18.

Switch subsequently filed a second Motion to Dismiss, and in the Alternative, Motion to Compel Arbitration on October 10, 2014. Illinois Action, Dkt. No. 48. In its second motion, Switch incorporates its arguments from the first motion and argues that the court has no authority over the dispute as ixmation had already instituted an AAA arbitration. *Id.* at 1. The Illinois District Court did not rule on Switch's second motion, instead granting ixmation's oral motion to dismiss the case by minute order dated November 3, 2014. Illinois Action, Dkt. No. 61.

On March 6, 2015, Switch filed the present Complaint in Sonoma County Superior Court, alleging one claim for Breach of Written Contract. ixmation subsequently removed the case to this Court on April 10, 2015. Dkt. No. 1. ixmation filed the present Motion to Compel Arbitration on April 17, 2015.

LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that written agreements to settle a controversy through arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The central purpose of the FAA "is to ensure that private agreements to arbitrate are enforced according to their terms." *Momot v. Mastro,* 652 F.3d 982, 986 (9th Cir.2011). In order to enforce an arbitration agreement, a court shall issue an affirmative order to proceed in arbitration if the court is satisfied "that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. Thus, a court's role in applying the FAA is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. If the response is affirmative on both counts, the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp. v. Ortho Diagnostic Sys.,* 207 F.3d 1126, 1130 (9th Cir.2000) (citations omitted). The FAA leaves no place for the exercise of discretion by a district court. *Dean Witter Reynolds v. Byrd,* 470 U.S. 213, 218 (1985).

***3** In enacting the FAA, "Congress declared a national policy favoring arbitration...." *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984); *see also Republic of Nicaragua v. Standard Fruit Co.,* 937 F.2d 469, 475 n.8 (9th Cir.1991) ("The [FAA] reflects the strong Congressional policy favoring arbitration by making such clauses 'valid, irrevocable, and enforceable.' ") (quoting 9 U.S.C. § 2). Allowing parties to design an arbitration process tailored to their dispute allows for efficient, streamlined procedures. *AT & T Mobility LLC v. Concepcion,* —— U.S. ——, 131 S.Ct. 1740, 1749 (2011). Thus, courts have consistently applied a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983). "[A]ny doubts concerning the scope of arbitrable issues [are to] be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24–25.

"When evaluating a motion to compel arbitration, courts treat the facts as they would when ruling on a motion for summary judgment, construing all facts and reasonable inferences that can be drawn from those facts in a light most favorable to the non-moving party." *Chavez v. Bank of Am.,* 2011 WL 4712204, at *3 (N.D.Cal. Oct. 07, 2011) (citing *Perez v. Maid*

Brigade, Inc., 2007 WL 2990368, at *3 (N.D.Cal. Oct. 7, 2007)).

DISCUSSION

In its Motion, ixmation argues the parties' agreement is subject to the arbitration provision contained in the Proposal it submitted to Switch in July 2013. Mot. at 4. The arbitration provision requires "any dispute, claim, question, or disagreement arising from or relating to this agreement or any claim breach thereof" that the parties cannot resolve on their own to be adjudicated by arbitration. Glass Decl., Ex. 1. Although Switch subsequently issued a separate Purchase Order, ixmation maintains Switch judicially admitted it accepted the terms and conditions in the Proposal, including the arbitration provision, when it argued before the Illinois District Court in its Motion to Dismiss "there is no dispute that the Agreement contains a valid arbitration provision because the Agreement's terms expressly mandate arbitration and, consistent with that mandate, [ixmation] has already initiated the arbitration." Mot. at 10–11 (quoting Switch's first Motion to Dismiss at 4).

In response, Switch argues it did not sign or otherwise agree to ixmation's Proposal, and the parties have therefore never agreed to arbitrate their disputes. Opp'n at 3. As for the argument that Switch judicially admitted to being bound by the arbitration clause based on its filings in the Illinois Action, Switch argues that ixmation has either misinterpreted or misrepresented Switch's arguments. *Id.* at 5.

It is well settled that "[a]rbitration is a matter of contract and a party cannot be required to submit any dispute which he has not agreed so to submit." *AT & T Techs., Inc. v. Commc'n Workers*, 475 U.S. 643, 648 (1986). Thus, when a party disputes "the making of the arbitration agreement," the FAA requires that the "court [ ] proceed summarily to the trial thereof" before compelling arbitration under the agreement. *Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 962 (9th Cir.2007) (citing 9 U.S.C. § 4). The court's inquiry encompasses "not only challenges to the arbitration clause itself, but also challenges to the making of the contract containing the arbitration clause." *Id.* (citing *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140–41 (9th Cir.1991)). As the Ninth Circuit clarified in *Sanford*, "[i]ssues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration." *Id.* (emphasis in original).

*4 Under California contract law, the elements for a viable contract are (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration. *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir.1999). Here, there is no dispute the parties were capable of contracting, their agreement for ixmation to design and manufacture a light bulb manufacturing machine related to a lawful matter, and delivery by ixmation and payment by Switch constitutes sufficient consideration. Thus, the only question before the Court is whether Switch consented to the arbitration agreement.

A party's acceptance of an agreement to arbitrate may be express or implied. *Bayer v. Neiman Marcus Holdings, Inc.*, 2011 WL 5416173, at *5 (N.D.Cal. Nov. 8, 2011), *aff'd* 582 Fed.Appx. 711 (9th Cir.2014); *Pinnacle Museum Tower Ass'n v. Pinnacle Mktg. Dev. (U.S.) LLC*, 55 Cal.4th 223, 236 (2012). "Although an implied in fact contract may be inferred from the conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise." *Friedman v. Friedman*, 20 Cal.App. 4th 876, 887 (1993) (internal quotation marks omitted). "[A] promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct." *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1050 (9th Cir.2015), *as amended on denial of reh'g and reh'g en banc* (Apr. 28, 2015) (internal quotations and citation omitted).

Here, the Proposal and Purchase Order together could constitute the parties' agreement, as both appear to contain material terms. However, the Proposal contains an arbitration provision while the Purchase Order does not. Further, the Proposal provides that all disputes shall be governed by the laws of the State of Illinois, while the Purchase Order provides that California law applies and jurisdiction for any disputes exists exclusively in the Sonoma County Superior Court or the Northern District of California. While federal law is applied to the interpretation of forum-selection clauses, *see Doe I v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir.2009), those general principles are difficult to apply on an undeveloped record with so many factual issues. Thus, it is not clear from the documents themselves that an agreement to arbitrate exists.

It is true "any doubts concerning the scope of arbitrable issues [are to] be resolved in favor of arbitration," including "the construction of the contract language itself." *Moses H.*, 460 U.S. at 24–25. However, the same is not true on a motion to compel arbitration that is opposed on the ground that no agreement to arbitrate had been made between the parties. If there is doubt as to whether an express, unequivocal agreement to arbitrate exists, the matter should be submitted to a jury. *See, e.g., Three Valleys Mun. Water Dist.*, 925 F.2d at 1141 (indicating agreement with Third Circuit that, where there is a doubt as to whether an agreement to arbitrate exists, the matter should be submitted to a jury and "[o]nly when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement") (internal quotations and citation omitted); *Concat LP v. Unilever, PLC*, 350 F.Supp.2d 796, 804 (N.D.Cal.2004) (indicating that, where a motion to compel arbitration "is opposed on the ground that no agreement to arbitrate was made," a court should apply a standard similar to the Rule 56 summary judgment standard—i.e., the court should give to the opposing party the benefit of all reasonable doubts and inferences that may arise, and "[o]nly when there is no genuine issue of material fact concerning the formation of an arbitration agreement should a court decide as a matter of law that the parties did or did not enter into such an agreement").

***5** ixmation argues that a signed arbitration agreement is not required because Switch's agreement is reflected by its statements and conduct. Reply at 5–6. As noted above, Switch itself maintained in the Illinois Action that the dispute between the parties was subject to an agreement to arbitrate. In that case, Switch argued it accepted ixmation's July 2013 Proposal, and the Proposal and Purchase Order together became the parties' "Agreement." Illinois Action, Dkt. No. 7 at 2. It further argued "there is no dispute that the Agreement contains a valid arbitration provision because the Agreement's terms expressly mandate arbitration." *Id.* at 4. However, while the Court may consider Switch's previous argument as evidence of an agreement to arbitrate, it is not considered a judicial admission in this case. *See Nextdoor.Com, Inc. v. Abhyanker*, 2013 WL 3802526, at *8 (N.D.Cal. July 19, 2013) (an admission in a prior lawsuit, while admissible as evidence in a later proceeding, is not binding) (citing *Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1185 (7th Cir.1996)).

Further, Switch argues that it did not have the opportunity to contest the arbitrability of ixmation's claims at the time it filed its motions to dismiss in the Illinois District Court because ixmation had opened the AAA arbitration proceeding and was already attempting to assert rights under the arbitration provision. Opp'n at 5. Switch maintains it "simply argued that IXMATION's claims in the [Illinois] Lawsuit should be made part of the arbitration already pending. If the arbitration had proceeded, Switch would have moved for the arbitrator to conclude AAA lacked jurisdiction for want of an arbitration agreement." *Id.* at 5–6. ixmation argues this argument is "frivolous" and the Court should hold Switch to its prior statements because it is "playing fast and loose with the courts." Reply at 6–7. However, as noted above, the Court must construe all facts in a light most favorable to the non-moving party. *Chavez*, 2011 WL 4712204, at *3. Accordingly, because Switch disputes whether an arbitration exists, it would be inappropriate for the Court to find as a matter of law that the parties entered into such an agreement. The Court finds that fact questions need development and the record needs improvement before this issue can be sorted out.

Accordingly, the Court finds ixmation has not proven by a preponderance of the evidence that an agreement to arbitrate was formed between the parties.

CONCLUSION

Based on the analysis above, the Court **DENIES** ixmation's Motion to Compel Arbitration. ixmation's Motion to Dismiss or Stay Action is therefore **DENIED AS MOOT.**

IT IS SO ORDERED.

All Citations

Slip Copy, 2015 WL 4463672

Footnotes

1 Although Civil Local Rule 7–2(b) requires all motions to be filed as one document, ixmation filed a separate Motion (Dkt. No. 6) and Memorandum of Points and Authorities in Support of Motion (Dkt. No. 7). For citation purposes herein, the Court's references to ixmation's Motion refer to the Memorandum.

2 For purposes of this Order, the Court shall refer to Switch (Assignment for the Benefit of Creditors), LLC and Switch Bulb Company as "Switch."

3 As discussed below, ixmation previously brought suit against Switch in Illinois state court, and Switch subsequently removed that matter to the Illinois District Court's Eastern Division. The Court takes judicial notice of the Illinois District Court's docket and documents filed therein. *See* Fed.R.Evid. 201(b); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir.2006).

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2012 WL 32380
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Rosa KWAN, et al., Plaintiffs,
v.
CLEARWIRE CORPORATION, et al., Defendants.

No. C09–1392JLR. | Jan. 3, 2012.

Attorneys and Law Firms

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ORDER

JAMES L. ROBART, District Judge.

I. INTRODUCTION

*1 Before the court are the following motions: (1) Defendants Clearwire Corporation, Clearwire Communications LLC, and Clearwire U.S. LLC's (collectively "Clearwire") motion to compel arbitration and to stay Plaintiffs' action (Dkt.# 127), (2) Defendant Bureau of Recovery's ("BOR") motion to compel arbitration and to stay Plaintiffs' action (Dkt.# 126), and (3) Plaintiffs' motion to defer the court's ruling with respect to arbitration pending further discovery (Dkt.# 153). Having reviewed the motions, all papers filed in support or opposition thereto, and the governing law, and being fully advised, the court DENIES Clearwire's and BOR's motions to compel arbitration without prejudice because there are issues of fact with respect to these motions which require an evidentiary hearing pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4. The court further DENIES Plaintiffs' motion to defer the court's ruling with respect to arbitration as MOOT. [1]

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Rosa Kwan is not a Clearwire customer, but she alleges that she was mistakenly and repeatedly called by Clearwire and/or its collection agency vendors in their efforts to reach a Clearwire customer with an overdue account. (3rd Am.Compl.(Dkt.# 38).) Ms. Kwan brought a putative class action complaint against Clearwire and its collection agency vendors for violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)A)(iii), the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692(d)(5), (d)(6) & (e)(14), civil conspiracy, Washington's Consumer Protection Act, RCW ch. 19.86, *et seq.*, and other claims. [2] (*Id.*)

On February 1, 2011, Ms. Kwan amended her complaint to add Plaintiffs Amber Brown and Heather Reasonover, who allegedly are or have been customers of Clearwire. (4th Am.Compl.(Dkt.# 111).) Ms. Brown and Ms. Reasonover also allege that they were repeatedly called by Defendants, and have sued Defendants on largely the same grounds as Ms. Kwan. (*Id.*) In response to the addition of Ms. Brown and Ms. Reasonover as plaintiffs, Defendants Clearwire and BOR filed separate motions to compel arbitration of the new plaintiffs' claims. (Clearwire Mot. (Dkt.# 127); BOR Mot. (Dkt.# 126).)

In May 2009, Ms. Brown elected to obtain mobile internet service from Clearwire for a 14 day trial period. [3] (4th Am.Compl.(Dkt.# 111) ¶ 2.3.) In late 2009 or early 2010, Ms. Reasonover elected to obtain mobile internet service from Clearwire for a trial period of seven business days. [4] (*Id.* ¶ 2.15.) Clearwire asserts that before using Clearwire's service or equipment, Clearwire requires its customers to agree to Clearwire's Terms of Service ("TOS"). (Camacho Decl. ¶ 4.) Generally, Clearwire asserts that its standard business practices "ensure that customers have the opportunity to read the TOS before they sign up, before they receive equipment from Clearwire, before they use Clearwire equipment, and before they are able to access the internet through their Clearwire service." (*Id.*)

*2 Clearwire asserts that the TOS applicable to Ms. Reasonover and Ms. Brown's claims contains the following clause:

> This is an agreement between you and [Clearwire]. By using Clearwire's wireless broadband internet access

> service ... or any equipment purchased or leased by you from Clearwire ... you agree to be bound by and comply with the following terms and conditions.

(Camacho Decl. ¶¶ 5–6 & Ex B (introductory paragraph; original in capital and bolded lettering); *see also id.* Ex. A (which contains substantially similar language).) One the terms of the TOS is an arbitration clause, which reads as follows:

> Arbitration ... and class action waiver.... All disputes arising under this agreement ... will be settled exclusively by binding arbitration using the commercial rules of American Arbitration Association ("AAA") then in effect. The place for arbitration will be in the state where the service is provided .... The decisions of the arbitrator will be binding and conclusive upon all parties involved .... You and Clearwire waive any right to trial by jury of any claims or disputes relating to this agreement or the service or equipment. Neither party shall, and each party waives any right to, participate in a class action (including any class arbitration)....

(*Id.* Exs. A ¶ 26 & B ¶ 26 (original in capital and bolded lettering).)

Clearwire asserts that it sent order confirmation emails to both Ms. Brown and Ms. Reasonover which included a link to the TOS and prominent references to key TOS provisions such as the arbitration clause. (*Id.* ¶ 5.) The court notes, however, that the confirmation email submitted by Clearwire contains only a general link to Clearwire's homepage at www.clearwire.com, and not a direct link to its TOS. (*See id.*)

Plaintiffs have submitted evidence that Clearwire's homepage (at www.clearwire.com), however, makes no reference to the TOS. (Williamson Decl. (Dkt.# 133) ¶ 2 & Ex. A.) When one scrolls to the bottom of the homepage, there is a list of terms or links, which includes a link for "legal." (*See id.*) If one clicks on the "legal" link, a second webpage appears which lists various other links alphabetically, including the TOS, which is found by scrolling to the bottom half of the second webpage. (*See id.*) To view the TOS, one must then click on the link marked "terms of service," which pulls up a third webpage containing the TOS. (*See id.*)

Ms. Brown has admitted that she received Clearwire's confirmation email on May 18, 2009. (Brown Decl. (Dkt.# 131) ¶ 4 & Ex. A.) Ms. Brown, however, notes that the references to the TOS and its provisions occurred on the third page of the email. (*Id.* ¶ 5.) She testifies that she "probably did not notice or read this third page of the email." (*Id.*) She further testifies that if she had, she "would not have expected it to foreclose [her] class action claims or compel [her] to arbitrate them." (*Id.*)

***3** Ms. Brown has testified that her Clearwire modem arrived the week after she received her May 18, 2009 confirmation email. (Brown Decl. ¶ 5.) Clearwire asserts that its records confirm that Ms. Brown assented to the TOS before she accessed the internet with her Clearwire modem on May 27, 2009. (Camache Decl. ¶ 5; Supp. Camache Decl. (Dkt.# 142) ¶ 5 & Ex. C.) Specifically, Clearwire has presented copies of business records that it contends confirm that Ms. Brown "clicked an acknowledgement stating that she had read and agreed to the TOS, which accompanied [Clearwire's] 'I accept terms' page." (Supp. Camacho Decl ¶ 5.)

Ms. Brown, however, disputes this fact. (Brown Decl. ¶ 6 ("I was never presented with an "I accept terms" page when attempting to connect the modem.").) She states that when she attempted to connect her modem, she could not get it to operate properly in her home. (*Id.*) She testifies that she was not required to click an acknowledgement on Clearwire's website before or after she attempted to get her modem working. (*Id.*) She further testifies that she called Clearwire to cancel her service, but was persuaded by a Clearwire representative to allow a Clearwire technician to come to her home to check the modem connection. (*Id.*) She agreed with the proviso that her 14–day trial period would be renewed after the service call. (*Id.*)

Clearwire's technician arrived at Ms. Brown's home on May 27, 2009, which is the same day that Clearwire asserts Ms. Brown "clicked an acknowledgement stating that she read and agreed to the TOS, which accompanied the 'I accept terms' page." (Supp. Camache Decl. ¶ 5 & Ex. E.) Ms. Brown has testified, however, that she was at work when the technician arrived and that her roommate let the technician in her home. (Brown Decl. ¶ 6.) The parties have stipulated that an issue of fact exists with regard to whether Ms. Brown logged in and

consented to the TOS on May 27, 2009.[5] (Stip.(Dkt.# 146) ¶ 6.)

Ms. Brown has testified that, following the technician's visit, she discovered that use of her microwave oven interfered with her modem signal, and that Clearwire's modem still did not work properly in her home. (*See id.*) Ms. Brown has testified that she called Clearwire customer service again with the intent to cancel the service. (*Id.* ¶ 7.) Clearwire initially told Ms. Brown that her trial period was over, and that she owed Clearwire for the service.[6] (*Id.*) After speaking with three Clearwire representatives, Clearwire finally agreed that Ms. Brown was still in the trial period, and could cancel her service. (*Id.*)

Ms. Brown has testified that Clearwire agreed to email her a shipping label for return of the modem. (*Id.* ¶ 7 & Ex. C.) Ms. Brown has testified that Clearwire emailed shipping labels to her on three occasions, but she was unable to print any shipping labels that Clearwire sent to her via email. (*Id.* ¶ 7; *see also* Supp. Camache Decl. ¶ 14.) Clearwire asserts that Ms. Brown was unable to print these shipping labels because by the time she attempted to print them the labels had expired. (Supp. Camache Decl. ¶ 13.) Ms. Brown also has testified that she asked Clearwire if she could just return the modem to a Clearwire dealer since there was one within two blocks of her home, but Clearwire refused. (Brown Decl. ¶ 8.)

*4 In any event, Ms. Brown has testified that on or about December 31, 2009, she spoke with a Clearwire representative who offered to mail her a shipping label to return the modem. (*Id.* ¶ 13.) Ms. Brown received the shipping label in the mail sometime on or after January 4, 2010. (*See id.* ¶¶ 13–14.) After receiving the shipping label in the mail, Ms. Brown shipped the modem back to Clearwire, and Clearwire received it on January 14, 2010. (Supp. Camache Decl. ¶ 14 & Ex. K.)

In late 2009 or early 2010, Ms. Reasonover contacted a Clearwire representative concerning an offer to obtain mobile internet service from Clearwire for a seven day trial period. (Reasonover Decl. (Dkt.# 132) ¶¶ 3–4.) Ms. Reasonover has testified that the Clearwire sales agent made no mention of a contract or accepting terms and conditions, and assured her that she could cancel at any time. (*Id.*) Clearwire shipped a modem to Ms. Reasonover, but it arrived on a work day when she was not present to accept the package. (*Id.* ¶ 5.) Due to her work travel schedule, she was unable to pick it up from Federal Express until after the seven day trial period had expired. (*Id.*) Ms. Reasonover has testified that she realized that because it was impossible for her to return the modem within the seven day trial period, she would be obligated to pay for the modem and for the first month of service. (*Id.*)

Clearwire sends written "materials" with its modems. (*See* Supp. Camacho Decl. ¶ 7.) There is no indication in the record concerning the volume of these materials or the manner of their presentation. Ms. Reasonover's written testimony indicates that she reviewed at least some of the materials that accompanied her modem. (*See* Reasonover Decl. ¶ 6.) Clearwire has presented evidence that part of the materials it sends with its modems includes that following excerpt:

> You can review our terms of service at http:// www.clear.com/company/ legal/main.htm. By activating or using our service or equipment, you agree to be bound by the terms and conditions set forth at www.clear.com. Please read the terms and conditions and policies carefully as they among other things, establish your liability for the equipment, require term commitments, and require mandatory arbitration of disputes.

(Supp. Camacho Decl. Ex. D.) The court notes that this provision is set forth at the bottom of a page entitled "Welcome!" and is set forth in smaller type than the rest of the page. As noted above, neither internet address provided in the above excerpt immediately displays the TOS. The first link requires the user to scroll to the second half of the webpage and find the link "Terms of Service." (*See* Williamson Decl. ¶ 2 & Ex. A.) If this hyperlink is clicked, then the TOS appears on the next webpage. (*See id.*) The second link requires a user to click on two additional hyperlinks to find the TOS. (*See id.*)

When Ms. Reasonover plugged in the modem she received from Clearwire, she was only able to obtain "one green bar," which indicates a weak modem signal, and she only obtained this minimal signal at one inconvenient location in her house. (*See* Reasonover Decl. ¶ 6.) Before connecting to the internet, Ms. Reasonover was presented with Clearwire's "I accept terms" page. (*Id.* ¶ 7.) Ms. Reasonover, however, has testified that she abandoned this page, deciding not to accept the terms and conditions. (*Id.*) She has testified that she "did not under any circumstances agree to a contract." (*Id.*) Clearwire asserts that Ms. Reasonover accessed the TOS acknowledgement page (Supp. Camache Decl. ¶ 15), but

provides no evidence that she ever clicked on the "I accept terms" page. Ms. Reasonover decided instead to contact Clearwire to discuss the low signal. (*Id.*) She has testified that she spent an hour on the telephone with several different Clearwire representatives, but decided to cancel her service and so informed a Clearwire representative. (*Id.* ¶ 8.)

***5** Ms. Reasonover has testified that the Clearwrie representative told her that she could not cancel her service because she had automatically signed up for one year of service as part of the "special" offer. (*Id.* ¶ 9.) When she asked to speak to a supervisor, the Clearwire agent hung up on her. (*Id.*) Ms. Reasonover filed a complaint with the Better Business Bureau and also reported Clearwire's actions to American Express which blocked further charges that Clearwire attempted to make to Ms. Reasonover's account. (*Id.*) Ms. Reasonover has testified that she never received internet service from Clearwire. (*Id.* ¶ 10.) She also testified that Clearwire refused to accept the return of its modem, and that she paid for it. (*Id.* ¶ 13.) Clearwire has denied that Ms. Reasonover ever paid for her modem (Stip.¶ 5), but admits that this is an issue of fact yet to be determined. (*Id.* ¶ 6.)

Both Clearwire and BOR have moved to compel arbitration pursuant to Clearwire's TOS. (*See* Clearwire Mot.; BOR Mot.) Ms. Brown and Ms. Reasonover argue, among other things, that they did not agree to Clearwire's TOS, and thus cannot be bound by the arbitration provision contained therein. (Resp. to Clearwire Mot. (Dkt.# 129) at 2–4.) In addition, Ms. Brown and Ms. Reasonover assert that BOR acted as an independent contractor and not an agent of Clearwire, and therefore, BOR cannot enforce the arbitration clause with respect to their claims. (Resp to BOR Mot. (Dkt.# 130) at 4–13.) Ms. Brown and Ms. Reasonover have also moved to defer the court's ruling on arbitration until the parties have conducted further discovery. (*See* Plaint. Mot. (Dkt.# 153).)

III. ANALYSIS

A. Standards and Choice of Law

The Federal Arbitration Act ("FAA") provides that written agreements to arbitrate disputes arising out of transactions involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA allows "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement. 9 U.S.C. § 4.

It is well settled, however, that a court may not compel arbitration until it has first resolved whether a valid arbitration agreement exists. *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir.2004). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quotation marks omitted).

The party seeking to enforce an arbitration agreement bears the burden of showing that the agreement exists and that its terms bind the other party. *See, e.g., Sanford v. Memberworks, Inc.*, 483 F.3d 956, 962 (9th Cir.2007); *Three Valleys Mun. Water Dist. v. E .F. Hutton & Co.*, 925 F.2d 1136, 1139–41 (9th Cir.1991); *see also Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362 (2d Cir.2003) (holding that arbitration clause of a contract was unenforceable because party seeking to enforce it had not shown that a lawful contract had been created). This burden is a substantial one:

> ***6** Before a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect.... The district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise.

Three Valleys Mun. Water Dist., 925 F.2d at 1141 (citing *Par–Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3rd Cir.1980)). Accordingly, the court must give Ms. Brown and Ms. Reasonover the benefit of all reasonable doubts and inferences with regard to Clearwire's and BOR's motions.

The general rule in interpreting an arbitration agreement is that courts "should apply ordinary state-law principles that govern formation of contracts." *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 920 (9th Cir.2011) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)); *Ingle v.*

Circuit City Stores, Inc., 328 F.3d 1165, 1170 (9th Cir.2003). Therefore, state law governs the question of whether the parties in the present matter entered into an agreement to arbitrate disputes relating to the provision of Clearwire's service or products. In determining which state law controls, the court applies the choice-of-law rules of the forum state. *See Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 994 (9th Cir.2010); *Hines v. Overstock.com, Inc.*, 668 F.Supp.2d 362, 366 (E.D.N.Y.2009).

Washington applies the most significant relationship test. *McKee v. AT & T Corp.*, 164 Wash.2d 372, 191 P.3d 845, 851–52 (Wash.2008). Applying this test, Washington courts have applied Washington law to a consumer contract, where Washington is the place of contracting, the place of negotiation (what little there is), the place of performance, the location of the subject matter, and the residence of one of the parties—the consumer. *Id.* The court concludes that Washington courts would apply Washington law with respect to the contract formation issues involving Ms. Brown, and Texas law with respect to the contract formation issues involving Ms. Reasonover.

B. Clearwire's Motion to Compel Arbitration

It is a basic tenet of contract law, in either Washington or Texas, that in order to be binding, a contract requires a "meeting of the minds" and "a manifestation of mutual assent." *See, e.g., Discover Bank v. Ray*, 139 Wash.App. 723, 162 P.3d 1131, 1132 (Wash.Ct.App.2007) ("In order to form a valid contract, there must be an objective manifestation of mutual assent.") (citing *Keystone Land & Dev. Co. v. Xerox* 152 Wash.2d 171, 94 P.3d 945, 949 (Wash.2004)); *In re Marriage of Obaidi and Qayoum*, 154 Wash.App. 609, 226 P.3d 787, 791 (Wash.App.2010) ("A valid contract requires a meeting of the minds on the essential terms."); *Southwest Airlines, Co. v. Boardfirst, LLC*, No. 3:06–CV–0891–B, 2007 WL 4823761, at * 4 (N.D.Tex. Sept.12, 2007) ("For a contract to exist, the parties must manifest their mutual assent to be bound by it") (discussing Texas contract law and citing *Alliance Milling Co. v. Eaton*, 86 Tex. 401, 25 S.W. 614, 616 (Tex.1894)); *Sacks v. Haden*, 266 S.W.3d 447, 450 (Tex.2008) ("A meeting of the minds is necessary to form a binding contract."). "The making of contracts over the internet 'has not fundamentally changed the principles of contract law.' " *Hines*, 668 F.Supp.2d at 366 (quoting *Register.com, Inc. v. Verio*, 356 F.3d 393, 403 (2d Cir.2004)).

*7 One primary means of forming contracts on the internet are so-called "clickwrap" (or "click-through") agreements, in which website users typically click an "I agree" box after being presented with a list of terms and conditions of use. *Overstock*, 668 F.Supp.2d at 366. Click-wrap agreements derive their name by analogy to "shrinkwrap" used in the licensing of tangible forms of software sold in packages. *Specht v. Netscape Comm'ns Corp.*, 306 F.3d 17, 22 n. 4 (2d Cir.2002) (Sotomayor, J.). "Just as breaking the shrinkwrap seal and using the enclosed computer program after encountering notice of the existence of governing license terms has been deemed by some courts to constitute assent to those terms in the context of tangible software, ... so clicking on a webpage's clickwrap button after receiving notice of the existence of license terms has been held by some courts to manifest an Internet user's assent to terms governing the use of downloadable intangible software...." *Id.* (internal citation omitted).

In addition to clickwrap agreements, "browsewrap" agreements have arisen as another means of contracting on the internet. *Overstock*, 668 F.Supp.2d at 366. In a browsewrap agreement, the terms and conditions of use for a website or other downloadable product are posted on the website typically as a hyperlink at the bottom of the screen. *Id.* Unlike a clickwrap agreement, where the user must manifest assent to the terms and conditions by clicking on an "I agree" box, a browsewrap agreement does not require this type of express manifestation of assent. *Id.* Rather, a party instead gives his or her assent by simply using the product—such as by entering the website or downloading software. *See id.* In ruling upon the validity of browsewrap agreements, courts primarily consider whether a website user has actual or constructive notice of the terms and conditions prior to using the website or other product. *Id.* (citing *Specht*, 306 F.3d at 20 (finding insufficient notice)). Elements of shrinkwrap, clickwrap and browsewrap agreements are at issue here.

In the seminal decision of *Specht v. Netscape Comms. Corp.*,[7] the Second Circuit held that internet users did not have reasonable notice of the terms in an online browsewrap agreement and therefore did not assent to the agreement under the facts presented to the court. 306 F.3d at 20, 31. In *Specht*, users of a website were urged to click on a button to download free software. *Id.* at 23, 32. There was no visible indication that clicking on the button meant that the user agreed to the terms and conditions of a proposed contract that contained an arbitration clause. *Id.* The only reference to the terms was located in text visible if the users scrolled down to the next screen, which was "submerged." *Id.* at 23, 31–32. Even if a user did scroll down, the terms were

not immediately displayed. *Id.* at 23. Users would have to clink on a hyperlink, which would take them to a separate webpage entitled "License & Support Agreements." *Id.* at 23–24. Only on that webpage was a user informed that the user must agree to the license terms before downloading a product. *Id.* at 24. The user would have to choose from a list of licensing agreements and again click on another hyperlink in order to see the applicable terms and conditions. *Id.* The Second Circuit concluded on these facts that there was not sufficient or reasonably conspicuous notice of the terms that the plaintiffs could have manifested assent to the terms under these conditions. *Id.* at 32, 35. The Second Circuit, however, was careful to distinguish the method just described from clickwrap agreements, which do provide sufficient notice. *Id.* at 22 n. 4, 32–33.

***8** Significantly, in *Register.com, Inc. v. Verio,* 356 F.3d 393 (2d Cir.2004), the Second Circuit distinguished *Specht* on the basis that the facts in *Specht* "did not compel the conclusion that its downloaders took the software subject to those terms because there was no way to determine that any downloader had seen the terms of the offer." *Id.* at 402. In Register.com, the facts were crucially distinguishable from *Specht* because the Register.com user saw the terms of the offer and admitted that it was aware of the terms of the offer. *Id.* The Second Circuit held that, where a plaintiff knew of the terms of the offer, there was no reason why enforceability of the terms should depend on whether the plaintiff was offered an "I agree" button to click. *Id.* at 403.

In considering the validity of clickwrap or browsewrap agreements, Texas courts are in sync with the general guidelines established by the Second Circuit in its two seminal decisions concerning this area of law. Texas courts have upheld the validity of clickwrap agreements. *See, e.g., Recursion Software, Inc. v. Interactive Intelligence, Inc.,* 425 F.Supp.2d 756, 782–83 (N.D.Tex.2006) (citing *Barnett v. Network Solutions,* 38 S.W.3d 200, 204 (Tex.App. Eastland 2001, pet. denied) (upholding a forum selection clause in an online contract that required users to scroll through the terms and conditions before clicking to accept or reject them)). However, central to the *Barnett* court's holding was the fact that the user was conspicuously presented with the agreement prior to clicking assent. *Barnett,* 38 S.W.3d at 204; *see also Realpage, Inc. v. EPS, Inc.,* 560 F.Supp.2d 539, 545 (E.D.Tex.2007). In addition, at least one federal district court in Texas applying Texas contract law has upheld a browsewrap agreement, but only where the user admitted that it was aware of the terms the other party had placed upon use of the product and that by using the product for its own marketing opportunities it was violating those restrictions. *See Southwest Airlines,* 2007 WL 4823761, at *5–*7.

The court has not identified any clickwrap or browsewrap cases decided by Washington courts. Washington courts, however, have upheld the validity of shrinkwrap agreements. In *Mortenson Co. v. Timberline Software,* 140 Wash.2d 568, 998 P.2d 305 (Wash.2000), the Washington Supreme Court held that shrinkwrap agreements are valid, and the terms contained within them are enforceable, because the purchaser accepts the terms when it uses the product. The *Mortenson* court expressly noted that "[t]he terms were included within the shrinkwrap packaging of each copy of [the product]." *Id.* at 313. In upholding the formation of the shrinkwrap contract, the *Mortenson* court relied heavily upon the rulings in *Hill v. Gateway 2000, Inc.,* 105 F.3d 1147 (7th Cir.1997) and *ProCD v. Zeidenberg,* 86 F.3d 1447 (7th Cir.1996). *Mortenson,* 998 P.3d at 312–13.

In *ProCD,* the court upheld the validity of a shrinkwrap contract where a consumer purchased a software database program at a retail store, with a license enclosed in the package limiting the software's use to non-commercial applications. The software also required a user to accept the license agreement by clicking an on-screen button before activating the software. The court found that ProCD proposed a contract that invited acceptance by using the software after having an opportunity to review the license. If the buyer disagreed with the terms of the contract, he or she could return the software. Holding that the consumer was bound by the terms of the license agreement, the *ProCD* court stated that "[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right the license expressly extends), may be a means of doing business valuable to buyers and sellers alike." *ProCD,* 86 F.3d at 1451.

***9** In *Hill,* a consumer ordered a Gateway computer over the telephone. When the computer arrived, the box contained Gateway's standard terms governing the sale. According to Gateway's standard terms, the consumer accepted the terms by retaining the computer for 30 days. When the consumer was not satisfied with the operation of the computer, he sued Gateway on behalf of a class of similarly situated consumers. Relying on the *ProCD* court's analysis that the vendor is the master of the offer, the *Hill* court enforced the arbitration clause found in Gateway's standard terms even though the

consumer was not aware of the terms until he received the computer. *Hill,* 105 F.3d at 1150.

Central to each court's analysis in *Mortenson, ProCD,* and *Hill* was the fact that the terms and conditions at issue were included with the product purchased by the consumer. Thus, similar to the Second Circuit's analysis in *Specht* and Register.com, the central issue of concern in Washington in determining whether or not a consumer is bound by an alleged contract is whether the consumer has notice of and access to the terms and conditions of the contract prior to the conduct which allegedly indicates his or her assent.

The court now turns to the specific facts pertinent to the alleged contracts formed by Ms. Brown and Ms. Reasonover. Clearwire asserts that Ms. Brown assented to its TOS both (1) by using her modem after having received the confirmation email which noted the TOS on its website and then retaining the modem for six months, and (2) by clicking on its "I accept terms" web-button prior to accessing the internet on her modem. (Clearwire Mot. at 14.) Ms. Brown admits that she received an email confirmation of her telephone order from Clearwire. However, as the court noted above, the confirmation email did not contain a direct link to Clearwire's TOS, but rather a link to Clearwire's homepage. To find the TOS, Ms. Brown would have had to negotiate her way through two more hyperlinks. Further, the reference to the TOS did not appear until the third page of the email Ms. Brown received. Like the court in *Specht,* this court finds that the breadcrumbs left by Clearwire to lead Ms. Brown to its TOS did not constitute sufficient or reasonably conspicuous notice of the TOS. Accordingly, the court declines to hold that Ms. Brown manifested assent to the TOS based on her receipt of Clearwire's email and retention of the modem alone. Further, the court notes that Ms. Brown did in fact ultimately return her modem to Clearwire.

Nevetheless, Clearwire asserts that it has business records confirming that Ms. Brown "clicked" on an "I accept terms" button on its website prior to accessing the internet with her modem. Assuming she did, Ms. Brown would be bound by the TOS. Ms. Brown, however, denies that she ever clicked such a button. The court notes that the same day that Clearwire asserts that Ms. Brown clicked on the "I accept terms" button, a Clearwire technician visited her home, while she was not there, to check the modem connection. The parties have expressly stipulated that a material issue of fact exists with respect to whether or not Ms. Brown ever clicked Clearwire's "I accept terms" button. Accordingly, the court denies Clearwire's motion to compel arbitration without prejudice with respect to Ms. Brown.

***10** Because the parties have stipulated to the existence of a genuine issue of material fact concerning whether Ms. Brown assented to the arbitration clause contained with the TOS by clicking on the "I accept terms" button on Clearwire's website, the court is required to "proceed summarily to a trial thereof." 9 U.S.C. § 4. Accordingly, the court will schedule the required evidentiary hearing with respect to the factual issue of Ms. Brown's assent to the TOS as indicated further below.

Clearwire has presented no evidence that Ms. Resaonover ever clicked on its "I accept terms" button. Indeed, Ms. Reasonover has testified that when she was presented with this webpage, she abandoned the page, specifically deciding not to accept the TOS. (Reasonover Decl. ¶ 7.) Clearwire's argument that Ms. Reasonover has assented to its TOS is based instead on its assertion that she received notice of the TOS through (1) the confirmation email it sent, (2) the materials that Clearwire sent with its modem, and/or (3) her access of the "I accept terms" page on Clearwire's website which Clearwire asserts "presented her with the TOS." (Clearwire Mot. at 9–10; Supp. Camacho Decl. ¶ 6.) Clearwire argues that Ms. Reasonover's notice of the TOS, through one and/or all of these three devices, combined with her retention of the modem, renders her bound to the terms of the TOS, including its arbitration provision. (Clearwire Mot. at 9–10.)

First, for all of the reasons that the court found Clearwire's confirmation email to Ms. Brown to be inadequate notice of the TOS, the court finds that it is inadequate notice with respect to Ms. Reasonover as well. Further, the materials that Clearwire included in the modem packaging fare no better with respect to establishing Ms. Reasonover's assent. There is no evidence before the court that Clearwire included the TOS itself in the modem's packaging. Rather, Clearwire has only submitted evidence that at the bottom of one of the pages it included in the modem packaging was a reference to the TOS and to where the TOS could be located on its website. The statement actually contains reference to two different hyperlinks. Neither link, however, immediately displays the TOS. The first link requires the user to find and then click on an additional hyperlink, entitled "Terms of Service." If this hyperlink is clicked, then the TOS appears on the next webpage. (*See id.*) The second link, which is Clearwire's homepage, requires a user to click on two

additional hyperlinks to find the TOS. (*See id.*) The court concludes, based on the authorities described above, that inclusion of this notice in the modem's packaging alone, without inclusion of the TOS itself, is inadequate notice to bind Ms. Reasonover by reason of her retention of the modem.

Clearwire nevertheless asserts that Ms. Reasonover had notice of the TOS when she accessed Clearwrie's website and was presented with the "I accept terms" page. (*See* Reply (Dkt.# 141) at 11–12.) The court, however, is unwilling on the basis of a summary judgment standard under which Ms. Reasonover must be given the benefit of all doubts and inferences, *see Three Valleys Mun. Water Dist.*, 925 F.2d at 1141, to find that Ms. Reasonover's mere access of the "I accept terms" page establishes that she had notice of the TOS. First, the two TOS assent pages that Clearwire has placed in the record as "examples" of pages "used during the relevant time frames" do not appear to immediately display the TOS. (*See* Camacho Decl. Exs. A & B; Stip. ¶ 6.) Instead, the pages appear to require a user to either click on another hyperlink or scroll down an inset page in order to view the TOS. (*See* Camacho Decl. Exs. A & B.) Ms. Reasonover has never testified that she took any of these actions to view the TOS, but rather merely states that she "abandoned" the page, "determining not to accept the terms and, instead, to telephone Clearwire's service center ...." (Reasonover Decl. ¶ 7.) Further, there is no specific evidence in the record establishing which of these pages Ms. Reasonover viewed, or even that she viewed either one of these pages as opposed to some other page not yet in the record.

***11** Finally, there is no dispute that Ms. Reasonover specifically declined to press the "I accept terms" button presented on Clearwire's webpage. The court is skeptical of Clearwire's position that, despite Ms. Reasonover's express decision not to press the button, she nevertheless should be held to be bound by the TOS by virtue of her mere access of the page and her retention of the modem. This is particularly so when Ms. Reasonover has testified that despite the fact that the modem never worked in her house, Clearwire refused to allow her to return it. Clearwire seems to want it both ways—insisting that consumers be bound by the TOS when they click their consent, but refusing to concede that they are not so bound when they specifically decline to do so. Nevertheless, the court finds based on the record before it that there are genuine issues of material fact concerning whether Ms. Reasonover had actual or constructive notice of the TOS. The court, therefore, denies Clearwire's motion to compel arbitration without prejudice with respect to Ms. Reasonover, as well. Accordingly, as required by the FAA, 9 U.S.C. § 4, the evidentiary hearing noted above will also address the factual issue of Ms. Reasonover's actual or constructive notice of the TOS as indicated further below.

C. BOR's Motion to Compel Arbitration

BOR has also moved to compel arbitration on the basis of the arbitration provision contained within Clearwire's TOS. The court has ruled that there are factual issues that must be resolved with respect to Clearwire's motion to compel arbitration of both Ms. Brown's and Ms. Reasonover's claims. Thus, it is possible that, following an evidentiary hearing on the issues, the court will rule that Ms. Brown's and Ms. Reasonover's claims are subject to arbitration under the clause contained in the TOS.

There is no dispute that BOR is not a party to the TOS. A contractual right to arbitration "may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration." *Britton v. Co–Op Banking Group*, 4 F.3d 742, 744 (9th Cir.1993). There are circumstances, however, such as under various agency and estoppel theories, in which nonsignatories to an arbitration agreement may compel arbitration against signatories or themselves be compelled to arbitrate by signatories. *See Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir.2006); *M.S. Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir.1999); *Britton*, 4 F.3d at 744–46. Agents of a signatory to an arbitration agreement can compel the other signatory to arbitrate so long as (1) the wrongful acts of the agents for which they are sued relate to their behavior as agents or in their capacities as agents, and (2) the claims against the agents arise out of or relate to the contract containing the arbitration clause. *Amisil Holdings, Ltd. v. Clarium Capital Management*, 622 F.Supp.2d 825, 831–33 (N.D.Cal.2007) (relying upon *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185 (9th Cir.1986) and *Britton v. Co-op Banking Group*, 4 F.3d 742 (9th Cir.1993)).

***12** BOR has presented evidence that it acted as an agent of Clearwire at the time that it made calls to Ms. Brown and Ms. Reasonover. Plaintiffs, however, assert and present evidence that the relationship between BOR and Clearwire was one of an independent contractor. If BOR's relationship was one of an independent contractor, then it cannot compel Ms. Brown or Ms. Reasonover to arbitration on the basis of the arbitration clause in Clearwire's TOS. *See, e.g., Swift v. Zynga Game Network, Inc.*, No. C–09–5443 EDL, 2011 WL 3419499, at * 12 (N.D.Cal. Aug.4, 2011) ("Independent contractors do

not fall within the exception that non-signatory agents may be bound by an arbitration agreement."). The question of whether an entity is operating as an agent or an independent contractor is ordinarily one of fact. *Kelsey Lane Homeowners Assoc. v. Kelsey Lane Co., Inc.*, 125 Wash.App. 227, 103 P.3d 1256, 1261 (Wash.Ct.App.2005).

The court finds on the record here that there is an issue of fact concerning whether the relationship between BOR and Clearwire was one of an independent contractor, or whether it was the type of close agency relationship that would entitle BOR to enforce the terms of Clearwire's arbitration clause against Ms. Brown and Ms. Reasonover. Accordingly, the court denies BOR's motion without prejudice, and as required will "proceed summarily to a trial" with respect to this issue. *See* 9 U.S.C. § 4. The court will schedule the required evidentiary hearing with respect to the issue of BOR's relationship with Clearwire, and its alleged right to enforce the arbitration agreement against Ms. Brown and Ms. Reasonover, as indicated below.

D. Plaintiffs' Motion to Defer Ruling on the Motion to Compel Pending Further Discovery

After Defendants' motions to compel arbitration were fully briefed, Plaintiffs moved to defer ruling on the motions until further discovery had been conducted. (*See* Plaint. Mot.) Plaintiffs asserted that such discovery was necessary in light of the Supreme Court's ruling in *AT & T Mobility LLC v. Concepcion*, —— U.S. ——, 31 S.Ct. 1740 (2011). (Reply (Dkt.# 158).) The court has now denied Defendants' motions to compel arbitration without the necessity of reaching the issues implicated by the Supreme Court's recent ruling in *Concepcion*. Accordingly, the court denies Plaintiffs' motion as moot.

IV. CONCLUSION

Based on the forgoing, the court DENIES Clearwire's motion to compel arbitration without prejudice (Dkt.# 127). The court also DENIES BOR's motion to compel arbitration without prejudice (Dkt.# 126). Finally, the court DENIES Plaintiffs' motion to defer the court's ruling with respect to Defendants' motions to compel arbitration as MOOT (Dkt.# 153).

The court further ORDERS Ms. Brown, Ms. Reasonover, Clearwire and BOR to submit a joint status report within 14 calendar days of this order stating the number of days they seek with respect to the evidentiary hearings noted above, the timeframe in which the parties seek to conduct the hearings, the number of witnesses each party intends to call, along with a statement concerning other evidence the parties intend to present. After receiving the parties' joint status report, the court will schedule the necessary hearing.

***13** Dated this 28th day of December, 2011.

All Citations

Not Reported in F.Supp.2d, 2012 WL 32380

Footnotes

1 No party requested oral argument, and the court deems these motions appropriate for decision without it.

2 Clearwire has admitted that "Ms. Kwan was never a Clearwire customer but was mistakenly called in efforts to reach a Clearwire customer with a past-due amount."

3 Consistent with Plaintiffs' allegations, Clearwire asserts that Ms. Brown signed up for Clearwire service on May 15, 2009. (Camacho Decl. (Dkt.# 128) ¶ 5.)

4 Consistent with Plaintiffs' allegations, Clearwire asserts that Ms. Reasonover signed up for Clearwire service on January 21, 2010. (Camacho Decl. ¶ 5.)

5 The parties have also stipulated that the court should consider the TOS assent pages attached as Exhibts A and B to the Supplemental Camacho Declaration as examples of what Clearwrie's TOS assent pages looked like during the relevant time periods but not as copies of what Ms. Brown and Ms. Reasonover actually viewed. (Stip.¶ 6.)

6 Ms. Brown asserts that Clearwire agreed to a 14–day extension of the trial period following the technician's May 27, 2009 visit. (Brown Decl. ¶ 6.) Clearwire asserts that it only agreed to a seven day extension, and that Ms. Brown's June 3, 2009 call to cancel her service was therefore after her seven day extension of the trial period had expired. (Supp. Camache Decl. ¶ 10.) The court, however, has counted the days on the calendar several times to confirm that June 3, 2009 is indeed the seventh day following May 27, 2009. Thus, it appears to the court that, even assuming Ms. Brown's trial period was extended for only seven (and not 14) days, she called to cancel within her extended trial period. In any event, the factual issue is not material to any legal issue the court is asked to resolve in these motions.

7 *Specht* was drafted by Justice Sotomayor while she was a circuit court judge.

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2011 WL 666328
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
FRY'S ELECTRONICS, INC., Defendant.

No. C10–1562RSL. | Feb. 14, 2011.

Attorneys and Law Firms

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ORDER GRANTING KA LAM'S MOTION TO INTERVENE AND BIFURCATING DISCOVERY

ROBERT S. LASNIK, District Judge.

*1 This matter comes before the Court on "Intervenor–Plaintiff Ka Lam's Motion to Intervene and Strike Defendant's Purported Arbitration Agreement" (Dkt.# 7) and Fry's Electronics Inc.'s "Cross Motion to Compel Arbitration and Stay" (Dkt.# 9). The parties agree that Lam should be permitted to intervene as of right in the above-captioned matter.

Defendant seeks to compel arbitration of Lam's claims pursuant to an August 2003 "Agreement to Arbitrate Disputes Regarding Employment." Lam argues that the agreement to arbitrate (a) is unenforceable because it was not supported by independent consideration, (b) is illusory, (c) has been waived by defendant, (d) was signed by someone other than Lam, and (e) would, if enforced, deprive Lam of substantive rights under Title VII. Having considered the memoranda, declarations, and exhibits submitted by the parties [1] and having heard the arguments of counsel, the Court finds as follows:

A. Lack of Consideration

The Federal Arbitration Act ("FAA") provides that arbitration clauses are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A party may challenge the enforceability of an arbitration agreement by raising any defense that would be available to it under the general contract law of the applicable state. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1121 (9th Cir.2008). Lam argues that the August 25, 2003, arbitration agreement is invalid because it lacks consideration, an essential element of a contract under Washington law. *DePhillips v. Zolt Constr. Co., Inc.*, 136 Wash.2d 26, 31, 36, 959 P.2d 1104 (1998).

The general rule in Washington is that contracts signed when an employee is first hired, such as non-competition agreements, arbitration clauses, and confidentiality provisions, are supported by consideration. *See Labriola v. Pollard Group, Inc.*, 152 Wash.2d 828, 834, 100 P.3d 791 (2004). In that context, both parties make promises and incur new obligations: the employer promises to hire the employee in exchange for the employee's promise to comply with the policies, procedures, and terms set forth in the contract. The general rule applies here. In exchange for the arbitration agreement (among other documents) that Lam purportedly signed on August 25, 2003, defendant took him into its employ. Consideration therefore existed for Lam's promise to arbitrate disputes arising out of his employment with defendant.

Lam argues that the arbitration agreement itself establishes that no consideration existed. Under Washington law, a promise to continue an at-will employment relationship, with no increase in wages, change in responsibilities, promise of training, or other material alteration in the relationship, is not consideration for a post-employment modification or additional agreement. *See Labriola,* 152 Wash.2d at 834, 100 P.3d 791. The first sentence of the August 25, 2003, agreement states that the agreement is "[i]n consideration of the continuation of the employment relationship." Decl. of Lisa Souza (Dkt.# 10), Ex. A. Lam therefore argues that the only consideration for the promise to arbitrate was the promise to continue the employment relationship, which is ineffective under Washington law. Lam ignores the reality of the situation, however. The existence or non-existence of consideration is not determined by the recitals of the written instrument. *Zackovich v. Jasmont,* 32 Wash.2d 73, 83, 200 P.2d 742 (1948). Rather, the Court compares the nature of the relationship before and after contracting to determine whether

consideration was exchanged. *Labriola,* 152 Wash.2d at 836, 100 P.3d 791. Lam signed the arbitration agreement, if at all, on the date he was first hired by defendant. Because the relationship between Lam and defendant materially changed at the time of contracting, with both parties taking on new obligations, consideration for the August 25, 2003, arbitration agreement existed.

B. Illusory Contract

*2 At oral argument, Lam's counsel asserted for the first time that the employee handbook signed by his client, in which the arbitration agreement was located, was illusory and therefore unenforceable in its entirety. This argument is based on the fact that the handbook specifically reserves to the employer the power to modify most of the policies governing Lam's employment. The argument fails under Washington law.

The seminal case of *Thompson v. St. Regis Paper Co.,* 102 Wash.2d 219, 685 P.2d 1081 (1984), disposes of the illusory contract argument. When an employee is hired for an indefinite period without the benefit of a written employment contract, the employer obligates itself to pay the employee for any work performed, but retains the right to control the working relationship through its policies. Unilateral changes to the employment policies are binding: the employee can either accept those changes, quit, or be fired. If an employer chooses to issue an employee handbook or policy manual, however, it "may create an atmosphere where employees *justifiably rely* on the expressed policies and, thus, justifiably expect that the employers will do the same." *Thompson,* 102 Wash.2d at 230, 685 P.2d 1081 (emphasis in original). If an employer hopes to retain unilateral control over the working relationship, it must make clear that the employee should not rely on the policies as stated: the employer "can specifically state in a conspicuous manner" that the manual is simply a general statement of company policy and is not intended to be part of the employment relationship or it "may specifically reserve a right to modify those policies or write them in a manner that retains discretion to the employer." *Id.* at 230–31, 685 P.2d 1081. The Court ultimately reviews the handbook or policy manual to determine whether it "creates an atmosphere of job security and fair treatment with promises *of specific treatment in specific situations"* such that an employee would be induced to remain on the job and not actively seek other employment based on those promises. *Id.* at 230, 685 P.2d 1081. If the employee could fairly rely on the expressed policies, the policies become enforceable components of the employment relationship. If they are merely statements of company policy or contain a clear reservation of rights as described above, the policies are not enforceable. *Id.*

The arbitration agreement is a written contract, separate and distinct from the handbook in which it is contained. If signed, there would be nothing illusory about its terms: both parties could be compelled to arbitrate a dispute as set forth in the agreement. Nor would Fry's attempt to retain the power to modify their policies and procedures make the arbitration agreement illusory. The mere declaration that the employer is retaining control of the working relationship is not dispositive. The Court evaluates the nature of the policies and their likely effect on the employee to determine whether a binding contract exists or whether the retention of control is effective. In this case, the promise to arbitrate is clearly a promise of specific treatment in specific situations on which the employee would reasonably rely: the employer would therefore be bound by its statement and may not unilaterally alter the arbitration policy. Thus, the agreement, whether entered into separately or as part of the employee handbook, is not illusory and would be enforceable.

C. Waiver [2]

*3 A validly executed and otherwise enforceable arbitration agreement can be waived if (1) the employer has knowledge of an existing right to compel arbitration, (2) the employer acts in a manner that is inconsistent with the right to compel arbitration, and (3) prejudice would arise if arbitration were subsequently compelled. *See Adler v. Fred Lind Manor,* 153 Wash.2d 331, 362, 103 P.3d 773 (2005); *United Computer Sys., Inc. v. AT & T Corp.,* 298 F.3d 756, 765 (9th Cir.2002). "Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Verbeek Props., LLC v. GreenCo Envtl., Inc.,* 159 Wash.App. 82, 246 P.3d 205, 2010 WL 5141280 at * 2 (Dec. 20, 2010). The party opposing arbitration has the burden of showing that a waiver has occurred. *Otis Housing Ass'n v. Ha,* 165 Wash.2d 582, 587, 201 P.3d 309 (2009).

Defendant has a policy of requiring all employees to sign an agreement to arbitrate disputes as a condition of employment. Decl. of Lisa Souza (Dkt.# 10) at ¶ 4. Defendant therefore knew (or should have known) that it had a right to compel arbitration of Lam's Title VII claim as soon as it was asserted. Lam has not, however, shown inconsistent acts or prejudice arising therefrom. This action was filed by the

Equal Employment Opportunity Commission ("EEOC") on September 29, 2010. That was the first time the dispute at issue in this litigation (*i.e.*, whether defendant violated Title VII) was joined. Defendant was not required to, nor could it, demand arbitration in response to the EEOC's filing of the complaint in this action or its three-year investigation of Lam's claims. The EEOC is not a party to the arbitration agreement and therefore could not be compelled to arbitrate under the FAA. *Equal Emp't Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 288, 289, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002).[3] Lam did not seek to intervene in the EEOC's action until November 4, 2010, and one could reasonably argue that the right to compel arbitration did not exist until he was granted leave to become a party to this lawsuit, thereby asserting a claim to which the arbitration agreement might apply. Defendant did not wait that long: as soon as Lam raised the possibility of asserting a Title VII claim, defendant demanded arbitration. Because defendant promptly sought arbitration of Lam's Title VII claim, its actions are entirely consistent with an intent to arbitrate, and no prejudice has arisen.

Lam argues that defendant waived its contractual right to arbitrate when it failed to seek arbitration of plaintiff's Washington Law Against Discrimination ("WLAD") claim. Lam filed his WLAD claim on May 21, 2010, in King County Superior Court.[4] He assumes, without providing any supporting authority, that the failure to seek arbitration of one claim acts as a waiver for all other claims arising out of the same event or occurrence. This does not appear to be the law in Washington. The issue is whether defendant has exhibited "conduct inconsistent with any other intention but to forego a known right." *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.*, 28 Wash.App. 59, 62, 621 P.2d 791 (1980). Even if defendant's failure to seek arbitration of the WLAD manifests an intent to forego the right to arbitrate that claim, this litigation raises a separate issue that will not be presented to the state court, namely whether defendant's conduct violated Title VII. Although the separation of these two claims is inefficient and will create significant redundancies, the state court will not find facts or make conclusions of law pertaining to the Title VII claim defendant now seeks to arbitrate. In such circumstances, the failure to compel arbitration regarding the WLAD claim was not a clear election to litigate the Title VII claim. *See Verbeek Props.*, 159 Wash.App. 82, 246 P.3d 205, 2010 WL 5141280 at * 4–5.

*4 Even if defendant's conduct with regards to the WLAD claim is considered in the waiver analysis, the six month delay in seeking to compel arbitration does not reflect a voluntary and intentional relinquishment of the right to arbitrate. Defendant filed an answer to plaintiff's WLAD claim on June 21, 2010, but did not demand arbitration in that pleading.[5] Both sides served and responded to written discovery requests. In response to a request seeking copies of all employment contracts between Lam and defendant, defendant identified the arbitration agreement. Decl. of Scott C.G. Blankenship (Dkt. # 8), Ex. H at 24. Thus, by the end of September 2010, approximately four months after the WLAD claim was filed, plaintiff was on notice that defendant believed the dispute was subject to arbitration. When Lam sought to intervene in the EEOC's Title VII action, defendant moved to compel arbitration in both the state and federal proceedings.

A contractual right to arbitration may be waived if not timely invoked. *Otis Housing*, 165 Wash.2d at 587, 201 P.3d 309. The question, then, is whether defendant's demand for arbitration was timely in the circumstances. A survey of the cases in which Washington courts have found a waiver suggests that a more significant delay and/or a more active litigation strategy than that which occurred here is necessary to constitute a waiver. *See, e.g., Pedersen v. Klinkert*, 56 Wash.2d 313, 320, 352 P.2d 1025 (1960) (arbitration agreement waived when raised for the first time after judgment was entered); *Ives v. Ramsden*, 142 Wash.App. 369, 382–83, 174 P.3d 1231 (2008) (arbitration agreement waived where defendant waited three years and four months until the eve of trial to raise the issue). Courts are most likely to find waiver when a litigant has affirmatively sought a judicial determination of the issue and then decided that arbitration might be the better forum. *See Otis Housing*, 165 Wash.2d at 588, 201 P.3d 309 (waiver found where plaintiff had unsuccessfully litigated the issue of whether an option had been properly exercised before seeking arbitration); *Harting v. Barton*, 101 Wash.App. 954, 962, 6 P.3d 91 (2000) (defendant who sought summary judgment and unsuccessfully litigated the action through trial waived non judicial forum). Nothing of the sort has occurred here. At the time it sought to enforce the arbitration agreement, defendant had not requested any affirmative relief from either court, nor had it obtained any adverse rulings. Defendant raised the arbitration agreement in response to plaintiff's discovery requests within a few months of the filing of the state action. While it is possible that the initial delay in raising the arbitration agreement reflected a knowing and intentional

waiver of the agreement, that is not the only, or even the most likely, explanation given the nature of corporate litigation, the EEOC's significant involvement in this matter, and the overlapping proceedings. In such circumstances, the Court finds that Lam has failed to show conduct inconsistent with an intent to arbitrate. *See B & D Leasing Co. v. Ager,* 50 Wash.App. 299, 303–04, 748 P.2d 652 (1988) (despite nine month delay in seeking arbitration, "appellants' conduct was not consistent only with a waiver of the right to arbitration, and therefore no waiver occurred.") [6]

***5** Finally, Lam has failed to show that he would suffer prejudice if arbitration were compelled. Lam argues that he has incurred substantial costs and attorney's fees associated with discovery in the state court action. As noted above, the discovery conducted in state court is in its preliminary stages, and Lam has not yet asserted any claims in the federal proceeding. Neither court has resolved any of the issues raised in the pending actions. Contrary to Lam's unspoken assumptions, his discovery efforts would not be wasted if arbitration were compelled, nor would there be unnecessary duplication of effort. Any documents and information that have already been obtained can be used in arbitration. Moreover, the arbitrator has the authority to allow discovery as necessary, including the types of written discovery pursued in the state proceeding. Lam would not be prejudiced if the contractual arbitration provision were enforced at this point in the litigation.

D. Allegation of Forgery

Lam asserts that he never saw the August 25, 2003, arbitration agreement before it was filed by defendant in this litigation, that he did not sign the agreement, and that the signature on the document "does not look like mine." Decl. of Ka Lam (Dkt.# 14) at ¶¶ 4–5. Lam hypothesizes that the "arbitration agreements were created by Fry's after the state court litigation began." *Id.* at ¶ 6, 748 P.2d 652. Defendant, on the other hand, states that the arbitration agreement is signed by all employees, that Lam acknowledged receipt of the employee handbook of which the agreement was a part, and that the signature on the August 25th agreement is very similar to other signatures that Lam does not deny are his. [7]

Where there is conflicting evidence regarding one party's assent to the arbitration agreement, the parties will not be forced to arbitrate unless and until it is finally determined that a binding agreement was formed. *See Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.,* 925 F.2d 1136, 1140–41 (9th Cir.1991); *Brooks v. Robert Larson Auto. Group, Inc.,* 2009 WL 2853452 at *3 (W.D.Wash. Sept.1, 2009). Pursuant to 9 U.S.C. § 4, the Court shall proceed summarily to a trial on the question of forgery. Lam and Fry's shall have sixty days in which to conduct discovery related to this issue and to file dispositive motions. If the matter is not resolved on motion practice, the Court will schedule a one day trial to determine whether the signature on the August 25, 2003, agreement is a forgery.

The implications of this dispute are serious. The parties should carefully consider the impact of their litigation strategy at this point. If the evidence shows that a party has lied to the Court or engaged in fraudulent practices, the Court will not hesitate to impose terms and/or sanctions on the unsuccessful party at the conclusion of the summary trial.

E. Denial of Substantive Rights

Lam argues that an order compelling arbitration in the context of this case will destroy his ability to pursue a Title VII claim, thereby depriving him of his substantive rights under the statute. As a general matter, enforcement of an arbitration agreement does not contravene the substantive rights afforded by Title VII because only the forum, not the protections against workplace discrimination, are altered. *See 14 Penn Plaza LLC, Pyett,* —— U.S. ——, 129 S.Ct. 1456, 1469–70, 173 L.Ed.2d 398 (2009). Lam's argument appears to be based on the fact that, once the EEOC files suit in its own name, the employee has only two choices: he may intervene in the EEOC's suit or he may watch from the sidelines. *Equal Emp't Opportunity Comm'n v. Waffle House, Inc.,* 534 U.S. 279, 291, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002). Nothing about this process or the exclusivity of the EEOC's control over the claim suggests that the EEOC's decision to file suit abrogates or otherwise immunizes the employee from an existing agreement to arbitrate. An employee may, as Lam has done in this case, seek to intervene in the EEOC's case, at which point the employer may seek to enforce the agreement to arbitrate as to the intervenor. The Supreme Court specifically addressed this situation and noted that, although the agreement to arbitrate cannot be enforced against the EEOC, the employee can be compelled to arbitrate pursuant to the agreement of the parties. *Id.* at 294 n .9.

***6** For all of the foregoing reasons, Lam's motion to intervene (Dkt.# 7) is GRANTED. Lam shall file and serve his complaint within fourteen days of the date of this Order. The cross-motions regarding the arbitration agreement (Dkt. # 7 and Dkt. # 9) are DENIED. Lam and Fry's have sixty days

from the date of this Order in which to conduct discovery related to the validity of the signature on the August 25, 2003, agreement and to file dispositive motions on that issue. Lam's "Motion to Supplement the Record" (Dkt.# 38) is GRANTED, but the Court does not find the submission persuasive.

All Citations

Not Reported in F.Supp.2d, 2011 WL 666328

Footnotes

1 The Court has not considered the supplemental authority Lam submitted on February 9, 2011. Dkt. # 40). The information was available and relevant from the first filing in this matter and should have been presented with plaintiff's motion.

2 Under the FAA, the Court's tasks are limited to (a) determining whether a valid agreement to arbitrate exists and (b) deciding whether a particular dispute falls within the scope of the agreement. *United Steelworkers of Am. v. Warrior & Gulf,* 363 U.S. 574, 582–83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). Although waiver is not a challenge to the validity of the agreement (but rather its enforceability), the Ninth Circuit has determined that "particular contractual defenses to enforcement of the arbitration clause," such as breach and waiver, are properly decided by the district court. *Cox,* 553 F.3d at 1120.

3 In addition, courts generally find that informal complaints, settlement negotiations, and EEOC investigations do not trigger a duty to demand arbitration under the theory that parties should be able to pursue extrajudicial resolution of their dispute without waiving their contractual right to arbitrate. *See Martin Mariettta Aluminum, Inc. v. Gen. Elec. Co.,* 586 F.2d 143, 147 (9th Cir.1978); *Marie v. Allied Home Mortg. Corp.,* 402 F.3d 1, 15–16 (1st Cir.2005); *Adler,* 153 Wash.2d at 362, 103 P.3d 773.

4 Plaintiff filed his WLAD claim because the statute of limitation was about to expire. At the time, the EEOC had not yet determined whether it would pursue a Title VII claim, and Lam was therefore precluded from filing his Title VII and WLAD claims together.

5 The import of this omission is hard to determine. Lam has not identified, and the Court has not found, any decision in which the failure to raise arbitration as an affirmative defense, standing alone, is deemed a waiver of a contractual right to arbitrate. While the presence or absence of an "arbitration" defense is often considered when determining whether a party's conduct is consistent with an intention to arbitrate, it is not dispositive.

> More fundamentally, there is reason to doubt whether Rule 8's reference to "arbitration" was ever intended to encompass demands for future arbitration. Affirmative defenses, if proven, allow defendant to avoid or reduce the liabilities asserted in the complaint. A demand for arbitration, on the other hand, is simply a demand for a different forum. Because arbitration does not alter the substantive rights of the parties, it is not a means of avoiding, reducing, or limiting liability. At common law, the defense of "arbitration and award" was used not as a method for asserting a right to arbitration, but as a means of bringing to the court's attention the prior resolution of the dispute by a third-party, extra-judicial tribunal.

6 In his motion, Lam also argues that defendant's request for arbitration is untimely pursuant to Section II of the arbitration agreement. As noted above, the Court's tasks are limited to (a) determining whether a valid agreement to arbitrate exists and (b) deciding whether a particular dispute falls within the scope of the agreement. *United Steelworkers,* 363 U.S. at 582–83. The agreement at issue here applies to all disputes "arising from or in any way related to" Lam's employment with Fry's Electronics. Given the breadth of the agreement and the Supreme Court's instruction that any doubts regarding the scope of the arbitration clause should be resolved in favor of arbitration (*Id.* at 582–83), the Court finds that the interpretation and application of the contractual limitations period is a procedural question for the arbitrator to decided. *See Cox,* 533 F.3d 1114, 1120–21 (quoting *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)).

7 Defendant argues that whether Lam signed the August 25, 2003, arbitration agreement is a red herring because his signature on the "Acknowledgment of Receipt of Handbook by Associate" constitutes binding assent to the terms of the arbitration agreement. The Ninth Circuit has held, however, that signing an acknowledgment of receipt is not a knowing agreement to arbitrate unless the acknowledgment specifically notifies the employee (a) that the handbook contains an arbitration clause or (b) that by signing the acknowledgment, the employee is waiving the right to a judicial forum. *Kummetz v. Tech Mold, Inc.,* 152 F.3d 1153, 1155 (9th Cir.1998). The acknowledgment signed by Lam does not mention

the arbitration agreement or its effect. Under the *Kummetz* analysis, his signature on that document does not constitute knowing agreement to the arbitration provision.

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2010 WL 3732910
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court, W.D. Washington, at Seattle.

In re PARK WEST GALLERIES, INC., MARKETING AND SALES PRACTICES LITIGATION.
This Document Relates to: Blackman v. Park West Galleries, Inc., Case No. C08–1310RSL.

MDL No. 09–2076RSL. | Sept. 17, 2010.

ORDER DENYING PARK WEST'S MOTION TO COMPEL ARBITRATION

ROBERT S. LASNIK, District Judge.

***1** This matter comes before the Court on "Park West's Motion to Compel Arbitration." MDL 09–2076RSL, Dkt. # 91; C08–1310RSL, Dkt. # 163. After this motion was filed, the Court dismissed most of plaintiffs' claims, including all claims against defendants PWG Florida, Inc., Vista Art, LLC, and Fine Art Sales, Inc., and all claims arising out of Park West's sales of art work at sea. The Court has therefore considered defendant's motion only insofar as it relates to the remaining claims.

Park West argues that Mr. and Mrs. Davidson, Mr. Lee, and Mrs. Barton entered into binding arbitration agreements when they purchased artwork from Park West, and that these plaintiffs should be compelled to participate in arbitration in Miami–Dade County, Florida. Plaintiffs respond that they never agreed to the arbitration provisions, that the provisions are unconscionable, and that Park West's proposed forum is inadequate to provide relief because the American Arbitration Association ("AAA") no longer accepts consumer financial services arbitration cases. Taking the evidence in the light most favorable to plaintiffs, the relevant facts are as follows:

Mr. and Mrs. Davidson signed invoices containing arbitration provisions while on a cruise in August 2008.[1] Decl. of Mary Courson (MDL09–2076RSL Dkt. # 94) at 42–51. The arbitration provisions are printed on the front of the invoices, directly above the signature lines. The reverse sides of the invoices also contain language indicating that any claims or disputes are subject to arbitration pursuant to the arbitration provision. Mr. Lee signed an invoice while on a cruise in February 2008 that contains arbitration language identical to that included in the Davidsons' invoices. *Id.* at 70–71. An invoice apparently issued to Mrs. Barton at a land-based auction in April 2007 does not have an arbitration provision on the front of the invoice. *Id.* at 74. The reverse side of this invoice states that "[a]ny and all claims or disputes are subject to the arbitration provision set forth in this auction invoice" and "[i]n the event of any claims or disputes of any kind, the buyer agrees to submit any such claims or disputes to arbitration pursuant to the arbitration of claims and disputes provision set forth in this auction invoice." *Id.* at 75.

Plaintiffs' claims for damages arising out of sales that occurred at sea have been dismissed. Thus, the only contract still at issue is the April 1, 2007, invoice issued to Mrs. Barton.

Arbitration "is a matter of consent, not coercion." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Unless the parties agree to submit the issue of arbitrability to arbitration, the Court must determine whether an agreement to arbitrate exists. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). "When the validity of an arbitration agreement is challenged, the court should 'apply ordinary state-law principles that govern the formation of contracts.' " *Luna v. Household Fin. Corp. III*, 236 F.Supp.2d 1166, 1173 (W.D.Wash.2002) (*quoting Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir.2002)).

***2** Although there is no arbitration provision on the front of the April 2007 invoice, the document nonetheless contains a promise to arbitrate. The reverse side states, "[i]n the event of any claims or disputes of any kind, buyer agrees to submit any such claims or disputes to arbitration ...." Decl. of Mary Courson (MDL09–2076RSL Dkt. # 94) at 75. There is a genuine issue of material fact regarding whether plaintiff consented to even this minimal indication of an intent to arbitrate, however. Mrs. Barton states that the signature on the invoice is neither hers nor her husband's. The signature is markedly different than the only other exemplar in the record (*Id.* at 72), and Park West offers no evidence in support of its contention that one of the Bartons signed the invoice. Where plaintiffs deny the very existence of the contract containing an arbitration provision, compelling arbitration "would be inconsistent with the 'first principle' of arbitration that 'a party cannot be required to submit [to arbitration] any dispute

which he has not agreed so to submit.' " *Three Valleys Mun. Water Distr. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1142 (9th Cir.1991) (*quoting AT & T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 658 (1986)). There being a genuine issue of material fact regarding the formation of the contract, plaintiffs cannot be compelled to arbitrate this threshold issue. *Id.* at 1140–41.

For the foregoing reasons, Park West's motion to compel arbitration is DENIED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3732910

Footnotes

1 One of the invoices presented by Park West is unsigned. *Id.* at 40–41. The Davidsons also purchased art two land-based auctions, but there were no arbitration provisions associated with those sales.

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SCHROETER GOLDMARK BENDER

December 02, 2015 - 4:18 PM

Transmittal Letter

Document Uploaded: 718550-Petition for Review.pdf

Case Name: Traci Turner, Appellant v. Vulcan Inc., et al., Respondents
Court of Appeals Case Number: 71855-0

Party Respresented: Appellant
Is this a Personal Restraint Petition? ◯ Yes ◉ No
Trial Court County: King - Superior Court # 12-2-03514-8

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
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- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ◯ Other: _____

Comments:

No Comments were entered.

Sender Name: Darla Moran - Email: moran@sgb-law.com