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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

EMMANUEL D. KEPAS, Plaintiff, v. EBAY, INC., a Delaware Corporation Defendants.	: : : : : : : : : : :	**MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY PROCEEDINGS** Case No. 2:06CV00612 DB Judge: Dee Benson

Plaintiff, Emmanuel D. Kepas, by and through his attorneys of record, respectfully submits this Memorandum in Opposition to Defendant eBay, Inc.'s Motion to Compel Arbitration and Dismiss or Stay Proceedings.

INTRODUCTION

Mr. Kepas brought suit in this Court to recover damages related to eBay's wrongful discrimination and retaliation against Mr. Kepas in violation of his rights under both Title VII of

the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2, as amended by the Civil Rights Act of 1991, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a). Mr. Kepas also seeks general and compensatory damages resulting from eBay's breach of Mr. Kepas' employment contract and the covenant of good faith and fair dealing.

In July 2003, eBay hired Mr. Kepas to work as the Manager of its eWatch Team. Pursuant to eBay's employment procedures, Mr. Kepas was initially hired only on a probationary basis. After approximately four months, based on Mr. Kepas' performance, eBay extended Mr. Kepas an offer of continued employment. As a condition to employment, however, Mr. Kepas was informed that he must sign an arbitration agreement ("Arbitration Agreement" or the "Agreement"). Mr. Kepas signed the Arbitration Agreement in November 2003.

Relying on that Arbitration Agreement, Defendant now moves the Court to compel arbitration and dismiss or stay the proceedings. However, as discussed below, because the Arbitration Agreement is contrary to California law and is therefore invalid and unenforceable, Defendant is not entitled to an order compelling arbitration. Accordingly, Mr. Kepas respectfully requests that this Court deny Defendant's Motion to Compel Arbitration and Dismiss or Stay Proceedings.

STATEMENT OF FACTS

1. In July 2003, eBay hired Mr. Kepas, on a probationary basis, to work at its Draper, Utah, facility as the Manager of its eWatch Team. (*See* Affidavit of Emmanuel Kepas ("Kepas Affidavit") at ¶ 2.)

2. In November 2003, after determining that Mr. Kepas satisfactorily completed his duties during the probationary employment period, eBay removed Mr. Kepas from probationary status and extended him an offer of continued employment as the Manager of the eWatch Team. However, this offer of continued employment was conditioned on Mr. Kepas' willingness to sign eBay's standard Arbitration Agreement. Mr. Kepas signed the Arbitration Agreement on November 7, 2003. (*See id.* at ¶¶ 3-4.)

3. The boilerplate Arbitration Agreement provides, in pertinent part, as follows:

> The parties to this Agreement agree to arbitrate any dispute, demand, claim, or controversy ("claim") they may have against each other, including their current and former agents, owners, officers, directors, or employees, which arises from the employment relationship between Employee and Employer or the termination thereof. Claims covered by this Agreement include, but are not limited to, claims of employment discrimination and harassment under Title VII of the Civil Rights Act, as amended, . . . , the Age Discrimination in Employment Act, as amended, the Americans with Disabilities Act, 42 U.S.C. section 1981, . . . breach of employment contract or the implied covenant of good faith and fair dealing, express or implied; wrongful termination in violation of public policy, and all other claims for wrongful termination and constructive discharge or tortious conduct . . . .

(Agreement ("Agr.") at 1, attached hereto as Exhibit 1.)

4. Despite this broad coverage of claims, the Arbitration Agreement specifically exempts from arbitration certain claims. In particular, the Agreement states as follows:

> The parties agree that any claims that either party has that arise out of the Employee Proprietary Information and Inventions Agreement are specifically excluded from this Agreement. This includes, for example and without limiting the generality of the foregoing exclusion, claims by the Company that you have disclosed or misappropriated the Company's trade secrets and/or claims by you that you are the rightful owner of an invention.

(*Id.*)

5. Although the Arbitration Agreement provides that "[t]he Employer will pay the arbitrator's fee for the proceeding, as well as any room or other charges by AAA," it also states that the arbitrator

> shall have the power to award any type of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, *the costs of arbitration,* attorneys' fees and punitive damages when such damages and fees are available under the applicable statute and/or judicial authority.

(*Id.* at 1-2 (emphasis added).)

6. The Agreement also provides that any arbitration between the employee and employer must be conducted in Santa Clara County, California, "in accordance with the rules issued by the American Arbitration Association (AAA) for resolution of employment disputes, wherever this Agreement is silent on the arbitration procedure." (*Id.* at 1.)

7. Because the Arbitration Agreement is silent on the issue of witness costs, the AAA rules governing the resolution of employment disputes apply. Rule 45 of the Employment Arbitration Rules and Mediation Procedures provides that, "[u]nless otherwise agreed by the parties or as provided under applicable law, the expenses of witnesses for either side shall be borne by the party producing such witnesses." (AAA Employment Arbitration Rule 45, attached hereto as Exhibit 2.)

8. The Arbitration Agreement is to be governed by and interpreted in accordance with the laws of the State of California and "can be modified only by a written document signed by eBay's VP of Human Resources and the Employee." (Agr. at 2.)

ARGUMENT

1. THE ARBITRATION AGREEMENT IS INVALID AND UNENFORCEABLE

The Federal Arbitration Act ("FAA") provides that an arbitration contract "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 (2006) (emphasis added). In interpreting that Act, the United States Supreme Court has declared that "[s]tates may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (quoting 9 U.S.C. § 2). "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

In this case, the Agreement is governed by the laws of California. (Agr. at 1.) That State provides that an arbitration agreement is "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." Cal. Civ. Proc. Code § 1281 (2006). Thus, the question whether an arbitration agreement is enforceable, under both California law and the FAA, requires the court to determine if there are "reasons, based on general contract law principles, for refusing to enforce the . . . agreement." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 679-80 (Cal. 2000).[1] In *Armendariz*, the California Supreme Court held

[1] Although the United States Supreme Court has held that certain procedural questions regarding the scope of arbitrable issues "are presumptively not for the judge, but for an arbitrator, to decide," the Court has unequivocally held that questions concerning "whether the parties are bound by a given arbitration clause" are questions "for a court to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

that a contract may be unenforceable when it is contrary to public policy or is unconscionable. *See id.* at 680. The Agreement in question in this case is both unconscionable and contrary to public policy and is thus invalid. Accordingly, Defendant's Motion to Compel should be denied.

a. The Arbitration Agreement is Contrary to Public Policy

Pursuant to California law, "[a]ny one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Cal. Civ. Code § 3513 (2006); *see also id.* § 1668. Because certain statutory rights are "designed to protect the public interest, not just the individual," the courts have held that those rights cannot be waived or "contravened by private agreement." *Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 712 (Cal. Ct. App. 2004).

In *Armendariz*, the court held that the statutory rights created by California's Fair Employment and Housing Act ("FEHA") were created for a public reason, stating, "[i]t is indisputable that an employment contract that required employees to waive their rights under the FEHA to redress sexual harassment or discrimination would be contrary to public policy and unlawful." 6 P.3d at 681. As "the antidiscriminatory objectives and overriding public policy purposes of [FEHA and Title VII] are identical," *Beyda v. City of Los Angeles*, 65 Cal. App. 4th 511, 517 (Cal. Ct. App. 1998), the statutory rights created by Title VII are likewise unwaivable statutory rights that cannot be contravened by private agreement.

To ensure that "an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA [or Title VII]," California courts have imposed certain minimal requirements on a mandatory employment arbitration agreement. Such an agreement is

lawful only if it

> (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

Armendariz, 6 P.3d at 681-82 (internal quotations omitted). In discussing the fifth requirement, the *Armendariz* court reasoned, "it is not only the costs imposed on the claimant but the *risk* that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process." *Id.* at 687. Thus, "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Id.*

In this case, the Agreement contains at least two clauses that fail to meet the *Armendariz* test. First, although the Agreement provides that eBay must pay all fees related to the arbitrator, it also states that an arbitrator may "award any type of legal or equitable relief that would be available in a court of competent jurisdiction including, . . . *the costs of arbitration*, attorneys' fees and punitive damages when such damages and fees are available under the applicable statute and/or judicial authority." (Agr. at 1-2.) Because the Agreement provides that the arbitrator's fees are to be paid, at least initially, by eBay, the only effect this provision has is to authorize the arbitrator to shift the costs of arbitration to Mr. Kepas as part of any equitable relief awarded. In *Mercuro v. Superior Court*, 96 Cal. App. 4th 167 (Cal. Ct. App. 2002), the court addressed the validity of a similar fee-shifting provision, in which the employee "could wind up paying the entire cost of the arbitration . . . should he lose." *Id.* at 181-82. The court concluded that such a

provision fails to satisfy the *Armendariz* requirement, stating, "[b]ack-loading this cost to the employee does not solve the problem the Supreme Court was addressing in *Armendariz*." *Id.* at 182. Rather, "[s]uch a system still poses a significant risk that employees will have to bear large costs to vindicate their statutory right against workplace discrimination, and therefore chills the exercise of that right." *Id.* Because the Agreement in this case may require Mr. Kepas to bear the costs of arbitration, it is contrary to public policy and unenforceable under *Armendariz*.

Second, the Agreement also violates *Armendariz's* prohibition against unreasonable costs. As stated above, a mandatory arbitration agreement may not require an employee to "bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Armendariz*, 6 P.3d at 687. In this case, the Agreement provides that it shall be governed by the AAA's rules wherever it is "silent on the arbitration procedure." (Agr. at 1.) Those rules state that, "[u]nless otherwise agreed by the parties or as provided under applicable law, the expenses of witnesses for either side shall be borne by the party producing such witnesses." (Exhibit 2.) Because Mr. Kepas was employed in eBay's Utah facility and all of his witnesses reside in Utah, Mr. Kepas would be forced to incur substantial costs to secure the attendance of his witnesses in an arbitration that is held in California. Mr. Kepas would not be required to bear those costs were he free to prosecute his claims in this Court. Hence, the Agreement fails to satisfy the *Armendariz* requirements and is therefore invalid.[2]

[2] It should be noted that, even if eBay offered to change the terms of the Arbitration Agreement to comply with the *Armendariz* requirements, such an attempt must fail. As stated in *Armendariz*, "[n]o existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it." 6 P.3d at 697.

b. The Arbitration Agreement is Unconscionable

The Agreement is also invalid because it is unconscionable. California law vests courts with the authority to invalidate unconscionable contracts. *See* Cal. Civ. Code § 1670.5 (2006). To be unconscionable, a contract must exhibit both procedural and substantive unconscionability. *Armendariz*, 6 P.3d at 690. Procedural unconscionability focuses on "oppression or surprise due to unequal bargaining power" and "generally takes the form of a contract of adhesion." *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 983 (Cal. 2003) (internal quotations omitted). Substantive unconscionability, on the other hand, "may take various forms, but may generally be described as unfairly one-sided." *Id.* at 984. "Stated another way, [s]ubstantive unconscionability focuses on the actual terms of the agreement, while procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties." *O'Hare v. Mun. Res. Consultants*, 107 Cal. App. 4th 267, 273 (Cal. Ct. App. 2003) (alteration in original) (internal quotations omitted). While both procedural and substantive unconscionability must be present in order to find a clause unconscionable, the two elements "need not be present in the same degree." *Mercuro*, 96 Cal. App. 4th at 174. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz*, 6 P.3d at 690.

1. Procedural Unconscionability. Procedural unconscionability generally takes the form of a contract of adhesion. *Little*, 63 P.3d at 983. "The term [contract of adhesion] 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."

Armendariz, 6 P.3d at 689 (alteration in original) (internal quotations omitted).

In this case, the Agreement is a contract of adhesion. Besides including boilerplate terms on a standardized pre-printed form, the Agreement expressly provides that "I understand that I would not be hired by the Employer if I did not sign this Agreement." (Agr. at 2.) Such a statement demonstrates that the Agreement was not the product of a negotiation between the parties but was instead the result of eBay's 'take it or leave it' offer. *See Fitz*, 118 Cal. App. 4th at 722 (finding an arbitration agreement procedurally unconscionable because the agreement "was presented in a take-it or leave-it manner, and [the employee] lacked equal bargaining power"). Moreover, the degree of procedural unconscionability or "surprise due to unequal bargaining power" in this case is heightened because eBay employed Mr. Kepas for nearly four months prior to demanding that he sign the Arbitration Agreement.

2. Substantive Unconscionability. Substantive unconscionability looks to whether the agreement is unfairly one-sided. *Little*, 63 P.3d at 984. A contract is unfairly one-sided and thus substantively unconscionable if it lacks "a modicum of bilaterality, wherein the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration." *Id.* (internal quotations omitted); *see also O'Hare*, 107 Cal. App. 4th at 273. Also, contracts are substantively unconscionable if they contain "place and manner terms" that require the "weaker, less sophisticated parties" to arbitrate in a "state geographically distant from their . . . residence." *Wilmot v. McNabb*, 269 F. Supp. 2d 1203, 1211 (N.D. Cal. 2003).[3] Because the

[3] In *Bolter v. Superior Court*, 87 Cal. App. 4th 900, 908 (Cal. Ct. App. 2001), the court held "there may be arbitration provisions which do give an advantage to one party. . . . In those cases, . . . it is not the requirement of arbitration alone which makes the provision unfair but rather the place or manner in which the arbitration is to occur." (alterations in original) (internal quotations omitted)).

Agreement in this case lacks bilaterality and requires Mr. Kepas to arbitrate in a state other than his residence or place of employment, it is substantively unconscionable.

At first glance, the Agreement appears to be bilateral because it compels both parties to arbitrate any dispute "which arises from the employment relationship between Employee and Employer." (Agr. at 1.) However, as the Agreement specifically exempts from arbitration all claims typically brought by an employer, it is evident that the Agreement is only cloaked in the appearance of bilaterality and is thus substantively unconscionable.

California courts acknowledge that "[c]laims for unpaid wages, wrongful termination, employment discrimination and the like invariably are brought by employees, while claims involving trade secrets, misuse or disclosure of confidential information, and unfair competition typically are asserted *only* by employers." *Martinez v. Master Protection Corp.*, 118 Cal. App. 4th 107, 115 (Cal. Ct. App. 2004) (emphasis added); *see also Fitz*, 118 Cal. App. 4th at 725. Recognizing this difference in the typical claims asserted by employers and employees, California courts have held that an arbitration agreement is substantively unconscionable if "it compels arbitration of the claims *more likely* to be brought by the weaker party but exempts from arbitration the types of claims that are *more likely* to be brought by the stronger party." *Fitz*, 118 Cal.App.4th at 724 (emphasis added). For example, in *Fitz*, the court invalidated an arbitration agreement based, in part, on the fact that the agreement exempted from arbitration all claims "regarding noncompete agreements and intellectual property rights." *Id.* at 725. Noting that the exemption applied to claims asserted by both employee and employer, the court nonetheless found the agreement to be substantively unconscionable because the "mandatory arbitration

requirement can only realistically be seen as applying primarily if not exclusively to claims arising out of the termination of employment, which are virtually certain to be filed against, not by, [the employer]," while "[a] substantial portion of the claims [the employer] is most likely to initiate against employees . . . need not be arbitrated." *Id.* (first alteration in original).

Also, in *Mercuro*, an arbitration agreement required all breach of contract, discrimination, and state or federal statutory claims to be arbitrated but exempted from arbitration injunctive and equitable claims for "intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information." 96 Cal.App.4th at 175-76 (internal quotations omitted). Despite the fact that, as in *Fitz*, the exemption applied to both employer and employee claims, the court nevertheless held that the agreement lacked bilaterality because the employer "requires the weaker parties—its employees—to arbitrate their most common claims while choosing to litigate in the courts its own claims against its employees." *Id.* at 176. Finding that no reasonable business justification existed for the exemption, the court concluded that the arbitration agreement was substantively unconscionable. *Id.* at 177.[4]

As in *Fitz* and *Mercuro*, the Agreement in this case operates to compel the arbitration of claims most typically brought by employees while allowing eBay to litigate claims most typically brought by employers. Because the Agreement is unfairly one-sided and is not supported by a reasonable business justification, it is substantively unconscionable.

An agreement may also be substantively unconscionable if its place and manner provisions

[4] The court concluded that the exemption was not supported by a reasonable business justification because California law specifically allows a party in an arbitration proceeding to petition a court for "a provisional remedy," including a preliminary injunction or temporary restraining order. *Id.* (citing Cal. Civ. Proc. Code § 1281.8).

favor the stronger party. In *Bolter*, the court invalidated a clause in an arbitration agreement which required California franchisees to arbitrate their claims in Utah, the franchisor's headquarters. 87 Cal. App. 4th at 909. The court reasoned, "[the franchisor] understood those terms would effectively preclude its franchisees from ever raising any claims against it, knowing the increased costs and burden on their small businesses would be prohibitive." *Id.* at 910.[5]

Mr. Kepas was and is a resident of Utah at all times relevant to this dispute. Mr. Kepas was hired to work at eBay's Draper, Utah, facility, and he signed the Agreement at that facility. Despite the fact that Mr. Kepas will be forced to incur significant costs to arbitrate this dispute in California, a state unrelated to any of the claims in this case, eBay nonetheless seeks to compel Mr. Kepas to arbitrate his unwaivable statutory claims there. This forum provision serves only to provide eBay with a tactical advantage, requiring Mr. Kepas to absorb the costs of travel and accommodations in order to arbitrate his claims. "Arbitration was not intended for this purpose." *Armendariz,* 6 P.3d at 692. Also, because Mr. Kepas' witnesses are also residents of Utah, Mr. Kepas would not be able secure their attendance by subpoena. *See* Cal. Civ. Pro. Code § 1989 (2006). If any witnesses did decide to testify, Mr. Kepas would be required to pay their travel and accommodation expenses. Such costs would be substantial and may preclude Mr. Kepas from proceeding with arbitration. Thus, the forum provision is substantively unconscionable.

Given that the Agreement is both procedurally and substantively unconscionable, California

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[5] Similarly, in *Wilmot*, the court held that the forum clause in an arbitration agreement between individual investors and their financial advisor was unconscionable because it required plaintiffs, residents of California, to arbitrate their dispute with defendant in Denver, Colorado. 269 F. Supp. 2d at 1205-06. Relying on *Bolter*, the court concluded that the venue provision was unconscionable because it "requires Plaintiffs to resolve their dispute before the [AAA] in a state geographically distant from their California residence" and the plaintiffs "are the weaker, less sophisticated parties who contend that the costs of proceeding in the specified venue are preclusive." *Id.* at 1211.

law grants discretion to this Court to either invalidate the entire contract or sever the unconscionable terms. Cal. Civ. Code § 1670.5. In determining whether to invalidate the entire contract or merely strike out the unconscionable clause, this Court must look to the "various purposes of the contract." *Armendariz*, 6 P.3d at 696. "If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced." *Id.* However, "[i]f the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." *Id.*

In cases, such as this, where "multiple defects" are present in an arbitration agreement, the "defects indicate a systematic effort to impose arbitration on an employee not simply as an alterative to litigation, but as an inferior forum that works to the employer's advantage." *Id.* at 697. Because "[a]n employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter," *id.* at 697 n.13, this Court should refuse to sever the unconscionable provisions and should instead hold that the entire Agreement is invalid due to unconscionability.

CONCLUSION

The Agreement is unenforceable under two separate legal doctrines. First, because Mr. Kepas must incur expenses unique to arbitration, the Agreement fails to comply with the *Armendariz* requirements and is therefore contrary to public policy. Second, because the Agreement is unfairly one-sided and is designed to disadvantage Mr. Kepas, it is unconscionable.

DATED this 13th day of September, 2006.

/s/ Kathryn J. Steffey
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2006, I electronically filed the foregoing **MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY PROCEEDINGS** with the Clerk of Court using the CM/ECF system which sent notification of such filing and sent via first class, U.S. Mail, postage pre-paid to the following:

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/s/ D. Scott Crook

Exhibit Index

1. Arbitration Agreement
2. AAA Employment Arbitration Rule 45