IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

EMMANUEL D. KEPAS,)

Plaintiff,)

vs.) CASE NO. 2:06-CV-612DB

eBAY, a Delaware corporation,)

Defendant.)

_____)

BEFORE THE HONORABLE DEE BENSON

December 13, 2006

Motion Hearing

A P P E A R A N C E S

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December 13, 2006 2:30 p.m.

P R O C E E D I N G S

THE COURT: Good afternoon.

We're here in the case of Emmanuel D. Kepas against eBay, Inc. This is 06-CV-612.

Mr. Durham is here --

MR. DURHAM: I am, Your Honor.

THE COURT: Mr. Matthew Durham is here representing the defendant eBay. Mr. D. Scott Crook is here to my right representing the plaintiff.

Tell me who else you have at counsel table.

MR. CROOK: Yes, Your Honor. This is Kathryn Steffey from my office who is an associate and for Mr. Kepas, the plaintiff.

THE COURT: Thank you.

We're here on a motion to compel arbitration and dismiss or stay proceedings.

Mr. Durham, it is your motion. I would be glad to hear from you first.

MR. DURHAM: Thank you, Your Honor.

As the Court pointed out, we're here on eBay's motion to compel arbitration. It is really quite a simple matter today.

Just as a way of laying some factual background,

Mr. Kepas was hired by eBay in July of 2003 and after a probationary period, he was hired as a regular employee. At that time he signed an arbitration agreement and under the arbitration agreement he agreed to arbitrate all claims arising out of his employment with eBay.

In July of this year he filed a complaint in Federal Court alleging sex discrimination and harassment and age discrimination and breach of contract and breach of the implied covenant of good faith and fair dealing. When we contacted Mr. Kepas's attorney to mention to him that there was this arbitration agreement --

THE COURT: I know all this.

MR. DURHAM: Okay.

THE COURT: I have read your briefs, unless you think you need it on the record.

MR. DURHAM: No.

THE COURT: This is just background, and we know he wants to be here and you want to be in arbitration.

MR. DURHAM: Exactly.

The Court will also know that when Mr. Kepas opposed our motion, he essentially raised two or three issues. Basically he argued that the arbitration agreement was unenforceable under California law and particularly under the Armendariz case, because it imposed upon him at least the risk of bearing certain costs attendant to the

arbitration that he wouldn't bear if he were in litigation.

Secondly, that the arbitration agreement was unconscionable.

I think there is an additional issue regarding the severability of some of the provisions of the arbitration agreement that I will address in my argument, but I want to address first of all Mr. Kepas's two objections to the arbitration agreement.

First of all, he argues that he faces a risk of bearing costs associated with the arbitration, costs that he would not bear if he were litigating his action in court.

The agreement, which we have attached as an exhibit to our moving papers, provides 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 costs of arbitration and attorney's fees and punitive damages, when such damages and fees are available under the applicable statute and/or judicial authority.

I think this argument that Mr. Kepas risks bearing the costs of arbitration because the arbitrator could possibly award those to eBay is illusory, because the arbitrator can't award those costs anymore than Your Honor could impose upon Mr. Kepas costs associated with paying for your time or renting this courtroom or anything like that.

Title Seven and the A.D.E.A. simply don't provide for an award of those kinds of costs and, consequently, neither does the arbitration agreement.

My reading of the arbitration agreement is that this provision was actually intended to make it very clear to an employee like Mr. Kepas, that anything that he was entitled to under the applicable statutes and any remedies that he could obtain in the courtroom he can obtain in arbitration. But that does not allow the arbitrator the ability to award costs that would not be awardable in litigation under the appropriate statute. I think for that reason that argument that he is subject to costs of the arbitration and paying for the arbitrator and the time or facilities is without merit and the agreement is not enforceable on those grounds.

His second argument with respect to costs deals with witness costs, particularly the costs associated with the witnesses perhaps traveling to attend the arbitration hearing. Mr. Kepas does not really cite any authority for the proposition that requiring witnesses to testify in another state makes the agreement unenforceable. I think that that is because there is no authority for that proposition. If Mr. Kepas had entered into an employment contract that didn't have an arbitration clause, but did have a forum selection clause, those costs would be the same

as they would be in an arbitration agreement forum selection clause. I think what the Armendariz case was saying is if you want to have an enforceable arbitration agreement, you can't shift the costs that are unique to arbitration on to the plaintiff. If you as the employer want to have arbitration as your forum, then you, the employer, bear those unique costs. But witness fees and getting the witnesses to the forum that the parties have agreed upon as the appropriate one for resolving disputes is not a cost that is unique to arbitration. If we were litigating under just a regular forum selection clause, Mr. Kepas would face those same costs. I think on that basis the arbitration agreement can't be found unenforceable.

Now I want to move on to the issue of unconscionability, and as the Court certainly knows in order to find the agreement unconscionable and, therefore, unenforceable, it has to be both procedurally unconscionable and substantively unconscionable. Mr. Kepas's arguments with respect to procedural unconscionability are basically that this was an adhesion contract and on a preprinted form and not really subject to negotiation, and that he had been working at eBay for four months at the time it was presented to him and, therefore, he didn't really have a meaningful choice with respect to the agreement.

We cited a number of cases, however, Your Honor,

that demonstrate that the fact that a contract is an adhesion contract is certainly a relevant factor, but it does not in and of itself make the agreement unenforceable. You have to look for something beyond the mere fact that you have an adhesion contract to find it unconscionable. You have to have something like oppression or surprise or some coercion or something like that. There is really no evidence and no suggestion of anything like that in this case. It is clearly very distinguishable from the Fitz case where there was an employee who had worked with their employer for 14 years and she would be required to forfeit her employment or sign the agreement.

We have cited other cases where the mere fact that an employee was sort of given this arbitration clause on a take it or leave it basis, and certainly the Court found that that was an adhesion contract but they did not find it unconscionable or unenforceable on that basis. An important factor here is I think you have to weigh kind of on a sliding scale basis the procedural conscionability issues against the substantive conscionability issues.

The arbitration agreement at issue in this case is in my estimation a very straightforward, relatively short and relatively clear agreement. I doubt that there was any surprise. I doubt that Mr. Kepas didn't understand the terms of the contract. I also think that it was not outside

the scope of what an employee entering into a new employment relationship might expect to see. I don't think there has really been a showing of any procedural unconscionability in connection with this agreement.

With respect to substantive unconscionability Mr. Kepas raises two subissues. One is that there is this carve out provision that deals with claims arising from eBay's proprietary information and invention agreement, and the second is that there is this forum selection clause in the arbitration agreement.

Addressing first the issue of the bilaterality or the carve out provision, the Armendariz case basically says that there only needs to be a modicum of bilaterality. There does not have to be symmetrical mutuality in the contract where each party has exactly symmetrical rights. There has to be some sort of bilaterality to show that each party is getting and were giving up something.

I think in this case the provision at issue is clearly a bilateral provision. It provides that the parties agree that any claims that either party has that arise out of the employee proprietary information and inventions agreement are excluded in the arbitration agreement. Then it goes on to say that this includes things, for example, like eBay wanting to enforce its rights with respect to the disclosure or misappropriation of trade secrets, or an

employee can try and use another forum to enforce his or her rights as an owner of an invention. There is clearly mutuality here with respect to this provision.

Now, there has been some discussion about whether a provision that carves out intellectual property rights or carves out remedies with respect to injunctive or equitable relief is really mutual or whether that mutuality is sort of illusory. With this agreement I think you really have a situation that is different from the cases cited, because you don't have a limitation only to injunctive relief where a lot of the cases have sort of said it is employers that seek to enforce those clauses and not employees. Employees are seeking remedies for wrongful termination or discrimination and those kinds of things, and it is employers that want the injunctive relief and all of that.

This agreement in its context is being used by an employer in the technology industry where there are many employees who are inventors and have inventions and want to protect their own rights, and where it is not limited just to injunctive relief but an employee who says, hey, do you know what, you used my invention and I'm entitled to the royalty or I am entitled to damages, and they can bring that cause of action in court rather than in arbitration and I think we meet the standard of mutuality there.

Moving on to the issue of the forum selection

clause, Mr. Kepas argues that the fact that the arbitration agreement has a clause that requires the arbitration to occur in California makes the agreement unconscionable. But the standard really under California law, which is relevant in this case, is that a forum selection clause is enforceable unless it really deprives the plaintiff of his or her day in court.

We have cited a number of cases that stand for the proposition that a forum selection clause is not per se unenforceable, that there is nothing unconscionable about it, particularly in a situation where the employee would understand entering into the employment relationship that they are working for a big company with facilities in a lot of different places, and the company might want, as a matter of its own efficiency and convenience, to say if you have a dispute with us, we're going to resolve it in one forum instead of going all over the country to resolve these.

I think on either of the issues regarding costs, whether it be the arbitration costs or witness travel costs, or on the unconscionability issue, Mr. Kepas has not really shown that this agreement is defective to the extent that it would be unenforceable under the Armendariz case and California law. We believe that the agreement is fully enforceable and should be enforced in its entirety. That is what the parties agreed to and that is what the parties

understood.

Should this Court conclude, however, that there is a provision of the arbitration agreement that it believes is unreasonable or shouldn't be enforced, the Court has ample authority to sever that offending provision and enforce the rest of the arbitration agreement.

The California civil code provides that you can do that. There are multiple cases that we have cited in our moving papers including the Bolter case where the Court said, yes, this provision does not work and this provision is unenforceable, but that doesn't mean that we throw out the whole agreement. One case uses the phrase you don't throw out the baby with the bath water. You can still enforce the arbitration agreement as long as the defects in the agreement don't go to the central purpose of providing an alternate forum for the resolution of disputes between the employer and the employee.

I think it is also important to point out, Your Honor, that the agreement itself contains a severability clause, and that the parties in entering into the contract contemplated that, although they were doing their best to enter into an enforceable contract, there might be some problems here or there, and if that were the case, what they wanted was to go ahead with the arbitration and strike perhaps any offending provisions.

Now, the cases say that you can strike offending provisions if they are collateral to the main purpose of the agreement. We have cited a couple of cases that I think are important. Once, again, we believe that the I.P. carve out provision in the agreement and the forum selection clause are fully enforceable, but there are certainly cases where provisions like that were found unenforceable by a court under other circumstances, and the court struck those clauses while enforcing the arbitration agreement as a whole.

Just in conclusion, I would summarize by pointing out that Mr. Kepas really does not risk facing any costs in this arbitration that he would not pay in a regular litigation matter brought in court. He can't really be charged with arbitration costs and witness costs, and it would not be any different than if he were a plaintiff litigating under a forum selection clause, that this agreement is not unconscionable and that it is procedurally fair, that Mr. Kepas was aware of what he was signing and knew what the agreement said and that there was no oppression or surprise. Also, the agreement is substantively fair in that it is mutual and the forum selection clause is not unreasonable or unconscionable on these facts.

On that basis, Your Honor, I would submit it

unless you have questions.

THE COURT: No, I don't at this time. Thank you very much.

Mr. Crook.

MR. CROOK: Thank you, Your Honor.

I think that there are essentially two very significant facts that I think should persuade this Court that the arbitration agreement is unenforceable as it stands. The first and I think most important fact is one that there is no general employment agreement in this case. There is no written agreement that has been forwarded by eBay that would govern other than this arbitration agreement, and that the arbitration agreement itself was drafted by eBay and was given to Mr. Kepas after a probationary period. By the very language of that agreement, it said I understand that I will not be hired by the employer if I do not sign this agreement.

The reason those facts are significant is because we are dealing with California law. eBay, who created this agreement and required Mr. Kepas to sign it to continue employment with eBay, put in it a provision that California law would apply. The Armendariz case is the seminal case that governs this issue.

There are two issues that this Court, two legal issues that this Court must look at. Number one, does this

agreement itself violate public policy? That is what Armendariz says is the first step in any analysis when we are dealing with a public right. The second question is is the contract itself unconscionable? Are there parts of the contract that would be unconscionable under California law? California law in the Armendariz case is very clear that the court in California, the Supreme Court is very concerned with the unequal bargaining power of employees, and the position that they are in when they are given an adhesion contract. So relying on Federal Court precedent, they established the five public policy requirements. The fifth one, of course, is the one that is at issue here with respect to the public policy issue. That requirement simply says that an arbitration agreement should not require employees to pay either unreasonable costs or any arbitrator's fees or expenses as a condition of access to the arbitration forum.

Now, Armendariz's progeny says that that means not only is the access issue an important issue, but whether there is any risk that an employee may have to pick up those costs. What is significant in this case is that eBay now says, well, there is a provision that we understand and we would like this Court to interpret to say we didn't really mean what we put in the agreement. The provision states this, 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, attorney's fees and punitive damages when such damages and fees are available under the applicable statute and/or judicial authority.

So taking eBay's argument at face value, they are asking this Court to ignore the provision that says costs of arbitration. They are saying, well, it is in there but we could never ever authorize that and no court would ever give us that, so just ignore it. As the Court is well aware, that is a violation of contractual interpretation. You can't just ignore what was put in there.

THE COURT: How is it different from costs of court?

MR. CROOK: Because under the arbitration agreement it specifically says that wherever the agreement is silent, the A.A.A. rules apply. Rule 48 of the American Arbitration rules says and defines costs of arbitration to include the expenses of the arbitrator, the arbitrator's fees, and it also includes expenses and hearing room fees. So what we have is we look at the arbitration agreement and it uses the term the costs of arbitration, not the costs of court, it says the costs of arbitration, and that is defined under the rules to include those arbitrator's fees.

THE COURT: They say they are not going to

interpret it that way.

MR. CROOK: Yes. They say that they are not going to interpret it that way now, but the question is why is it inserted in the first place? If it has no meaning, why did they put it in?

Then, secondly, I would suggest the reason they put it in is to discourage employees from going to the forum so that they may have to incur those fees. If they are saying we would have never gone after those fees, why do they put it in there? The only reason that we can see is to discourage employees from going to the forum. That is why we have that problem with that provision.

There is a real risk under Rule 45 of the A.A.A. as well that an employee -- it says specifically in those rules that an arbitrator may charge to an employee the costs of the arbitrator, the arbitrator's fees and the hearing room fees. So there seems to be no other reason to put it in other than to do exactly what they say, and that is to recover those costs and to move those back over to the employees. If that wasn't the reason, then the other reason was intimidation and that, of course, flies in the face of the policy behind Armendariz.

The second problem is the witness fee issue. The witness fee issue, again, is that what they have asked to do is to have the forum be Santa Clara County. What that does

is it makes Mr. Kepas have to pay for witnesses to go to Santa Clara County where eBay's headquarters are, where they have access to everything, and Mr. Kepas is going to have to go there.

Now, their argument has been, well, if this were a regular forum selection clause in a regular general employment agreement, then it would be okay. Well, that is not exactly true because under the case law, you have to show fairness for a forum selection clause. The most significant problem with that argument is this. There is no general employment agreement that does have a forum selection clause, so but for the arbitration agreement there is no reason to go to Santa Clara County.

In fact, the site of the allegations was in Utah and the proper forum would be here. So under Armendariz the question is what type of fees would you have had to incur had you not had that arbitration agreement? Well, in this case the only place where that would have been proper would have been in Utah. There is no forum selection clause that would require them to go to Santa Clara County.

What is also very significant, Your Honor, is that in the arbitration agreement, there is the carve out exception which applies to the proprietary and invention agreement. What is significant about that is that there is no forum selection clause with respect to that carve out.

In other words, if eBay were so concerned about having Santa Clara County be their site where they have their arbitrations or their matters litigated, presumably they would have included within their carve out an additional forum selection clause.

Now these both speak to the public policy argument, in other words, under Armendariz improperly shifting the costs that Mr. Kepas would not otherwise be required to pay to Mr. Kepas.

The second issue, though, is unconscionability. Under California law you have to show two things under unconscionability. One is procedural unconscionability and, two, substantive unconscionability. Procedural unconscionability is sufficient if there is a contract of adhesion. In Armendariz, the case that is relevant here, the parties, before they were ever employed, signed an arbitration agreement. That was it. The court found that it was procedurally unconscionable because of the uneven bargaining position. The element of procedural unconscionability is easily met in this case.

What adds more to the procedural unconscionability is that Mr. Kepas worked for a period of four months where he exclusively worked for eBay and was fully intending to work there after the probationary period, and then he was given the arbitration agreement, only after he had given up

other opportunities to work, and at that point the procedural unconscionability -- the scale weighs heavily in favor of Mr. Kepas's favor. The Fitz case which we have cited in our papers clearly indicates that that type of dealing is unconscionable.

But, of course, even if there is procedural unconscionability the Court also has to find substantive unconscionability. That is, again, easily met in this case. That is because there are three issues. One is the cost shifting which we have already talked about. Secondly, the forum selection clause -- there are two cases in California directly on point which say -- and they are Bolter and Wilmot, and both of those cases say that if an arbitration agreement requires a party to raise a claim in a forum that they are far removed from, and that they are the weaker party in the negotiations, then that is substantively unconscionable. There is no other case that has been cited by eBay that says that it is not substantively unconscionable.

Again, they go back to the general forum selection arguments and argue that, well, because generally you could have it, it is okay. But in these two California cases, both Bolter and Wilmot, they are arbitration forum selection clause cases and they are directly on point.

Finally, eBay requires Mr. Kepas to litigate his

most likely claim and exempts eBay's most likely claims. That is simply because of the carve out. Any claim that is subject to the arbitration agreement or that Mr. Kepas could bring or would most likely bring is required to be arbitrated. Any claim that is most likely to be brought by eBay does not have to be arbitrated.

The case that is directly on point, which is Fitz, which has the exact same mutuality arguments that eBay has been making here, says that that is substantively unconscionable. Therefore, we meet at least three different substantive unconscionability elements under California law, under controlling California law.

What is important is that California is very concerned about the tenor of the agreement. Armendariz says that if the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. The only purpose for this agreement was to force Mr. Kepas into a forum where it would cost him more money and it would be beneficial to eBay. Armendariz is very concerned about those two elements, the cost and the repeat player problem that comes into account when you're dealing with arbitration. Because eBay will be doing these in Santa Clara County, and because they will be doing them repeatedly, they will get the benefit of the doubt and that is what Armendariz is worried about. Under those cases, the

only two published cases that deal with multiple defects, they say that this Court must throw out the arbitration agreement.

Now, eBay does cite several unpublished cases, but under the California rule that is applicable, 977, it says that they must not be cited or relied on by a court or a party in any other action. We would say that it is improper for this Court to even consider those cases. But even if this Court were to consider them, I would just note that both Wilkins and Kozonasky deal only with one provision being unconscionable, not multiple defects.

We would argue that this Court must throw out the arbitration agreement and allow Mr. Kepas to continue in his action here and to deny the motion to compel arbitration.

If Your Honor has no other questions --

THE COURT: No, I don't right now.

Thank you, Mr. Crook.

Mr. Durham, did you want to say anything in response?

MR. DURHAM: If I may, Your Honor, just for a moment.

THE COURT: Do you contend that the cost of arbitration is synonomous with he cost of court?

MR. DURHAM: I don't know that I would contend that it is synonomous with the costs of court, but what I

would contend is that if it was not a cost that a court could award, it is not a cost that the arbitrator could award. That is what the agreement says.

THE COURT: So not completely synonymous but referring to the same thing, the same kind of thing?

MR. DURHAM: The same kind of thing, but if it is not an arbitration cost that is parallel to a cost that would be awarded by a judge, then it is not a cost to be awarded by the arbitrator.

First of all, we would basically --

THE COURT: How do these arbitrators get picked?

MR. DURHAM: I think --

THE COURT: Is there one or two or --

MR. DURHAM: I think it would proceed under the rules of the Triple A.

THE COURT: What does that say?

MR. DURHAM: That the parties have their choice. I have not checked that rule recently, but, as I recall, the parties can choose one or two or three.

With respect to the issue of costs, I think Your Honor's question points out exactly the issue, and that is that we think the agreement basically says that the arbitrator can only award what a judge could award. If a judge couldn't award costs like courtroom fees or the compensation for the judge's time, the arbitrator can't

award that to the plaintiff either.

THE COURT: The strict reading of your language, your client's language would come out the other way.

MR. DURHAM: Well, I think that the language --

THE COURT: It includes the arbitrator's costs.

MR. DURHAM: I think the language is broad because in some situations the arbitrator is going to be making an award that the employer will pay and that could include the arbitrator's costs, and I guess in some situations the arbitrator might be making an award that the employee would pay. We don't think that would include the arbitrator's costs, but the clause is broad enough to encompass both situations.

THE COURT: Well, but it is also broad enough so that later if you were to assess the arbitrator's costs against Mr. Kepas, and you included in that the fee that the arbitrator charged, there is an allowance under the present way this thing is structured for that argument to prevail.

MR. DURHAM: Well, I don't think so, Your Honor, because what it says is he can award any type of legal or equitable relief that would be available in a court of competent jurisdiction. A court of competent jurisdiction can't award that kind of relief to an employer. It can't require an employee to pay for the judge's time. It says that it would include those kinds of damages or fees when

they were available under the applicable statute and/or judicial authority. Once again, I don't think that they are.

With respect to the issue of an adhesion contract and --

THE COURT: Well, I don't know the word, but it is a little untight, untidy.

MR. DURHAM: I am not sure that that is the best language that anyone could ever come up with, but I do think that what it contemplates is that the arbitrator might be making an award that goes one way or that goes the other way, and what this language I believe is intended to say is you as the employee under California law and under Armendariz can get everything in arbitration that you could get in a court of law.

THE COURT: Well, that is what you want to say, but that is not necessarily what it says.

MR. DURHAM: Well, but the limiting language that says that the arbitrator can only award what a court of competent jurisdiction would award I think places a limitation on that.

THE COURT: Well, that is maybe why I think it is not so tight. It says 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. So far we

are fine. Including the costs of arbitration. Then that is defined, as Mr. Crook pointed out, to include the arbitrator's fees.

MR. DURHAM: The arbitrator certainly could award that to the plaintiff.

THE COURT: But he could make an award against the plaintiff, at the end of which the plaintiff is stuck with the arbitrator's fees. That is what they are worried about.

MR. DURHAM: I understand that that is what they are worried about, but I think, taking the provision as a whole, that can't happen.

THE COURT: Why can't it?

MR. DURHAM: It can't because --

THE COURT: It says including the costs of the arbitration.

MR. DURHAM: Right.

THE COURT: Maybe that is why it was not very tightly written because you say that is inconsistent. Only the costs that are similar to the costs that a court would have incurred --

MR. DURHAM: That is what I think a court could award, and I think that is what the arbitrator can award.

THE COURT: Well, maybe that is why I think it is not very tightly written.

MR. DURHAM: I don't want to move away from this

subject unless you are ready to, Your Honor.

Do you have other questions?

THE COURT: Let me just look at something.

MR. DURHAM: Okay.

THE COURT: For example, here in this very court, occasionally we refer a matter to arbitration. In fact, there are times I have ordered parties to go to arbitration. Usually they agree on how they are going to share those costs, but if they don't, I am not so sure that I don't have the authority to order those costs to be allocated among the parties in some way that I think is equitable.

Under the special master provision of Rule 53, the Court has the authority to fix the compensation of the special master who in effect is serving as a type of an arbitrator. So when it says available in a court of competent jurisdiction and you say including the costs of arbitration, we do things similar enough to that that --

MR. DURHAM: Well, I guess if you were looking down the road and saying that in the underlying arbitration proceeding there was a need to bring in someone else to decide a particular issue, and that those costs be allocated in a certain way, I don't know, but I think that is an issue that probably wasn't contemplated by the parties. I think what this language was contemplating is that in the ordinary course what could the plaintiff expect to be awarded? I

think what this provision is saying is that if you could get it in --

THE COURT: Well, that is what you thought it was supposed to say, but when you write it and put the costs of arbitration, and that is actually defined under these arbitration rules that you're referring everything to as including the arbitrator's fees, it just makes it less than tight. It should have said the costs of arbitration, and then that is defined, and by saying the costs of arbitration we don't mean the same meaning as that phrase is defined in the arbitration rules that we are adopting, no. It means in this sense only those costs of arbitration that are the same as the kinds of costs courts award when they are awarding costs in a court of law.

Right?

MR. DURHAM: Well, I guess --

THE COURT: Well --

MR. DURHAM: If you and I were writing it --

THE COURT: Stranger things have happened. Mr. Crook is making a very good argument that the costs of arbitration is a term of art under the arbitration rules, and you have said on the one hand that they would be limited to what a court of competent jurisdiction could award, but then in the very next clause it says including costs of arbitration. It is a little squishy.

Is squishy a word? That is an untight word.

MR. DURHAM: I think that is a word.

I think the reason that may be the case because it is contemplating awards going either direction. Maybe they would award arbitration costs to the plaintiff, but under their limiting language they wouldn't award those to the employer.

THE COURT: Well, it seems that the California courts would not want arbitration provisions to be upheld if there was the possibility that the expenses that are associated with hiring an arbitrator and hiring an arbitrator's room and all of those kinds of costs would ever be required to be paid by the employee.

MR. DURHAM: Well, that is why like, for example, in the Mercuro case they found a problem because that provision said that all arbitration costs would be awarded to the prevailing party, which is not what this agreement says. What this agreement says is that the arbitrator can award what a court of competent jurisdiction could award. It is different. The language is different --

THE COURT: -- than in that case.

MR. DURHAM: I think it was done to address the concerns that are raised in Armendariz.

THE COURT: Just kind of sloppily.

MR. DURHAM: Well, I didn't write it and I can

understand the Court's concern, but I think the language says that if the Court could award it to you, the arbitrator can award it to you.

In another place in the agreement eBay agrees to pay the arbitrator's costs, so I don't see the risk that Mr. Kepas would receive those because eBay would bear those costs.

THE COURT: Okay.

MR. DURHAM: With respect to the witness fees, I think our argument is basically that what Armendariz says is that if there are costs that are -- I don't think the language in Armendariz is unique to arbitration but it is similar language. In other words, if there are costs that the employee would face because you're in arbitration rather than litigation, those costs should be borne by the employer, but witness fees and expenses of getting witnesses to the forum where it is being decided, there is nothing unique about that with respect to arbitration. Any time that you're litigating an action in a forum where the witness does not live, there is that issue. I don't think that is the kind of cost that Armendariz is talking about when it talks about arbitration costs. Consequently, I don't think that that suggests that the agreement is unenforceable under that case.

Mr. Crook raised the issue or the fact that there

was no forum selection clause in connection with the carve out regarding trade secrets and inventions. I think there is a good explanation for that. I think if you need to go get an injunction, that you need to go get the injunction where the offending party is. That is a situation where a forum selection clause probably does not make sense, because you have got to be able to go get an injunction where the problem is. That would be true for the employee. If the employee found out that eBay was using his or her invention in a particular forum, he would want to go get an injunction in that forum to stop eBay from doing that. So I think that is the situation there.

With respect to unconscionability, we have cited a number of cases that suggest that the mere fact that someone is given a contract, a preprinted contract on a form, terms that are not changed, and you're sort of told that this is the agreement and you take it or you leave it, that certainly suggests that the contract is an adhesion contract, but that does not mean that the contract is unconscionable or unenforceable. In the cases cited by the parties here, where the courts have found procedural unconscionability is where the terms have been hidden in the contract, where you had to refer to the bylaws of the N.A.S.D. in order to know what the terms of the arbitration agreement were, or where the language was buried in small

print in footnotes or something like that or appended to the back of the employment application.

That is not the situation here. This was a stand-alone agreement. It is two pages and it is very straightforward. There is no suggestion, other than the mere fact that it is an adhesion contract, that there was anything oppressive or unfair or hidden about the terms of this contract.

With respect to the carve out provision, Mr. Crook argues that their cases basically say that the types of cases that an employer is going to litigate are these I.P. claims, and the types of cases that an employee is going to litigate are the kind that tend to follow the arbitration clause. I think what you have to do is look at it in the context of this industry and this particular provision. In none of the cases cited is there a provision that is like this provision. This provision clearly goes out of its way to make it clear to the employee that if you have intellectual property rights that you want protected, that you can litigate those in court as well. The provision is on its face very mutual, and given the fact that eBay is a technology company where it has employees who are patent owners and inventors, there is certainly a mutuality with respect to that provision and that does not make it substantively unconscionable.

With respect to the issue of the forum selection clause, I think the issue there -- I don't know that it really -- there is certainly no authority for the proposition that because there is a forum selection clause in a stand-alone arbitration agreement that that is somehow more unconscionable than a forum selection clause in an employment agreement. I just don't understand why that makes the forum selection clause more offensive than it would be in any kind of contract. On that basis I would just suggest that the forum selection clause does not suggest any sort of unconscionability.

Finally, with respect to this issue of multiple defects, there are in fact a number of cases that we cited in our papers that deal with arbitration agreements where there was a severance of offending provisions made even though there was more than one defect. I believe that those are unreported, but the fact of the matter is what you would have to sort of suggest here is that Armendariz is making some sort of a mathematical argument that if there is one offending provision that you can sever that out and enforce the rest of the agreement, but if there are two you can't.

I think the issue here is you have to look at what the core purpose of the arbitration agreement was and is, which is to provide an alternate forum for the resolution of these disputes. If you find a provision that is

troublesome, and that provision can be severed without altering that core purpose, then California law and the agreement itself and the Armendariz case and its progeny all suggest that that can be done by the Court.

THE COURT: Thank you very much, Mr. Durham.

Did you want to say anything more in response to him?

MR. CROOK: Your Honor, just one thing.

THE COURT: Okay.

MR. CROOK: It will be brief.

THE COURT: Sure.

MR. CROOK: With respect to the issue of taking the agreement as a whole, that is what we are speaking about with respect to Armendariz. What you do is if there are multiple defects, you look at them and say why are they there? What is the purpose of them being there? In this case the significant defects are, number one, a forum selection clause that requires Mr. Kepas to go elsewhere. There is no general employment agreement that has a forum selection clause, but we have an arbitration agreement. What is the purpose in doing that? That advantages eBay and disadvantages Mr. Kepas significantly.

Number two, arbitration costs can be shifted to Mr. Kepas under the way that that clause is currently constructed. You have gone through the language and can see

the problem with it, but the other issue is a court of competent jurisdiction would not be awarding arbitration costs unless in the circumstance that you're talking about, a master situation, and so the inclusion of that suggests to the employee that you may have to take these significant costs on yourself, again, discouraging an employee from litigating.

The third thing is the carve out. I just wanted to note a couple of things about that. Number one, on the carve out, and with respect to the issue of the carve out, eBay has the burden of proving that there is a special need in the industry or in their particular circumstance to have the carve out. That comes out of Armendariz and Fitz both. In this case all we have are generalized arguments about eBay being a different type of company.

The second thing is you'll note that that agreement, which was allegedly entered into between Mr. Kepas and eBay, was not included with the signing papers. If in fact it is as liberal as he is suggesting that it is, that would be interesting, because, for the most part, those types of agreements give work product to eBay, not the employee. So who is most likely to enforce that agreement? The fact is we can't even discuss that because we don't have a copy of that agreement. It wasn't given to the Court. So those types of arguments I don't think add anything.

I think, taken as a whole, what is the arbitration agreement intended to do? It was intended to make it hard for Mr. Kepas to bring a claim, and under California law those types of contracts should not be enforced.

THE COURT: Thank you very much, Mr. Crook.

The motion is granted. The matter is referred to arbitration pursuant to the agreement. I find the agreement to be binding on the parties. It is a contract of adhesion, but that does not make it illegal. Many employment based requirements are contracts of adhesion going one way or the other.

I do require for this agreement, consistent with my reading of California law, and I'm not going to issue a written opinion, so I want to say a couple of things on the record, but especially the Armendariz case which is cited by both sides, and I think it is very clear, and I find that the requirements of Armendariz are satisfied here, including the requirement that the agreement does not require employees to pay either unreasonable costs or any arbitrator's fees or expenses as a condition of access to the arbitration forum.

I'm granting the motion but I'm making it clear that the Court has interpreted and accepted the defendant's interpretation of the reference to arbitration costs as those costs that are limited to the same types of costs that

could be granted by this Court under the Rules of Civil Procedure and the local rules of the Court, and may not include the expenses related to the arbitrator's fees and the other costs of arbitration such as rental of the physical facility and the like. That is one adjustment. The defendant claims it is no different than what is intended to be in any event.

That should be clear in the order that you are going to prepare, Mr. Durham.

I am also going to require that in order for the arbitration agreement to be valid, that the forum selection clause be adjusted to allow the arbitration to occur in Utah or California at the plaintiff's election. My best reading, and this is not Armendariz, but I'm looking primarily at the Wilmot and Bolter cases, the two cases cited by the plaintiff from the California Court of Appeals, which indicate to me that this provision is improper under these circumstances, and that the plaintiff at least ought to have the option of requiring the arbitration proceeding, to which he is bound, to occur in Utah and not to be required to go to California and take all of his witnesses there and pay for their fees, the witness fees in doing so.

I am not persuaded, and you have done an excellent job of arguing this, Mr. Crook, and presenting the position in your brief as well, as well as I think you could possibly

do, but I'm not persuaded that the provisions relating to intellectual property are sufficiently problematic to require the Court to invalidate the entire agreement, under the general description of the business eBay is in, and the explanation given by Mr. Durham both in his brief and here today, so I am not inclined to require severance of that clause, nor to preserve the underlying arbitration agreement.

Prepare an order to that effect, Mr. Durham.

MR. DURHAM: Yes.

THE COURT: Thank you both for your arguments and your briefing. They have been very helpful.

We'll be in recess.

Make sure that he sees it and approves it as to form.

(Proceedings concluded.)

STATE OF UTAH)
)
COUNTY OF SALT LAKE)

I, Ed Young, do hereby certify that I am Official Court Reporter for the United States District Court for the District of Utah;

That as such Reporter I attended the hearing of the foregoing matter on 12-13-06, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages numbered from 1 to 38 constitute a full, true and correct report of the same.

DATED at Salt Lake City, Utah, this 21st day of Nov., 2009.

Ed Young, U.S. Court Reporter
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