

UNITED STATES COURT OF APPEAL

TENTH CIRCUIT

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| EMMANUEL D. KEPAS, | : | No. 09-4200 |
| | : | |
| Plaintiff-Appellant, | : | (D.C. No. 2:06-CV-00612-DB) |
| | : | (D. Utah) |
| vs. | : | |
| | : | |
| eBAY, a Delaware corporation, | : | |
| | : | |
| Defendant-Appellee. | : | With Keyword Index |

HEARING HELD SEPTEMBER 20, 2010

BEFORE

JUDGE BRISCOE, JUDGE LUCERO, JUDGE HOLMES

CAROLYN ERICKSON, CSR
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3 P R O C E E D I N G S

4 (Transcriber's note: speaker identification
5 may not be accurate with audio recordings.)

6 MS. HOLLINGSWORTH: Good morning.

7 JUDGE BRISCOE: Good morning.

8 MS. HOLLINGSWORTH: I'm April Hollingsworth on
9 behalf of Emmanuel Kepas today and I appreciate your time and
10 attention.

11 We are here on appeal of the district court's
12 decision to reform certain provisions in an arbitration
13 agreement between my client, Mr. Kepas, and eBay, his former
14 employer. The reason that this Court should reverse the
15 district court's decision to reform provisions in the
16 agreement rather than void the entire agreement boils down to
17 this, the court never engaged in the amount that is required
18 by the California law pursuant to the Armendariz decision
19 that says you have to look at the totality of the
20 circumstances and look at the intent of the parties in making
21 an agreement to determine whether or not to sever provisions
22 or invalidate the entire agreement because in this case, if
23 you look at the provisions that we found problematic and
24 frankly the court found problematic, there are three.
25 There's the form selection provision which stated that my

1 client, who lived in Utah, had to bring his claims in Santa
2 Clara County, California. There is language in the contract
3 that says the arbitrator can award costs to include for
4 arbitration costs. Now whether or not that could actually be
5 carried out because they may not be able to be awarded under
6 Title 7 is not really the point. The point is what it says
7 to an employee who doesn't know what Title 7 says is I might
8 have to bear these costs.

9 Finally, there is the carve out for intellectual
10 property decision or disputes. If you look at these
11 provisions in their totality, and pursuant to case law that
12 has looked at similar provisions, the conclusion is - has to
13 be that the intent behind this agreement was to dissuade
14 employees from trying to vindicate their rights. And if they
15 got the guts to do that, despite the risks to them, then they
16 were - it might - they try and make it prohibitive to them
17 expense-wise and logistically.

18 JUDGE BRISCOE: Well, let's take your first - your
19 first challenge, that is the forum selection clause. You
20 speak in your brief about extreme witness costs to bring your
21 witnesses to California from Utah and that that type of
22 expense, I guess you're saying wouldn't be borne if you were
23 involved in litigation, but wouldn't you have to pay witness
24 travel and expenses in litigation wherever you had it?

25 MS. HOLLINGSWORTH: Right, but our witness - if we

1 were allowed to litigate in Utah where the witnesses are,
2 then there is much less expense.

3 JUDGE BRISCOE: Just depose them in Wichita - in
4 Wichita - in Utah and you wouldn't have the expense of having
5 to travel to California.

6 MS. HOLLINGSWORTH: Well, I suppose that's an
7 option. I think is always more desirable -

8 JUDGE BRISCOE: And isn't there a valid reason for
9 the forum selection to be in California? Isn't that the home
10 office of EBay?

11 MS. HOLLINGSWORTH: Well, EBay didn't - sure, and
12 that benefits EBay. They've got their attorneys there.
13 They've got -

14 JUDGE BRISCOE: Well, I mean it's just it's not an
15 arbitrary forum selection, you know, we'll require all cases
16 and arbitrations to be handled in, you know, Alaska.

17 MS. HOLLINGSWORTH: Right. No, I agree it's not
18 arbitrated but certainly it's benefits eBay. And I'll get to
19 this, but the way the court dealt with that was improper
20 under California law. He said it can be brought in Utah then
21 as well and the court doesn't have the power to do that.

22 JUDGE LUCERO/HOLMES: One point, if I may move the
23 focus of - if I don't get any protest, I'll move it, but if
24 others want to stay where you are - it seems to me that we
25 have to look at Armendariz and determine whether the kind of

1 thing that the judge did in New Mexico - in Utah which is to
2 sever provisions and modify the agreement, at what point does
3 that violate the central purpose of the agreement and
4 basically become unconscionably?

5 MS. HOLLINGSWORTH: And the case law says you look
6 at the agreement as written and what its purpose is. What
7 the district court did in this case is to say, well, these
8 might be problematic, but I'll just -

9 JUDGE LUCERO/HOLMES: The problem that it can be
10 heard in California so let's move it to Utah. It's a problem
11 that we're going to have to shift the cost to the employee so
12 let's not do that. Well, for this employee great news, but
13 what about other employees? Are their rights being chilled
14 in the process? I mean, that's where I kind of struggled with
15 this case and your argument on that point and opposing
16 counsel's couldn't be very helpful to me.

17 MS. HOLLINGSWORTH: Well, the California law has
18 provided public policy argument on exactly that point. The
19 California courts don't want to allow this sort of agreement
20 to be put out there for employers and then be rectified once
21 you get into litigation. And this is a quote from Fitz and
22 they're citing the Armendariz case says "An employer will not
23 be deterred from routinely inserting such a deliberately
24 illegal clause into the arbitration agreements it mandates
25 for its employees if it knows that the worse penalty for such

1 illegality is a severance of the clause after the employee
2 had litigated the matter. In that sense, the enforcement of
3 a forum arbitration agreement containing such a clause
4 drafted in bad faith would be condoning or at least not
5 discouraging an illegal scheme and severance would be
6 disfavored unless it were for some other reason in the
7 interest of justice."

8 So they have spoken to that exact point and said,
9 no, we're not going to allow this because it - it from the
10 beginning it dissuades employees from vindicating their
11 right, and that's the improper purpose that we're not going
12 to tolerate.

13 JUDGE LUCERO/HOLMES: But the test the California
14 law has adopted goes towards a question of permeating the
15 agreement with the illegality. So we're still not talking
16 about one provision that is deemed to be illegal, I mean, we
17 can have the full severance document if we're talking about
18 that. And so why wouldn't it be the case in a situation like
19 this where you have these three discrete provisions and at
20 least as I understood - and correct me if I'm wrong in this -
21 the district court did not flatly say that this - that the
22 cost shifting provision was illegal, it just made it - it
23 clarified to make clear that this provision did not involve a
24 shifting of costs and that was part of the modification and
25 the under the words of the California cases restriction on

1 that term. So why is why - so what I want to focus on is not
2 the question of whether let's say these term - number one,
3 it's questionable whether that term is legal to begin with,
4 but more importantly, why is this agreement permeated with
5 illegality?

6 MS. HOLLINGSWORTH: Okay. And I just want to point
7 out that the way that the district court termed what he was
8 doing was making an adjustment and just to put it out there
9 California law doesn't allow for that sort of adjustment.

10 JUDGE LUCERO/HOLMES: And I wanted to get back to
11 that point. What would be the difference between just
12 striking the forum selection clause and allowing for Salt
13 Lake City, how is your client worse off by allowing for Salt
14 Lake City then just striking the clause? I mean, it's to the
15 same effect, right?

16 MS. HOLLINGSWORTH: It may be, but that's not what
17 the court did. The court changed it.

18 JUDGE LUCERO/HOLMES: It offered Salt Lake City as
19 an alternative forum.

20 MS. HOLLINGSWORTH: Right. And -

21 JUDGE LUCERO/HOLMES: When it could have stricken
22 the clause.

23 MS. HOLLINGSWORTH: Right. And it can't do that.

24 JUDGE LUCERO/HOLMES: Well, that's - that's not
25 clear to me from the cases. I understand that's what you're

1 saying, but okay, finish with the point about permeation,
2 please.

3 MS. HOLLINGSWORTH: Okay. So the case law looks to
4 several points as far as whether you decide to sever or
5 whether you void the contract. And it looks at - one of the
6 main reasons that it says you should void the contract rather
7 than sever is if there are multiple problematic clauses
8 because that says that it indicates that the employer is not
9 using this agreement as an alternative to litigation. It's
10 using it to disadvantage of the employee.

11 JUDGE LUCERO/HOLMES: What are the multiple clauses
12 here?

13 MS. HOLLINGSWORTH: The ones that we had talked
14 about. There's the forum selection clause.

15 JUDGE LUCERO/HOLMES: All right, that's one.

16 MS. HOLLINGSWORTH: There's the cost shifting
17 provision.

18 JUDGE LUCERO/HOLMES: Two.

19 MS. HOLLINGSWORTH: And then there's the exclusion
20 for intellectual property rights.

21 JUDGE LUCERO/HOLMES: And the district court, what
22 did it say about the exclusion? It didn't find that all
23 problematic, did it?

24 MS. HOLLINGSWORTH: It - well - it glossed over
25 that analysis. What it said is - I've got - this is the

1 entire discussion about that decision, the court said - and
2 it didn't issue a written opinion, so you find the analysis
3 in the oral argument transcript. And the judge said, "I'm
4 not persuaded that the provision relating to intellectual
5 property are sufficiently problematic to require the court to
6 invalidate the entire agreement under the general description
7 of the business eBay is in and the explanation given by Mr.
8 Durham, both in his brief and here today.

9 So there's a couple points I want to bring up on
10 that. One, all the case law in California that deals with
11 one of these provisions that carves out intellectual property
12 says this - the primary concern that you look at when you're
13 dealing with substantive unconscionability and it shows -
14 this is a legal contract. In every single one of those
15 cases, Armendariz, Fitz, Neutro, Martinez, they all deal
16 with-

17 JUDGE BRISCOE: Does it matter that we're dealing
18 here with eBay and employees who would work with eBay and
19 that there's a potential here for both the employer and the
20 employee to have those types of claims?

21 MS. HOLLINGSWORTH: Right. And that was the second
22 point I was going to get to. eBay makes that argument -

23 JUDGE BRISCOE: Right.

24 MS. HOLLINGSWORTH: - but they only make that
25 argument. What the case law says is you have to provide

1 evidentiary support for that. These conclusory arguments
2 that, Oh, we're a different sort of company, don't fly. And
3 any company who has that carve out provision could make the
4 same argument presumably if they have that provision, there
5 must be some inventions going on that they would want to
6 protect.

7 JUDGE LUCERO/HOLMES: But were any of the cases
8 that you cited to us just then, did they involve businesses
9 that were analogous to eBay? And my recollection, maybe
10 wrongly, is no.

11 MS. HOLLINGSWORTH: No, but that's not the point.
12 I mean, I don't -

13 JUDGE LUCERO/HOLMES: Why isn't that the point?
14 Because what we're talking about is whether the provision is
15 in there in a means to allow the company only - and it can be
16 viewed as realistically allowing the company only to get the
17 benefit of a non-arbitration forum, whereas in a situation
18 where you have a high tech company and the language
19 specifically says either party, why does not that in form our
20 view of what that clause is designed to do?

21 MS. HOLLINGSWORTH: Well, personally, I mean, I
22 don't view eBay - eBay is an online auction site. They
23 didn't invent the internet. They allow things to be sold on
24 the internet. So to call them a high tech company is, I'm
25 not sure is entirely accurate, but it doesn't matter what I

1 think. The courts have said that if employers want to argue
2 that they have a legitimate business reason for this lack of
3 mutuality then they need to provide evidence of it. It's not
4 enough to say -

5 JUDGE BRISCOE: So who has the burden here? You're
6 putting it on eBay -

7 MS. HOLLINGSWORTH: Absolutely.

8 JUDGE BRISCOE: - to prove this and not you? I
9 thought you were challenging the legality of this agreement?

10 MS. HOLLINGSWORTH: Yes, we are. And that's one of
11 the issues, that's one of the reasons that it is illegal but
12 eBay -

13 JUDGE BRISCOE: And you don't have the burden? You
14 don't have the burden then to establish that this is only the
15 type of claim that the employer would have -

16 MS. HOLLINGSWORTH: No.

17 JUDGE BRISCOE: - but not the employee?

18 MS. HOLLINGSWORTH: No. Armendariz, Fitz,
19 Martinez, they all say that is the employer's burden to show
20 that they have a legitimate business justification for it,
21 and without that evidentiary support, not just conclusions,
22 without that evidentiary support they're deemed not to have a
23 legitimate business justification for that provision and it's
24 doomed to be unconscionable.

25 And I would like to reserve the last couple minutes

1 for rebuttal.

2 JUDGE BRISCOE: Okay. Thank you.

3 MR. DURHAM: Good morning, Your Honors, my name is
4 Matthew Durham. I'm here on behalf of the appellee, eBay.

5 I think what I would like to do is address the
6 three main issues that I think are presented for the Court.
7 Number one is - is the arbitration agreement in this case
8 sufficient to satisfy the requirements of the Armendariz
9 decision and its progeny. Secondly, is the agreement
10 unconscionable both procedurally and substantively because it
11 needs to be both procedural and substantively unconscionable.
12 And third, even if there are unconscionable provisions in the
13 agreement, could those provisions be severed to allow the
14 arbitration agreement to be enforced.

15 We submit that the lower court did not err in
16 concluding that the requirements of Armendariz were met.

17 JUDGE LUCERO/HOLMES: But did the court below
18 modify or alter the fee and cost shifting provision?

19 MR. DURHAM: I believe, Your Honor, that what the
20 court did is it interpreted that provision and adopted the
21 interpretation that was proposed by eBay and found that the
22 Armendariz requirements were satisfied. In fact, at pages -

23 JUDGE LUCERO/HOLMES: So the answer to my question
24 is no, it did not alter, modify or change -

25 MR. DURHAM: That's right.

1 JUDGE LUCERO/HOLMES: - that requirement.

2 MR. DURHAM: That's right. What it did is it
3 looked at the contract and listened to the arguments and said
4 this is the interpretation of the contract that I think -

5 JUDGE BRISCOE: And how did it make that okay?
6 Because doesn't that in fact shift costs to the employee
7 potentially?

8 MR. DURHAM: It doesn't really, Your Honor, because
9 there are really two provisions that the appellant relies on
10 to cobble together this argument. In one provision of the
11 agreement it is very clear that eBay bears the costs for the
12 arbitrator's fee and any costs for renting the room and
13 associated costs.

14 JUDGE BRISCOE: And that's good and we like that
15 and nobody's arguing that's bad.

16 MR. DURHAM: Correct.

17 JUDGE BRISCOE: But it's the phrase costs of
18 arbitration that comes later.

19 MR. DURHAM: It is - it is, but what the appellant
20 ignores is the final clause of that provision which says that
21 it can only award those costs when such damages and fees are
22 available under the applicable statute and/or judicial
23 authority. Well, there's -

24 JUDGE LUCERO/HOLMES: Well, it isn't in California,
25 right?

1 MR. DURHAM: I'm not sure I understand your
2 question.

3 JUDGE LUCERO/HOLMES: Well, Armendariz doesn't
4 allow it, does it?

5 MR. DURHAM: Right.

6 JUDGE LUCERO/HOLMES: But this agreement was
7 written in California, wasn't it?

8 MR. DURHAM: Right.

9 JUDGE LUCERO/HOLMES: It requires the interpretation
10 to be made in California, doesn't it?

11 MR. DURHAM: Under California law.

12 JUDGE LUCERO/HOLMES: And it seems to me like it's
13 almost bad faith on its face to put a condition in there that
14 violates the law of California and then to have some other
15 state - I couldn't understand how the court got where it did
16 which is why I asked you did they change it or alter it,
17 because that language is still there.

18 MR. DURHAM: Well, but what a court of competent
19 jurisdiction could not do is award to the employer some per
20 diem salary for the judge, for the costs of renting a
21 courtroom and so those are costs that could not really be
22 awarded by an arbitrator in this case, and that - that
23 language Judge Benson relied upon and that's where he reached
24 the conclusion where he said "the requirements of Armendariz
25 are satisfied here, including the requirement that the

1 agreement does not require employees to pay unreasonable
2 costs or any arbitrator's fees or expenses. I'm granting the
3 motion but I'm making it clear that the court has interpreted
4 and accepted the interpretation of the reference to
5 arbitration costs." And so he didn't modify that provision.
6 He basically said -

7 JUDGE LUCERO/HOLMES: He interpreted it away.

8 MR. DURHAM: When you look at - when you look at
9 the provisions where eBay expressly says we're going to pay
10 arbitrator's costs. And when you look at the complete
11 provision about awarding costs and fees, which by the way
12 Armendariz requires as well, that the arbitrator be allowed
13 to award all remedies that would be - allow them under, you
14 know, appropriate authority. When you take those two
15 provisions together including the clause that the arbitrator
16 can only award remedies that a court could award, then
17 there's no way for the arbitrator to award the arbitrator's
18 fee -

19 JUDGE LUCERO/HOLMES: Can an employee reading that
20 agreement read it in - and not privy to Judge Benson's
21 decision - read it in the way that I read it or was my
22 reading just unreasonable?

23 MR. DURHAM: Well, none of the cases that have
24 found this chilling effect that opposing counsel talks about
25 are cases where they had this kind of express statement that

1 the employer would bear the cost. Where the chilling effect
2 was found was in cases where the arbitration agreement said
3 we are going to split the costs here. You're going to pay
4 part, we're going to pay part. And then later the employer
5 said, Well, that's fine. We - we won't - we won't insist
6 upon that agreement, we'll modify it. And the court said,
7 Well, that's no good because that would perhaps dissuade an
8 employee from bringing claims.

9 JUDGE LUCERO/HOLMES: Well somebody's reading this
10 agreement and not being a lawyer, just a plain old employee,
11 would read this language, it says any type of legal or
12 equitable relief that would be available in a court of
13 competent jurisdiction including costs of arbitration,
14 attorney fees, punitive damages, when such damages and fees -
15 and here's where he has to be a lawyer - are available under
16 the applicable state or applicable authority. A dah, I mean
17 what does that he would say, right? Or she would say?

18 MR. DURHAM: Well, a couple of things, I think,
19 Your Honor. First of all perhaps why the agreement advised
20 the employee to seek advice of counsel. And secondly, there
21 is an express provision where the agreement says eBay's going
22 to pay the costs.

23 JUDGE LUCERO/HOLMES: But if that agreement can be
24 interpreted applicable as contrary to Armendariz, why did
25 your company write it that way? Why don't you say - well, I'm

1 not in the business of writing companies contracts, but I
2 mean it seems to me that when it's written in a manner that's
3 deliberately ambiguous or deliberately can be interpreted in
4 a manner that would dissuade an employee from pursuing what
5 may be a legitimate right. It seems to me that that's a
6 clear violation of Armendariz.

7 MR. DURHAM: I think actually what was going on
8 here is eBay was trying scrupulously to comply with
9 Armendariz. Although - although the Armendariz requirement
10 that is most relevant in this case is the one about not
11 imposing arbitration fees and unreasonable costs on the
12 employee, there's also an Armendariz requirement that says
13 that the agreement must award all types of relief available
14 in court. And so I think the second provision was an attempt
15 to embody that requirement of Armendariz in the agreement.

16 And when you look at the express provision that
17 eBay would pay for arbitration costs and fees, and this
18 language that says that the arbitrator can only award what a
19 judge would award which would not include a judge's salary or
20 rental of the courtroom, then there's really no way that the
21 agreement violates Armendariz in that way.

22 JUDGE LUCERO/HOLMES: What about the Benson
23 provision? Was Judge Benson right about that in changing it
24 to Utah? (Inaudible) employ the option? Why did he have to
25 do that?

1 MR. DURHAM: Well, I think what the case - what the
2 contract itself says is that the court can administer or
3 modify provisions in the agreement to make it enforceable.
4 And what the California -

5 JUDGE LUCERO/HOLMES: But as written was it
6 unenforceable?

7 MR. DURHAM: I don't believe it was unenforceable
8 because I think forum selection clauses are not - there's
9 nothing per se that makes them unenforceable. What Judge
10 Benson did I think in this case was what is allowed under the
11 California code and under the contract, he limited that forum
12 selection provision so as not to prevent arbitration in Utah.
13 So in addition to being able to arbitrate in Santa Clara
14 County, California as provided in the contract, Judge Benson
15 said, Well, I'm not going to enforce that forum selection
16 clause with respect to an arbitration brought in Utah, which
17 is precisely what happened and which is what the position Mr.
18 Kepas would have been had he proceeded with litigation in
19 this case.

20 JUDGE LUCERO/HOLMES: And is it the fact that the
21 sufficiency of this agreement under Armendariz is going to be
22 evaluated by us in light of the, let's just call them the
23 modifications that were made by Judge Benson, is that right?
24 In other words, we're not supposed to step back and look at
25 the sufficiency of the agreement without the allowance of

1 having arbitration in Salt Lake City?

2 MR. DURHAM: I think that's right. I think - I
3 think there are cases cited by both - by both sides where the
4 appellate court has examined modifications that were made by
5 the trial court, but has also gone forward and said, you
6 know, with these other kinds of modifications, this agreement
7 would be enforceable and the arbitration can proceed.

8 JUDGE BRISCOE: Well, I thought -
9 Go ahead.

10 JUDGE LUCERO/HOLMES: I'm sorry. I mean that's a
11 pretty important point here because I mean basically it seems
12 to be the analysis what we're doing - that we were resolving
13 essentially two questions. One, under this agreement as
14 modified by Judge Benson - and let's take it for the moment
15 that the forum - that the cost shifting thing was a
16 modification - that agreement as modified, is it sufficient
17 under Armendariz? First question.

18 Second question is even if we find that there are
19 issues of unconscionability associated with this agreement,
20 which is - we could do an inquiry there - but even if we were
21 to find that, is this agreement itself enforceable because of
22 the ability to sever out those offensive passages? In other
23 words, can you sever out those passages? So it seems to me
24 it's important analytically from the get go for me to know
25 whether I'm looking at the agreement with the engrafted

1 modifications of Judge Benson for purposes of Armendariz or
2 whether somehow or another I need to look at it without even
3 any reference to those modifications.

4 MR. DURHAM: I understand your question. I think
5 what we're doing is we're - we're considering whether Judge
6 Benson's decision to enforce the arbitration agreement was
7 appropriate, and therefore, I think we're looking at the
8 modifications that Judge Benson made. But I think under
9 either analysis, the eBay arbitration agreement is
10 enforceable because I don't think that you can show this sort
11 of permeating unconscionability with respect to the contract.
12 And I believe that when you look at the fact that the
13 contract has a severance clause, that California law provides
14 for the modification or limitation of unconscionable clauses
15 including groups of clauses, that there's nothing
16 unenforceable about this agreement, any offending or
17 allegedly offending clauses could be modified or severed from
18 the contract to allow it to be enforceable.

19 JUDGE LUCERO/HOLMES: Yes, but analytically is it
20 not correct that what we're initially doing is saying is this
21 agreement - let's say now as modified sufficient under
22 Armendariz? I mean that's the first question.

23 MR. DURHAM: I think so.

24 JUDGE LUCERO/HOLMES: The second question is
25 whether there - even if these modifications made it

1 sufficient under - and I'm talking about the portion of
2 Armendariz that gives us the five check list, okay?

3 MR. DURHAM: Uh-huh (affirmative).

4 JUDGE LUCERO/HOLMES: Okay. Is it sufficient under
5 that? Then there's a separate part of Armendariz that talks
6 about this whole question of enforceability, and there then
7 we say is this agreement as modified enforceable because -
8 because there were so many things that Judge Benson had to do
9 per the argument of the plaintiff below, there was so many
10 things that he had to do that that tells us that this
11 agreement is permeated with illegality. Therefore, we won't
12 enforce it. In other words, as I see it there are two
13 different questions, one - at least two, the enforceability
14 question, and the question of whether it meets the checklist.

15 MR. DURHAM: Right. I think that's right. And I
16 think -

17 JUDGE LUCERO/HOLMES: Well, but how about thinking
18 it a little bit farther and thinking about the issues as
19 presented before us. Isn't the issue presented before us
20 under issue three the question of whether the arbitration
21 agreement is "tainted" to such a degree that modification is
22 an improper remedy? Isn't that an issue before us that we're
23 suppose to consider?

24 MR. DURHAM: Well -

25 JUDGE LUCERO/HOLMES: I'm not asking - I'm not

1 suggesting we should answer it one way or another, but I
2 thought that question was before us.

3 MR. DURHAM: We stated the issues slightly
4 differently. We said -

5 JUDGE LUCERO/HOLMES: Well, I understand, but you
6 didn't bring this appeal, did you?

7 MR. DURHAM: No.

8 JUDGE LUCERO/HOLMES: All right. So as its
9 presented to us what were we asked to decide? Am I wrong?
10 Weren't we asked to decide that?

11 MR. DURHAM: No, I think you're absolutely correct,
12 Your Honor, and if there are offending provisions under
13 Armendariz or under the Doctrines of Unconscionability, are
14 they such - are they so permeating of the contract that they
15 can't be severed and you can't save the arbitration -

16 JUDGE BRISCOE: And with that analysis you'd start
17 with the agreement as written. And the argument I thought
18 that the appellant was making is start there, look at it, and
19 if it is so unconscionable and parts cannot be removed to
20 make it right, that the court erred in its - whatever
21 phraseology you want to use - limitations or severances, it
22 shouldn't have been that. It should have just thrown the
23 whole thing out.

24 MR. DURHAM: Well, but this - this agreement is not
25 like any of the agreements that have been interpreted by the

1 other cases. The bilaterality problem that was addressed in
2 Armendariz and in Martinez and in Mercurio were - were clauses
3 where the - there were - all of the employees' claims had to
4 be brought in an arbitration forum. Some of the employers'
5 claims had to be brought in an arbitration forum.

6 In this particular case, the allegedly non-mutual
7 provision what it - it is very different. It addresses
8 claims under a specific contract, a separate contract entered
9 into by the parties, the employee proprietary information and
10 inventions agreement.

11 JUDGE BRISCOE: Do we have that agreement in the
12 record?

13 MR. DURHAM: I don't believe we do. I think
14 there's just a -

15 JUDGE BRISCOE: That makes our work a little
16 challenging, doesn't it?

17 MR. DURHAM: Well, I don't think so for a couple of
18 reasons. First of all, I think the arbitration agreement
19 itself refers to the agreement and says that you as the
20 employee may have claims against the company with respect to
21 your inventions, and those claims you can bring in federal
22 court. In addition, it's a separate paragraph standing alone
23 that could easily be severed by the court and allow the
24 arbitration agreement to go - to go forward. Just -

25 JUDGE BRISCOE: You're out of time. Thank you.

1 MR. DURHAM: I'm out of time. Thank you, Your
2 Honors.

3 JUDGE BRISCOE: The clock goes up.

4 MS. HOLLINGSWORTH: Your Honor, I just want to make
5 a couple follow-up points. As I stated before, the court
6 left out the final analysis of Armendariz. Armendariz goes
7 through these five minimal requirements for statutory claims.
8 Then it says you look at procedural unconscionability and
9 then you look at, given unconscionable provisions, do you
10 sever them or void the contract? And the court completely
11 left out that analysis.

12 So I want to make a couple points that they should
13 have looked at. First of all, all of the cases that we have
14 cited and that both sides are looking at Fitz, Mercurio,
15 Martinez, Armendariz, they all deal with similar provisions
16 that are like the provisions at issue in this case. And they
17 primarily look at the lack of mutuality and say given all of
18 these, we can't sever them. And this idea that you can sever
19 the provisions or not is somewhat figurative, because once
20 there's a whole bunch of them, the court just says if you
21 sever it you're just chopping off too much of the contract.
22 You have to look at the intent of it. And the intent here
23 clearly, given all these provisions, was to make it so that
24 the eBay employees couldn't vindicate their rights.

25 And the Armendariz court also says the court at

1 some point doesn't really have discretion anymore. Once
2 there's this taint, the court doesn't have the discretion to
3 sever or not. They have to invalidate the contract. And it
4 limits the reasons that you can sever a contract as opposed
5 to invalidate it, and those are to prevent parties from
6 gaining an undeserved benefit or to preserve the contractual
7 relationship between the two. Neither of those are at issue
8 here.

9 JUDGE BRISCOE: Thank you, counsel.

10 MS. HOLLINGSWORTH: Thank you.

11 JUDGE BRISCOE: Thank you both. This case is
12 submitted and we appreciate your arguments this morning.

13 (Whereupon the hearing was concluded)

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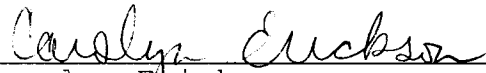
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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned recording was provided to me by Emmanuel D. Kepas and was transcribed by me from a audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages, to the best of my ability.

Signed this 5th day of January, 2011 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber