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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLEN WISELEY, individually and on
behalf of all others similarly situated,

Plaintiff-Appellant,

and

ANDREA FAGERSTROM,

Plaintiff,

v.

AMAZON.COM, INC., a Delaware
Corporation,

Defendant-Appellee.

No. 15-56799

D.C. No.

3:15-cv-00096-BAS-DHB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cynthia A. Bashant, District Judge, Presiding

Argued and Submitted August 30, 2017
Pasadena, California

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

Before: W. FLETCHER and IKUTA, Circuit Judges, and BARKER,** District Judge.

Allen Wiseley appeals from the district court's order granting Amazon's motion to compel arbitration. We have jurisdiction under 9 U.S.C. § 16(a)(3).

The Conditions of Use (COU) created a valid contract between Amazon and its customers, as Wiseley conceded. Applying California's approach to determining the enforceability of the choice-of-law provision in the COU, *see* Restatement (Second) of Conflict of Laws § 187(2)(b); *Nedlloyd Lines, B.V. v. Superior Court*, 3 Cal. 4th 459, 466 (1992), we conclude that Washington law applies here. Wiseley fails to explain how California's consumer protection statutes are more protective than Washington's consumer protection statutes; rather, Washington's and California's consumer protection laws and protections against unconscionable contracts appear to be substantially similar. *See Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1079 n.6 (9th Cir. 2007), *overruling on other grounds recognized by Ferguson v. Corinthian Coll., Inc.*, 733 F.3d 928, 937 (9th Cir. 2013); *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1261 (9th Cir. 2005). Therefore, applying Washington law is not contrary to a fundamental policy of California law. While California's sliding-scale approach to

** The Honorable Sarah Evans Barker, United States District Judge for the Southern District of Indiana, sitting by designation.

unconscionability, *see Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1243–44 (2016), might hypothetically invalidate some contracts that would be upheld under Washington’s single-prong approach, *see Gandee v. LDL Freedom Enters. Inc.*, 176 Wash. 2d 598, 603 (2013), the reverse is also true. Moreover, any distinction does not bear on this case, as we would reach the same result under California law.

While the COU are adhesive in nature, adhesion is insufficient to support a finding of procedural unconscionability under Washington law, *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wash. 2d 293, 304 (2004), and creates only a minimal degree under California law. *See Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1261–62 (9th Cir. 2017); *Baltazar*, 62 Cal. 4th at 1245. No additional indicia of procedural unconscionability are present.

The notices on Amazon’s checkout and account registration pages, which alerted Wiseley that clicking the corresponding action button constituted agreement to the hyperlinked COU, were in sufficient proximity to give him a “reasonable opportunity to understand” that he would be bound by additional terms. *Zuver*, 153 Wash. 2d at 304 (quoting *Shroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 260 (1975)). Wiseley conceded before the district court that there was sufficient notice to create a valid contract, and neither California nor Washington allows a party to escape contract obligations if it had actual or

constructive notice. *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176, 1179 (9th Cir. 2014) (applying California law); *W. Consultants, Inc. v. Davis*, 177 Wash. App. 33, 41 (2013).

There is no procedural unconscionability in the presentation of the arbitration clause itself, which appears in the same size font as the rest of the COU, with key terms bolded. *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 914 (2015) (explaining that any “obligation to highlight the arbitration clause of [the] contract . . . would be preempted by the [Federal Arbitration Act]”).

Nor does the incorporation by reference of the American Arbitration Association’s (AAA) rules create procedural unconscionability. *See Poublon*, 846 F.3d at 1262; *Baltazar*, 62 Cal. 4th at 1246; *cf. Woodward v. Emeritus Corp.*, 192 Wash. App. 584, 593, 595, 607 (2016) (holding that a similar provision referencing the AAA rules “effectively incorporates the Rules by reference”). Although Wiseley argues that it was unclear which rules would apply, he had a “reasonable opportunity to understand,” *see Zuver*, 153 Wash. 2d at 304 (quoting *Shroeder*, 86 Wash. 2d at 260), that the Consumer Arbitration Rules would apply in the context of his consumer purchases, and he could call the provided phone number to resolve any lingering uncertainty. While the AAA renamed the Supplementary Procedures for Consumer-Related Disputes in 2014, this does not render the reference

ambiguous or misleading in the version of the COU that applied when Wiseley made his purchases in 2012 and 2013.

Wiseley's three arguments for substantive unconscionability also lack merit.¹ First, the unilateral modification clause does not render the arbitration provision substantively unconscionable because Amazon is limited by the implied covenant of good faith and fair dealing.² See *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1033 (9th Cir. 2016) (applying California law); cf. *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wash. 2d 102, 112–13 (2014) (holding that the duty of good faith limits a party's unilateral discretion to determine a contract term).

Second, the arbitration clause's exemption of intellectual property claims for injunctive relief does not make the provision overly harsh or one-sided. Under Washington law, a provision that "gives [one party] alone the option of requiring arbitration" is not substantively unconscionable, so whether one party is more likely to bring such claims is immaterial. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash. 2d 781, 815–16 (2009). Even if Amazon is more likely to bring

¹Because Wiseley has shown only a minimal degree of procedural unconscionability under California law, a high degree of substantive unconscionability is required under the sliding-scale approach. See *Poublon*, 846 F.3d at 1263.

²Since the enforceability of provisions outside the arbitration clause is a question for the arbitrator, we address unilateral modification only as it applies to the arbitration clause. *Tompkins*, 840 F.3d at 1032.

intellectual property claims than its consumers, California law grants Amazon “an extra ‘margin of safety’ based on legitimate business needs.” *See Tompkins*, 840 F.3d at 1031 (quoting *Baltazar*, 62 Cal. 4th at 1250).

Finally, the attorneys’ fees provision does not create substantive unconscionability because it mirrors Washington’s statutory right to attorneys’ fees for frivolous claims. Wash. Rev. Code § 4.84.185. To the extent the provision is unilateral, Washington law automatically converts it to a bilateral provision that would afford Wiseley the same right. *See id.* § 4.84.330; *McKee v. AT & T Corp.*, 164 Wash. 2d 372, 400 (2008). The fees provision also complies with California law, which permits Amazon to seek fees as a sanction for frivolous claims. *See Poublon*, 846 F.3d at 1268. Further, Wiseley has not shown that the overall arbitration fee scheme “would be unaffordable or would have a substantial deterrent effect in [his] case.” *Sanchez*, 61 Cal. 4th at 920 (2015).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>				
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* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

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Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk