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Issue Date: 21 September 2007

CASE NO. 2007-SOX-00060

In the Matter of:

SAMUEL W. SULLIVAN,
Complainant,

vs.

SCIENCE APPLICATIONS INTERNATIONAL CORP.,

Respondent.

Order Granting Stay and Compelling Arbitration

Science Applications International Corp., the Complainant's former Employer, has moved under the Federal Arbitration Act[1] to compel the Complainant to arbitrate the claim for employment protection he made on June 9, 2006 under the Section 806 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act).[2] The motion is granted and the matter is stayed as the Federal Arbitration Act requires.[3]

An employee who served as International Tax Director for the publicly owned corporation, the Complainant worked out of San Diego.[4] A Mutual Agreement to Arbitrate Claims (arbitration agreement) he signed on February 16, 1999 committed him "to settle by arbitration all statutory . . . claims or controversies" with the Employer, including "claims for discrimination" and "claims for violations of any federal . . . law, statute, [or] regulation."[5] The

[1] 9 U.S.C. §§ 1-16.

[2] Public Law No. 107-204, codified at 18 U.S.C. § 1514A.

[3] 9 U.S.C. § 3 provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had* in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." (emphasis supplied).

[4] Motion to Compel Arbitration, Ex. 3, at pg. 3 and para. 8.

[5] *Id.*, Ex. 2, Mutual Agreement to Arbitrate Claims, at para. 1 (i) and (iii).

Complainant's San Diego workplace gives California the most significant connection to the parties' relationship, so its statutory and decisional law governs the validity of their arbitration agreement. *Circuit City Stores, Inc. v. Adams,* 279 F.3d 889, 892 (9th Cir. 2002). The arbitration agreement's choice of law provision incorporated by reference from the Employee Dispute Resolution Guide (1998)[6] also would apply California law.

The Federal Arbitration Act gives citizens a speedy and inexpensive way to resolve disagreements. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-219 (1985). A broad range of statutory rights may be mandatory subjects of arbitration, including claims for relief under:

- the Sherman Antirust Act, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 (1985);
- section 10(b) of the Securities Exchange Act, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987);
- the Racketeer Influenced and Corrupt Organizations Act, *Id.*, 482 U.S. at 222, and
- the Age Discrimination in Employment Act, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1990).

Agreements to arbitrate employment claims are enforceable. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (holding that arbitration agreements can be enforced under the Federal Arbitration Act without contravening Congressional policies that provide employees specific federal protections against discrimination). One who agrees to arbitrate a statutory claim "does not forgo the substantive rights afforded by the statute," he "only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer,* 500 U.S. at 26. *See also, EEOC v. Luce, Forward, Hamilton & Scripps,* 345 F.3d 742, 750 (9th Cir. 2003) (en banc) ("arbitration affects only the choice of forum, not substantive rights"); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005) (Roberts, J.) (compelling arbitration of a plaintiff's employment claim under the D.C. Human Rights Act after severing a clause that improperly forbade punitive damage awards); *but cf., EEOC v. Waffle House Inc.*, 534 U.S. 279 (2002) (holding that a suit by a government agency, such as the EEOC, to enforce the Americans with Disabilities Act may obtain "make-whole" relief for workers who could not sue themselves because they had signed mandatory arbitration agreements).

Article III courts and administrative law judges have found claims under § 806 of the Sarbanes-Oxley Act are subject to arbitration. *Alliance Bernstein Investment Research and*

[6] That Guide says that "[t]he arbitrator shall apply the substantive law and the law of remedies . . . of the state in which the employee was performing the majority of his or her work, or federal law or both . . ." *See*, Complainant's Opposition at Ex. A, Employment Arbitration Rules & Procedures, at pg. C-3, para. 7(G). The former Employer's Reply Brief, Ex. 1, contains an identical choice of law provision in the later version of the SAIC Employee Dispute Resolution Guide (April 2005), SAIC Employment Arbitration Rules & Procedures, at its pg. C-3, para. 7(G).

Management, Inc. v. Schaffran, 445 F.3d 121, 127 (2d Cir. 2006) (committing to an arbitrator the question whether a whistleblower claim under § 806 of the Sarbanes-Oxley Act was "[a] claim alleging employment discrimination . . . in violation of a statute" under the mandatory arbitration clause form U-4 of National Association of Securities Dealers contains); *Guyden v. Aetna Inc.*, 2006 WL 2772695 (D. Conn. 2006) (requiring a former employee to arbitrate a claim brought under § 806 of the Sarbanes-Oxley Act); *Boss v. Salomon Smith Barney Inc.*, 263 F.Supp. 2d 684 (S.D.N.Y. 2003) (similar); *Ulibarri v. Affiliated Computer Services*, 2005-SOX-46 and 47 slip op. at 17-22 (ALJ Jan. 13, 2006).

The Complainant objects that the arbitration agreement is unconscionable, and therefore unenforceable, under California law. The Federal Arbitration Act permits this type of challenge, for arbitration clauses are "valid, irrevocable, and enforceable, *save upon such grounds as exist* at law or in equity *for the revocation*[7] *of any contract*." 9 U.S.C. § 2 (emphasis added). This agreement is not part of a written employment contract,[8] but a stand-alone document. The overall validity or enforceability of a contract that contains an arbitration clause is determined by the arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967). A challenge to the arbitration clause on the basis of unconscionability is determined by the adjudicator who presides over the claim(s) that would be stayed for arbitration. *Doctor's Assocs., Inc., v. Casarotto*, 517 U.S. 681, 687 (1996) (contract defenses to arbitration include unconscionability); *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1267 (9th Cir. 2006)(en banc).

State law supplies the standards a party must satisfy to invalidate an arbitration clause or agreement. *Nagrampa*, 469 F.3d at 1267 (applying California law to a diversity matter because the litigation conduct of both parties waived the contract provision designating Massachusetts law as controlling); *Circuit City Stores, Inc.*, 279 F.3d at 892 ("In determining the validity of an agreement to arbitrate, federal courts 'should apply ordinary state-law principles that govern the formation of contracts.' "). This incorporation of state law to assess the validity of arbitration clauses or agreements is consonant with the Rules of Decision Act.[9]

State legislation or judicial decisions may permit a party to avoid an obligation an unconscionable contract imposed. *Doctor's Assocs., Inc.*, 517 U.S. at 686-687; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U. S. 265, 281 (1995); *Shearson/American Express, Inc. v. McMahon*, 482 U. S. 220, 226 (1987). California relieves a party of a duty to arbitrate when an arbitration clause or contract is procedurally and substantively unconscionable. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003); *Cleveland v. Oracle Corp.*, 2007 WL 915414 at *8 (N.D. Cal. 2007;) *Abramson v. Juniper Networks, Inc.*, 115 Cal.App.4th 638, 651, 9 Cal.Rptr.3d 422 (2004).

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[7] Courts have pointed out that Congress phrased the arbitration statute poorly when it referred to the "revocation of any contract." An offer is "revoked," while rescission voids or extinguishes a contract. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 98 & n. 4, 99 Cal.Rptr.2d 745, 6 P.3d 669, 679 (2000).

[8] Neither party submitted or referred to one in its motion papers.

[9] 28 U.S.C. § 1652, which reads: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

I decline the parties' invitation to theorize about how the California courts may rule on a motion by the Employer to stay the four causes of action and require arbitration of the complaint that has been filed in the San Diego Superior Court.[10] Those claims are not before the Secretary of Labor, and never could be. I must decide whether California CODE OF CIVIL PROCEDURE §1281, as California's courts apply it, supplies the basis "for the revocation of" the arbitration agreement that the Federal Arbitration Act recognizes, 9 U.S.C. § 2. The California statute tracks § 2 of the Federal Arbitration Act closely, saying:

> "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."
>
> California CODE OF CIVIL PROCEDURE §1281.

An adhesion contract, *i.e.*, a standardized form presented on a take-it-or-leave-it basis, without an opportunity to opt out or negotiate its content, is procedurally unconscionable. *Gatton v. T-Mobile USA, Inc.*, 152 Cal.App.4th 571, 582, 61 Cal.Rptr.3d 344, 353 (2007), *pet. for review filed* (Cal. Aug 1, 2007) (No. A112082, A112084); *Aral v. EarthLink, Inc.*, 134 Cal.App.4th 544, 557, 36 Cal.Rptr.3d 229, 238 (2005); *Martinez v. Master Prot. Corp*., 118 Cal.App.4th 107, 12 Cal.Rptr.3d 663, 669 (2004). It is often—but not always—the result of unequal bargaining power that results in oppressive substantive provisions buried in boilerplate. *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 818, 171 Cal.Rptr. 604, 610, 623 P.2d 165, 171 (1981). No affidavit or declaration offered in opposition to the motion to compel arbitration explains "the manner in which the contract was negotiated" or the "circumstances of the parties at that time." *Kinney v. United Healthcare Servs., Inc*., 70 Cal.App.4th 1322, 1329, 83 Cal.Rptr.2d 348, 352-353 (1999). No evidence shows whether the arbitration agreement is imposed on some or on all employees, whether they may negotiate other terms, or face a take-it-or-leave-it situation without "a modicum of bilaterality." *Ingle*, 328 F.3d at 1174 & n. 10. This record cannot support findings that adhesion or oppression played a role in the Complainant's assent to the arbitration agreement. *Cf.*, *Nagrampa*, 469 F.3d at 1281 (requiring factual findings).[11] Some employers provide employees a meaningful opportunity to opt out of what otherwise would be procedurally unconscionable arbitration programs. *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199-1200 (9th Cir. 2002) (on remand).

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[10] *Sullivan v. Science Applications International Corp*., *et al*., Case No. 37-2007-00068005-CU-OE-CTL (Superior Ct. for San Diego County), seeking relief for constructive discharge, adverse treatment in violation of public policy, retaliation, and age discrimination, attached to the Motion to Compel Arbitration as Ex. 3.

[11] The Opposition argues that the Complainant was denied the opportunity to negotiate the arbitration provision contained in the pre-employment package the Complainant received, but argument is not proof. An affidavit might have been appended to the Complainant's opposition. 29 C.F.R. § 18.6(b). *See, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U. S. 477, 483-484 (1989) (requiring arbitration after finding no proof in the record that the arbitration clause was an adhesion contract); *Marcos v. Koreana Plaza Market Oakland, Inc.*, 2007 WL 1771533 at *3 (N.D. Cal. 2007) (making findings of procedural unconscionability based on declarations) and *Filloramo v. NewAlliance Investments, Inc.*, 2007 WL 1206736 at *4 (D.Conn. 2007) (granting a motion to compel arbitration where the employee offered no affidavits or documents to dispute that he had signed a NASD form U-4 agreeing to arbitrate disputes with his employer).

This arbitration agreement and the procedures it incorporates are not substantively unconscionable under the standards the Supreme Court of California set in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 102, 99 Cal.Rptr.2d 745, 6 P.3d 669, 682 (2000), and so do not merit the relief California Legislature created in CIVIL CODE § 1670.5(a).[12] The California court first looked to standards found in the D.C. Circuit's decision that upheld the arbitrability of Title VII claims. *Cole v. Burns Intern. Security Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). The five required elements ensure that the employee will be able to vindicate the statutory rights effectively in the arbitral forum. *Id.*, 105 F.3d at 1482. This arbitration agreement satisfies each requirement, for it (1) leads to the selection of a neutral arbitrator, (2) offers more than minimal discovery, (3) produces a written award, (4) grants the relief that would be available in court, and (5) does not require the Complainant to pay unreasonable costs to participate in arbitration or the arbitrator's fees or expenses.

The arbitrator will be neutral, for JAMS gives the parties a panel of 7 arbitrators, from which they alternately strike names until a "mutually acceptable arbitrator" is identified.[13] How the California courts would view the supervised discovery permitted under the SAIC Employment Arbitration Rules and Procedures (April 2005) as compared to that available at the Office of Administrative Law Judges has not been litigated, and state appellate courts are not likely to face that issue. The arbitrator has subpoena authority, while it is unclear whether an administrative law judge does.[14] In the arbitral forum document production is unlimited, but only two depositions plus depositions of all experts are permitted as of right. Further discovery may be authorized "on order of the arbitrator" based on "a showing of substantial need."[15] That standard is satisfied if additional information is required "to adequately arbitrate the claim, taking into account the parties' mutual desire to have a fast, cost-effective dispute resolution procedure."[16] The Secretary of Labor's regulations give "administrative law judges . . . broad discretion to limit discovery in order to expedite the hearing,"[17] which may not represent much (if any) practical difference in the breadth and speed of discovery available in either forum. The discovery provision incorporated into the arbitration agreement is not abusive. *Booker*, 413 F.3d at 81-83 (refusing to invalidate provisions that repose discretion in an arbitrator about the extent of discovery available); *Mercuro v. Superior Court*, 96 Cal.App.4th 167, 183-184, 116

[12] The statute grants this remedy: "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

[13] *Id.*, SAIC Employment Arbitration Rules & Procedures (April 2005), at pg. C-1, para. 2. If no arbitrator is identified, another panel of 7 will be provided. I will not assume that parties acting in good faith would be unable to find a mutually acceptable arbitrator among so many choices.

[14] *Compare* the statutory authority to compel testimony and documents or things Congress granted to arbitrators at 9 U.S.C. § 7 *with* the contrasting views about ALJ authority expressed in *Childers v. Carolina Power & Light Co.*, 2000 WL 1920346, ARB Case No. 98-077 (Dec. 29, 2000) on the one hand and *Bobreski v. U.S. Envtl. Prot. Agency*, 284 F.Supp. 2d 67, 75-78 (D. D.C. 2003) and *Immanuel v. U.S. Dept. of Labor*, 1998 WL 129932 at *5 (4th Cir. 1998) (unpublished) on the other.

[15] *Id.*, SAIC Employment Arbitration Rules & Procedures (April 2005), at pg. C-2, para. 5(B)(b), (c) & (d).

[16] *Id.*, at para. 5(B)(d).

[17] 29 C.F.R. § 1980.107(b).

Cal.Rptr.2d 671, 682-684 (2002) (similar). The arbitrator's written decision will state its "factual and legal bases" for granting or denying any of the legal or equitable relief available "had the claim been asserted in court."[18] The Complainant must pay a modest arbitration fee of $150[19] to JAMS to invoke arbitration. California's standards are satisfied. *Armendariz*, 24 Cal.4th at 102, 99 Cal.Rptr.2d 745, 6 P.3d 669.

Neither does the arbitration agreement grant the former Employer one-sided advantages that shock the conscience. Agreements have been voided for substantive unconscionability when the party with superior bargaining power attempted to do such things as preserve its own access to courts while forcing the other party's claims to arbitration, *Nagrampa*, 469 F.3d at 1286; *Flores v. Transamerica HomeFirst Inc.*, 93 Cal.App.4th 846, 853-855, 113 Cal.Rptr.2d 376, 381-384 (2001), or to impose a one-year universal limitation period for employment-related statutory claims, *Davis v O'Melveny & Meyers*, 485 F.3d 1066, 1076-1077 (9th Cir. 2007). The Complainant's only substantive objection focused on the discovery supervision provision that I have found acceptable.

While the California courts apply a sliding scale analysis, without any proof of procedural unconscionability and without a legally sufficient claim of substantive unconscionability, the challenge simply fails. *Cf.*, *Nagrampa*, 469 F.3d at 1281 (pointing out the trial court's failure to apply the sliding scale); *Ahmed*, 283 F.3d at 1200 (dispensing with a substantive unconscionability analysis for failure to demonstrate procedural unconscionability). The Complainant failed to prove that the arbitration agreement is procedurally and substantively unconscionable as those concepts are interpreted and applied by California's courts, so California CODE OF CIVIL PROCEDURE §1281 and CIVIL CODE § 1670.5(a) offer him no relief.

Rights to an arbitral forum can be waived by action inconsistent with arbitration. *OM Group, Inc. v. Mooney*, 2006 WL 68791, at *7 (M.D. Fla. 2006) (relieving a former CEO from an arbitration provision found in his employment agreement when the corporation filed an action to require him to disgorge a bonus under § 304 of the Sarbanes-Oxley Act [15 U.S.C. § 7243] because the corporation initiated suit and litigated extensively in federal court). By participating in discovery at OSHA, before the matter came to the Office of Administrative Law Judges for trial, the former Employer did not waive its arbitration rights. That discovery was part of the Secretary's investigation of the complaint, not litigation. An arbitration clause cannot limit or interfere with the Secretary of Labor's statutory obligation to investigate Sarbanes-Oxley complaints,[20] or bind the Secretary, who is not a party to the arbitration agreement.

[18] Reply Brief, Ex. 1, SAIC Employment Arbitration Rules & Procedures (April 2005), at pg. C-4, para. 8(A).

[19] Reply Brief, Ex. 1, Arbitration Request Form, pg. A-2, para. 5. This is much less than the fee required to file suit in state court. http://www.sdcourt.ca.gov/portal/page?_pageid=53,128627&_dad=portal&_schema=PORTAL#civil.

[20] 18 U.S.C. § 1514A(b)(2)(A), incorporating the investigation provisions of 49 U.S.C. § 42121(b)(2)(A) & (B).

The Federal Arbitration Act requires that this claim be stayed, not dismissed. The stay does not re-instate the OSHA findings of May 18, 2007, or affect the merits of this employment discrimination claim, it changes the forum. The parties shall file a joint report here on the status of the arbitration on October 15, 2007 and every 60 days thereafter; a final report and motion to dismiss shall be filed no later than 15 days after the arbitration award is entered.

So Ordered.

A

William Dorsey
Administrative Law Judge