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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

KELLIE M. O'HANLON,	)	Case No. CV 15-06640 DDP (PJWx)
	)	
Plaintiff,	)	<b>ORDER DENYING DEFENDANT'S MOTION</b>
	)	<b>TO COMPEL ARBITRATION</b>
v.	)	
	)	[Dkt. No. 8]
JPMORGAN CHASE BANK, N.A.,	)	
	)	
Defendant.	)	
	)	

Presently before the Court is Defendant JPMorgan Chase Bank, N.A.'s Motion to Compel Arbitration and Dismiss or Stay Action. Having heard oral argument and considered the parties' submissions, the Court adopts the following order.

**I. BACKGROUND**

Plaintiff Kellie M. O'Hanlon, appearing *in pro per*, was hired by Washington Mutual in May 2007 as a Default Customer Care Section Manager. (Compl.; Def. Mot. Compel Arbitration at 2.) To apply for the job, Plaintiff had to sign a form that included an acknowledgment of Washington Mutual's arbitration policy. The acknowledgment stated:

///

1 If I accept an offer of employment with Washington Mutual,  
2 I agree to abide by its policies and procedures and to  
3 resolve all disputes relating to my employment through  
4 Washington Mutual's Dispute Resolution Process, which  
5 includes binding arbitration. As a condition of accepting  
any offer of employment, I will sign a *Binding Arbitration  
Agreement*. Upon request, Washington Mutual will provide me  
with a copy of the policy and the Agreement before I sign  
this application or the agreement.

6 (Decl. Of Sharon Young ISO Def. Mot. Compel Arbitration ("Young  
7 Decl.") Ex. A.)

8 When hired, Plaintiff received an offer letter that included a  
9 note that Plaintiff's employment was "contingent" on her "agreement  
10 to resolve eligible job related concerns through Washington  
11 Mutual's Dispute Resolution Process (DRP)." (Id. Ex. B.) It  
12 further stated that Plaintiff would receive an "original binding  
13 Arbitration Agreement for signature on [her] first day of work."

14 (Id.)

15 Plaintiff appears to have signed a Binding Arbitration  
16 Agreement ("arbitration agreement" or "agreement") on the day she  
17 received and returned the offer letter. (Id. Ex. C.) She also  
18 signed the agreement on her first day of work a few days later.  
19 (Id. Ex. D.) Plaintiff "does not recall a copy" of the agreement  
20 "being included in the job offer letter," but Plaintiff's signature  
21 is on the agreement. (See Pl. Opp'n to Mot. Compel Arbitration  
22 ("Pl. Opp'n") at 2.) Plaintiff states that she was given numerous  
23 papers to sign on her first day of work, including the agreement.

24 (Id.)

25 Defendant JP Morgan Chase acquired Washington Mutual in 2008,  
26 and Plaintiff's employment was transferred to Defendant at that  
27 time. (Compl.; Def. Mot. Compel Arbitration at 4; Pl. Opp'n at 2.)  
28 Plaintiff remained employed with Defendant until August 2014, when

1 Plaintiff alleges she was wrongfully terminated for contesting her  
2 credit card statement with Defendant. (Compl.) Defendant has  
3 requested that Plaintiff arbitrate this dispute per the arbitration  
4 agreement. Plaintiff has resisted, arguing that the agreement is  
5 not enforceable.

6 **II. LEGAL STANDARD**

7 Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et  
8 seq., a written agreement requiring controversies between the  
9 contracting parties to be settled by arbitration is "valid,  
10 irrevocable, and enforceable, save upon such grounds as exist at  
11 law or in equity for the revocation of any contract." 9 U.S.C. §  
12 2. A party to an arbitration agreement may petition a district  
13 court with jurisdiction over the dispute for an order directing  
14 that arbitration proceed as provided for in the agreement. Id. § 4.

15 The FAA reflects a "liberal federal policy favoring  
16 arbitration agreements" and creates a "body of federal substantive  
17 law of arbitrability." Moses H. Cone Mem. Hosp. v. Mercury Constr.  
18 Corp., 460 U.S. 1, 24-25 (1983). The FAA therefore preempts state  
19 laws that "stand as an obstacle to the accomplishment of the FAA's  
20 objectives." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S.  
21 Ct. 1740, 1748 (2011). This includes "defenses that apply only to  
22 arbitration or that derive their meaning from the fact that an  
23 agreement to arbitrate is at issue," as well as state rules that  
24 act to fundamentally change the nature of the arbitration agreed to  
25 by the parties. Id. at 1746, 1750.

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1 **III. DISCUSSION**

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3 **A. Applicability of Washington Mutual's Arbitration**  
4 **Agreement to Defendant JPMorgan**

5 Plaintiff argues that Defendant cannot enforce the arbitration  
6 agreement because Plaintiff entered into the agreement with her  
7 previous employer, Washington Mutual. (Pl. Opp'n at 10.)

8 Defendant argues that the arbitration agreement states that it will  
9 apply to successors in interest to Washington Mutual, which is what  
10 Defendant is. (Def. Mot. Compel Arbitration at 8-9; Def. Reply at  
11 2.)

12 The arbitration agreement states: "This Agreement shall remain  
13 in full force and effect at all times during and after my  
14 employment with Washington Mutual, or any successor in interest to  
15 Washington Mutual." (Young Decl. Ex. D § 21.) Further,  
16 nonsignatories to a contract may enforce the contract if they are  
17 intended third-party beneficiaries of the contract, or are agents  
18 or alter egos of a signatory. See Bouton v. USAA Cas. Ins. Co.,  
19 167 Cal. App. 4th 412, 424 (2008). Under the plain terms of the  
20 agreement and under standard contract law, Defendants can enforce  
21 the agreement against Plaintiff, if the agreement is valid.

22 **B. Unconscionability**

23 The FAA as well as federal and California case law recognize  
24 the standard contract defense of unconscionability is applicable to  
25 arbitration agreements. See 9 U.S.C. § 2 (where "savings clause"  
26 states that arbitration agreements are to be enforced according to  
27 their terms "save upon such grounds as exist at law or in equity  
28 for the revocation of any contract"); Chavarria v. Ralphs Grocery  
Co., 733 F.3d 916, 921 (9th Cir. 2013); Armendariz v. Found. Health

1 Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (2000). Plaintiff here  
2 alleges that the arbitration agreement is unconscionable and thus  
3 unenforceable. (Pl. Opp'n at 7-11.)

4 In California, unconscionability has two elements: procedural  
5 unconscionability and substantive unconscionability. Armendariz,  
6 24 Cal. 4th at 114. Both elements must be present for a contract  
7 to be unconscionable, but the elements need not be present to the  
8 same degree – there is a sliding scale between the two where more  
9 of one can make up for less of the other. Id.

#### 10 **1. Procedural Unconscionability**

11 Plaintiff argues that the arbitration agreement is  
12 procedurally unconscionable "because it was presented on a take it  
13 or leave it basis and did not include a copy of the arbitration  
14 rules," citing to Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1282  
15 (9th Cir. 2006); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165,  
16 1172 (9th Cir. 2003); Ferguson v. Countrywide Credit Indus., Inc.,  
17 298 F.3d 778, 783-84 (9th Cir. 2002); and Abeyrama v. J.P. Morgan  
18 Chase Bank, No. CV 12-00445 DMG (MRWx), 2012 WL 2393063 (C.D. Cal.  
19 June 22, 2012). (Pl. Opp'n at 8-10.) Plaintiff also points out  
20 that the agreement was adhesive, imposed as a condition of  
21 employment, and lacked opportunity for negotiation. (Id.)

22 Defendant argues that the agreement is not unenforceable  
23 "merely because it is imposed as a condition of employment." (Def.  
24 Mot. Compel Arbitration at 16.) Defendant also argues that  
25 Plaintiff had "the opportunity to consider other reasonable  
26 employment options, if any, prior to agreeing to the terms of any  
27 specific employer." (Id.) Defendant concludes saying there was no  
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1 evidence Plaintiff was oppressed or surprised by the agreement.  
2 (Id. at 16-17; see also Def. Reply at 4-7.)

3 The Ninth Circuit has explained the standard for California's  
4 procedural unconscionability, stating:

5 Procedural unconscionability concerns the manner in which  
6 the contract was negotiated and the respective  
7 circumstances of the parties at that time, focusing on the  
8 level of oppression and surprise involved in the agreement.  
9 Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778,  
10 783 (9th Cir. 2002); A & M Produce Co. v. FMC Corp., 135  
11 Cal. App.3d 473, 186 Cal. Rptr. 114, 121-22 (1982).  
12 Oppression addresses the weaker party's absence of choice  
13 and unequal bargaining power that results in 'no real  
14 negotiation.' A & M Produce, 186 Cal. Rptr. at 122.  
15 Surprise involves the extent to which the contract clearly  
16 discloses its terms as well as the reasonable expectations  
17 of the weaker party. Parada v. Super. Ct., 176 Cal. App.  
18 4th 1554, 98 Cal. Rptr.3d 743, 757 (2009).

19 Chavarria, 733 F.3d at 922. In Chavarria, the court found an  
20 employment arbitration agreement procedurally unconscionable  
21 because it was an adhesive take-it-or-leave-it requirement of  
22 continued employment. Id. at 923.

23 Here, the arbitration agreement was a standard, adhesive  
24 agreement that was presented to Plaintiff as a condition of  
25 employment. Defendant's argument that Plaintiff could have either  
26 taken the job or found a different job is a false choice, not the  
27 kind of non-oppressive, "meaningful" choice that the case law  
28 requires. See Ingle, 328 F.3d at 1172-72. That kind of meaningful  
choice is a choice to negotiate terms or even the existence of an  
arbitration agreement, not whether to be employed. See id.  
Therefore, the agreement is procedurally unconscionable.

## 2. Substantive Unconscionability

"A contract is substantively unconscionable when it is  
unjustifiably one-sided to such an extent that it 'shocks the

1 conscience.'" Chavarria, 733 F.3d at 923 (quoting Parada v.  
2 Superior Court, 176 Cal. App. 4th 1554 (2009)).

3 Plaintiff argues several grounds for substantive  
4 unconscionability in the arbitration agreement, the most  
5 significant of which are discussed below.

6 **a. Injunctive Claim Carve Out**

7 Plaintiff argues that the agreement lacks "mutuality because  
8 it excludes claims for injunctive relief favored by employers."  
9 (Pl. Opp'n at 7.) Defendant acknowledges that "both sides are  
10 required, with narrow exceptions, to submit their claims to binding  
11 arbitration." (Def. Mot. Compel Arbitration at 17.) But Defendant  
12 maintains that the agreement is not lacking mutuality, although  
13 Defendant does not directly respond to Plaintiff's argument in its  
14 Reply. (Id. at 17-18; Def. Reply at 2-4.) The agreement provides:

15 2. Washington Mutual and I understand that by entering  
16 into this Agreement, each of us is waiving any right we may  
17 have to file a lawsuit or other civil action or proceeding  
18 relating to my employment with Washington Mutual, and  
19 waiving any right we may have to resolve employment  
20 disputes through trial by jury. We agree that arbitration  
21 shall be in lieu of any and all lawsuits or other civil  
22 legal proceedings relating to my employment.

23 3. This Agreement is intended to cover all civil claims  
24 that involve or relate in any way to my employment (or  
25 termination of employment) with Washington Mutual,  
26 including, but not limited to, claims of employment  
27 discrimination or harassment on the basis of race, sex,  
28 age, religion, color, national origin, sexual orientation,  
disability and veteran status . . . , claims for breach of  
any contract or covenant, tort claims, claims based on  
violation of public policy or statute, and claims against  
individuals or entities employed by, acting on behalf of,  
or affiliated with Washington Mutual. The only exceptions  
to this are

Claims for benefits under a plan that is governed by  
ERISA,  
Claims for unemployment and workers compensation  
benefits,

1           Claims for injunctive relief to enforce rights to  
2           trade secrets, or agreements not to compete or solicit  
          customers or employees.

3           (Young Decl. Ex. D §§ 2-3.)

4           "[A]n arbitration agreement 'lacks basic fairness and  
5           mutuality if it requires one contracting party, but not the other,  
6           to arbitrate all claims arising out of the same transaction or  
7           occurrence or series of transactions or occurrences.'" Mercurio v.  
8           Superior Court, 96 Cal. App. 4th 167, 176-77 (2002). In Mercurio,  
9           the employer carved out from arbitration certain injunctive relief  
10          claims regarding trade secrets and unfair competition, and the  
11          court found this unconscionable. Id. at 177-78. The problem was  
12          that an employee fired for unauthorized disclosures, for example,  
13          would be forced to arbitrate the employment dispute, but the  
14          employer could go to court for injunctive relief against the  
15          employee. Id. at 176. Many California cases hold that contractual  
16          provisions allowing a court to hear certain injunctive relief  
17          claims, such as those regarding covenants not to compete and  
18          intellectual property, are designed to favor the employer and are  
19          substantively unconscionable. See, e.g., Jara v. JPMorgan Chase  
20          Bank, N.A., 2d Civil No. B234089, 2012 WL 3065307, \*3 (July 30,  
21          2012) (unpublished); Trivedi v. Curexo Tech. Corp., 189 Cal. App.  
22          4th 387, 397 (2010); Fitz v. NCR Corp., 118 Cal. App. 4th 702, 724-  
23          26 (2004); Mercurio, 96 Cal. App. 4th at 176-77.

24          The weight of authority provides that the carve out here  
25          would be found unconscionable in California courts. Defendant's  
26          citation to Pirro v. Washington Mutual Bank, No. CV 10-04162 ODW  
27          (JC), 2010 WL 3749597, \*3-4 (C.D. Cal. Sept. 23, 2010), is  
28          unavailing because in this circumstance, state law governs. The



1 agreement here provides for certain claims to be exempted from the  
2 arbitration requirement, but the exemption is designed to protect  
3 an employer's access to court for intellectual property protection.  
4 There is no countervailing protection for employees, even if an  
5 employee could theoretically utilize the same provision, because an  
6 employee's dispute regarding the same facts would be an employment  
7 dispute subject to arbitration. Because the provision is unfairly  
8 one-sided in application, the provision is substantively  
9 unconscionable.

10 **b. Costs**

11 Plaintiff argues that the arbitration agreement imposes costs  
12 on her that are higher than she would face in arbitration because  
13 the contract only requires the employer to "advance" the costs of  
14 arbitration. (Pl. Opp'n at 8.) Defendant argues that the  
15 agreement only requires an employee to pay a filing fee, just like  
16 in court, and that any cost-splitting would be controlled by the  
17 American Arbitration Association ("AAA") rules that are  
18 incorporated into the agreement by reference. (Def. Mot. Compel  
19 Arbitration at 13-14; Def. Reply at 3.) The agreement states:

20 12. Each party, at its own expense, has the right to hire  
21 an attorney to represent it in the arbitration. . . . Each  
22 party shall pay the fees of any witnesses testifying at its  
request, and pay the cost of any stenographic record of the  
arbitration hearing should it request such a record.

23 13. Any filing fee will be paid by the party initiating  
24 arbitration. To the extent such a fee exceeds the cost of  
25 filing a lawsuit in a court of that jurisdiction,  
26 Washington Mutual will reimburse the difference. Any  
27 postponement or cancellation fee imposed by the arbitration  
service will be paid by the party requesting the  
28 postponement or cancellation. During the time the  
arbitration proceedings are ongoing, Washington Mutual will  
advance any required administrative or arbitrator's fees.  
Each party will pay its own witness fees.

1 14. . . . The decision and award, if any, shall be  
2 consistent with the terms of this Agreement and shall  
3 include an allocation of the costs of the arbitration  
4 proceeding between the parties.

(Young Decl. Ex. D §§ 12-14.)

5 In Chavarria, the arbitration agreement split arbitrator fees  
6 equally, adding up to amounts of around \$3,500 to \$7,000 per day in  
7 arbitration fees being put on the employee, and the Ninth Circuit  
8 held this unconscionable. 733 F.3d at 925-26. These kind of fees  
9 would prevent an employee from effectively vindicating their rights  
10 by making arbitration cost prohibitive. See id. Further, in  
11 Ingle, the court found unconscionable a \$75 filing fee because  
12 there was no provision for a finding of indigence to excuse the fee  
13 for those unable to bear it. Ingle, 328 F.3d at 1177.

14 Here, an employee initiating arbitration pays a filing fee as  
15 determined by the AAA, capped by the amount a lawsuit costs in the  
16 relevant jurisdiction. Alone, this is not unconscionable (although  
17 there is no provision for indigent employees, with only a reference  
18 to indigent consumers in the AAA rules), but there is a problem  
19 with the allocation of costs and attorneys' fees. Initially, it  
20 seems problematic to have explicit language in the arbitration  
21 agreement providing for merely an "advance" of fees by the employer  
22 and a demand that the arbitrator "shall include an allocation of  
23 the costs of the arbitration proceeding between the parties."

24 Defendant argues that this contractual language must be  
25 understood through the AAA rules that state: "Arbitrat[or]  
26 compensation, expenses [as defined in section (iv) below], and  
27 administrative fees are not subject to reallocation by the  
28 arbitrator(s) except upon the arbitrator's determination that a

1 claim or counterclaim was filed for purposes of harassment or is  
2 patently frivolous." (Def. Mot. Compel Arbitration at 14 (citing  
3 Ex. J ("AAA Rules at Section R-48 at page 33")).) However, looking  
4 at the potential expenses in the AAA rules, section (iv) only  
5 provides for "hearing room rental," and other fees include: (ii)  
6 hearing fees; (iii) postponement/cancellation fees; (v) abeyance  
7 fee; and (vi) expenses (which does provide that the costs in that  
8 section "shall be borne by the employer," although it is not clear  
9 if that is subject to the provision providing for allocation  
10 above). (Decl. Of Michelle Lee Flores, Esq. ISO Def. Mot. Compel  
11 Arbitration Ex. J (AAA Rules) at 33-35.) This means that the AAA  
12 rules do not provide that only the employer pays the full costs of  
13 arbitration.

14 Additionally, the arbitration agreement here is not clear that  
15 it has incorporated the AAA rules – or which version of the AAA  
16 rules – as it states:

17 7. . . . The arbitration shall be conducted in accordance  
18 with the laws of the state in which the arbitration is  
19 conducted and the rules and requirements of the arbitration  
20 service being utilized, to the extent that such rules and  
requirements do not conflict with the terms of this  
Agreement.

21 (Young Decl. Ex. D § 7.) The plain language of section 7 does not  
22 fully incorporate AAA rules and it also provides that to the extent  
23 the rules are incorporated, the rules' provisions are subject to  
24 the express provisions in the contract, such as the allocation of  
25 costs in section 14 of the agreement.

26 Further, the agreement's provisions do not allow for costs of  
27 litigation – like discovery costs – to be awarded to prevailing  
28 plaintiffs after the end of the arbitration. In Chavarria, the

1 court specifically set out that this kind of cost-shifting needed  
2 to be accounted for in arbitration agreements. 733 F.3d at 925  
3 ("There is no justification to ignore a state cost-shifting  
4 provision, except to impose upon the employee a potentially  
5 prohibitive obstacle to having her claim heard."). There is also  
6 no provision for awarding attorneys' fees to a prevailing employee  
7 as would be done under several civil rights statutes. Therefore,  
8 the costs and fees provisions in the arbitration agreement are  
9 substantively unconscionable.

10 **c. Discovery**

11 Plaintiff argues that the limited discovery provision in the  
12 contract is unconscionable and prevents effective vindication of  
13 her rights. (See Pl. Opp'n at 10-11.) Defendant argues that  
14 limited discovery is the hallmark of arbitration and that Plaintiff  
15 has access to needed discovery as well as the option to request  
16 more discovery at the arbitrator's discretion. (Def. Mot. Compel  
17 Arbitration at 12-13; Def. Reply at 3-4.) The agreement states:

18 9. Either party shall be entitled to a limited amount of  
19 discovery prior to the arbitration hearing. Either party  
20 may make a request for production of documents from the  
21 other party. Either party may take a maximum of two (2)  
22 depositions. Either party may apply to the arbitrator for  
further discovery or to limit discovery. The arbitration  
has the discretion to enter an appropriate order upon a  
showing of sufficient cause. . . .

23 10. During the arbitration process, Washington Mutual and  
24 I may each make a written demand on the other for a list of  
witnesses, including experts, to be called and/or copies of  
documents to be introduced at the hearing. . . .

25 (Young Decl. Ex. D §§ 9-10.)

26 In Armendariz, the California Supreme Court adopted the Cole  
27 factors for employment arbitration of statutory rights.

28 Armendariz, 24 Cal. 4th at 102 (referring to Cole v. Burns Int'l

1 Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997)). One such  
2 factor is that the arbitration agreement must provide "for more  
3 than minimal discovery." Id.

4 In Armendariz, the court found that the arbitration agreement  
5 at issue there did provide for adequate discovery. Id. at 104-06.  
6 There, the agreement incorporated the California rules governing  
7 procedures for arbitration. Id. at 105. Further, the court found  
8 that parties "are also permitted to agree to something *less than*  
9 the full panoply of discovery provided" in court cases but that  
10 parties also "implicitly agree . . . to such procedures as are  
11 necessary" to vindicate a statutory claim, such as "access to  
12 essential documents and witnesses, as determined by the  
13 arbitrator(s)." Id. at 105-06. Applying this rule, other  
14 California courts have held arbitration provisions allowing for two  
15 depositions, document discovery, and arbitrator discretion are  
16 substantively unconscionable. See Jara, 2d Civil No. B234089, 2012  
17 WL 3065307, \*3; Fitz, 118 Cal. App. 4th at 715-19.

18 Here, there is a provision for limited discovery, but as  
19 Plaintiff argues, it is too limited. Leaving discovery at the  
20 arbitrator's discretion – without any indication of what kind of  
21 law or rules the arbitrator will apply to limit that discretion –  
22 does not protect the employee's entitlement to sufficient discovery  
23 for effective vindication of statutory rights. The scope of the  
24 discovery provision here is the same as the scope of the discovery  
25 provisions that were previously found unconscionable by California  
26 courts. Further, Plaintiff must meet a higher standard here than  
27 in court in order to receive her needed discovery ("sufficient  
28 cause"), which adds an additional burden as well as ambiguity into

1 the contract, all leading to a more expensive and lengthier  
2 process. Thus here, the Court finds the discovery provision is  
3 also substantively unconscionable.

4 **3. Sliding Scale of Unconscionability**

5 Both procedural and substantive unconscionability are present  
6 here. Most significant for substantive unconscionability are the  
7 grounds discussed above: the carve out for certain kinds of  
8 injunctive relief, the costs and fees provisions, and the discovery  
9 provisions. The agreement is also procedurally unconscionable.  
10 Therefore, the contract is unconscionable and unenforceable.


11 The Court declines Defendant's suggestion to sever any  
12 unconscionable portions of the contract because the  
13 unconscionability is pervasive and fundamental to the whole  
14 agreement, making it impossible to sever the unconscionable parts  
15 without re-writing the parties' agreement.

16 **IV. CONCLUSION**

17 For all the reasons stated above, the Court DENIES Defendant's  
18 Motion to Compel Arbitration and Dismiss or Stay Claims.

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20 IT IS SO ORDERED.

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23 Dated: October 7, 2015

  
HON. DEAN D. PREGERSON  
United States District Judge

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