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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HAROLD DEGRAFF,

Plaintiffs,

v.

PERKINS COIE LLP, et al.,

Defendants.

No. C 12-02256 JSW

**ORDER REGARDING MOTION  
TO DISMISS OR, IN THE  
ALTERNATIVE, TO STAY  
ACTION PENDING  
ARBITRATION**

Now before the Court is motion to dismiss or, in the alternative, to stay action pending arbitration filed by Perkins Coie LLP and Perkins Coie California, P.C. (“Perkins Coie”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and concludes that the matter is suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). Accordingly, the hearing set for August 3, 2012 is HEREBY VACATED. For the reasons set forth in the remainder of this Order, Perkins Coie’s motion is GRANTED.

**BACKGROUND**

Plaintiff Harold DeGraff (“Plaintiff”) seeks to bring this action on behalf of himself and a purported class. Plaintiff, a lawyer, signed a Partnership Agreement and Employee Agreement with Perkins Coie. Plaintiff contends that he was an employee of Perkins Coie who was wrongfully required to pay for certain business expenses. Perkins Coie contends, on the other hand, that Plaintiff joined Perkins Coie as a partner of the law firm. In the Partnership Agreement, there is an arbitration provision. In light of this arbitration provision, Perkins Coie

1 moves to dismiss this action or, in the alternative, to stay it pending arbitration. The Court will  
2 address any additional facts as necessary in the remainder of this order.

3 **ANALYSIS**

4 **A. Applicable Legal Standards.**

5 Pursuant to the Federal Arbitration Act (“FAA”), arbitration agreements “shall be valid,  
6 irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the  
7 revocation of any contract.” 9 U.S.C. § 2. Once the Court has determined that an arbitration  
8 agreement involves a transaction involving interstate commerce, thereby falling under the FAA,  
9 the Court’s only role is to determine whether a valid arbitration agreement exists and whether  
10 the scope of the parties’ dispute falls within that agreement. 9 U.S.C. § 4; *Chiron Corp. v.*  
11 *Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

12 Notwithstanding the liberal policy favoring arbitration, by entering into an arbitration  
13 agreement, two parties are entering into a contract. *Volt Information Sciences, Inc. v. Board of*  
14 *Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989) (noting that arbitration  
15 “is a matter of consent, not coercion”). Thus, as with any contract, an arbitration agreement is  
16 “subject to all defenses to enforcement that apply to contracts generally.” *Ingle v. Circuit City*  
17 *Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003.) Therefore, arbitration agreements may be  
18 “invalidated by generally applicable contract defenses, such as fraud, duress, or  
19 unconscionability.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

20 **B. Perkins Coie’ Motion.**

21 Plaintiff does not dispute the validity of the agreement or that the arbitration agreement  
22 encompasses the dispute at issue. Plaintiff opposes the motion on the grounds that the  
23 agreement to arbitrate is unconscionable and therefore is unenforceable.

24 As a threshold matter, the Court must resolve what standard governs the dispute at issue.  
25 Plaintiff contends that the Court should apply California law pursuant to the Employment  
26 Agreement and that the heightened standard set forth in *Armendariz v. Foundation Health*  
27 *Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000), applies. Perkins Coie argues that Washington law  
28 applies pursuant to the choice of law provision in the Partnership Agreement and that the

1 heightened standard set forth in *Amendariz* is inapplicable regardless of the choice of law.  
2 However, because Perkins Coie contends that the heightened standard in *Amendariz* is  
3 inapplicable, there is no difference between California and Washington law. As discussed  
4 below, the Court finds that the heightened standard set forth in *Amendariz* does not apply.  
5 Therefore, there is no conflict and the Court need not resolve whether California law or  
6 Washington law applies.

7 **1. Whether the Heightened Standard in *Amendariz* Applies.**

8 *Amendariz* enumerated several minimum requirements for arbitrating claims. *See*  
9 *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 508 (2005) (internal  
10 quotation marks and citation omitted). However, the California Supreme Court has made clear  
11 that these requirements are only applicable to claims “that seek to enforce public policies that  
12 are carefully tethered to statutory or constitutional provisions.” *Id.* at 508 (holding that  
13 *Amendariz*’s cost-shifting rule was inapplicable to breach of contract claim). In *Giuliano v*  
14 *Inland Empire Personnel, Inc.*, 149 Cal. App. 4th 1276, 1290 (2007), the California Court of  
15 Appeal held that statutory wage claims for failure to provide multi-million dollar bonus and  
16 severance payments were not subject to *Amendariz*. Despite the fact that the claims were for  
17 “wages,” the court found that the claims did not raise public policy concerns. The court  
18 distinguished cases that had applied *Amendariz* to wage claims on the grounds that those cases  
19 were addressing overtime or minimum wage claims under the Fair Labor Standards Act. *Id.*  
20 The court held that *Amendariz* did not apply because the claims for bonus and severance  
21 payments were “not based on the [California Fair Housing and Employment Act] or a  
22 fundamental public policy that is tied to a constitutional or statutory provision.” *Id.*

23 Similarly, here, although Plaintiff brings California wage claims, his claims are for the  
24 alleged failure to reimburse for business expenses. The Court notes that it is debatable whether  
25 Plaintiff’s claims are even properly brought as wage claims. *See Nelson v. Dollar Tree Stores,*  
26 *Inc.*, 2011 WL 3568498, \*2-5 (E.D. Cal. Aug. 15, 2011) (holding that reimbursement for  
27 business expenses does not constitute “wages” under California law); *see also Drumm v.*  
28 *Morningstar, Inc.*, 695 F. Supp. 2d 1014, 1021 (N.D. Cal. 2010). Regardless, similar to the

1 claims at issue in *Guiliano*, Plaintiff’s claims are not based on FEHA or a fundamental public  
2 policy that is closely tethered to a constitutional or statutory provision. Accordingly,  
3 *Amendariz* is inapplicable.

4 **2. Whether the Arbitration Agreement is Unconscionable.**

5 When a party challenges an arbitration agreement on the basis of unconscionability, that  
6 party must demonstrate that the arbitration agreement is both procedurally and substantively  
7 unconscionable. *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006).  
8 Although a party must establish both elements, those elements exist on a sliding scale. *Id.* “In  
9 other words, the more substantively oppressive the contract term, the less evidence of  
10 procedural unconscionability is required to come to the conclusion that the term is  
11 unenforceable, and vice versa.” *Id.* (quoting *Armendariz*, 24 Cal. 4th at 114).

12 **a. Procedural Unconscionability.**

13 “Procedural unconscionability addresses the manner in which agreement to the disputed  
14 term was sought or obtained... .” *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1099 (2002).  
15 The procedural element of an unconscionable contract generally takes the form of a contract of  
16 adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to  
17 the subscribing party only the opportunity to adhere to the contract or reject it. *Little v. Auto*  
18 *Stiegler, Inc.*, 29 Cal. 4th 1064, 1071 (2003) (citing *Armendariz*, 24 Cal. 4th at 113). In the case  
19 of preemployment arbitration contracts, the “economic pressure exerted by employers on all but  
20 the most sought-after employees may be particularly acute, for the arbitration agreement stands  
21 between the employee and necessary employment, and few employees are in a position to  
22 refuse a job because of an arbitration requirement.” *Id.* (citing *Armendariz*, 24 Cal. 4th at 115);  
23 *see also Szetela*, 97 Cal. App. 4th at 1100 (“When the weaker party is presented [a] clause and  
24 told to ‘take it or leave it’ without the opportunity for meaningful negotiation, oppression, and  
25 therefore procedural unconscionability, are present.”).

26 Perkins Coie contends that Plaintiff is a sophisticated lawyer. That fact, however, is not  
27 dispositive. *See Nagrampa*, 469 F.3d at 1283 (“the sophistication of a party, alone, cannot  
28 defeat a procedural unconscionability claim”). Plaintiff declares that he was told he had to sign

1 the Partnership Agreement and that he had no opportunity to negotiate the terms. (Declaration  
2 of Harold DeGraff, ¶ 7.) Accordingly, the Court finds that Plaintiff has demonstrated the  
3 existence of some procedural unconscionability. However, Plaintiff’s showing is only minimal.  
4 *See Nagrampa*, 469 F.3d at 1284 (noting that evidence that defendant had “overwhelming  
5 bargaining power, drafted the contract, and presented it to [plaintiff] on a take-it-or-leave-it  
6 basis” amounted to only minimal evidence of procedural unconscionability). Therefore,  
7 Plaintiff must make a strong showing of substantive unconscionability.

8 **b. Substantive Unconscionability.**

9 The concept of substantive unconscionability relates to the actual terms of the arbitration  
10 agreement and whether those terms are “overly harsh” or “generates one-sided results.”  
11 *Nagrampa*, 469 F.3d at 1281 (internal citations and quotation marks omitted). “The paramount  
12 consideration in assessing conscionability is mutuality.” *Id.* (internal citations and quotation  
13 marks omitted). Plaintiff argues that the arbitration provision is substantively unconscionable  
14 because it requires the arbitration to be completed in 90 days, to be conducted in Seattle, to  
15 apply Washington law, and to remain confidential. According to Plaintiff, these provisions  
16 deprive him of relief that would otherwise be available to him if he pursued the action in a  
17 court. However, with the exception of the confidentiality requirement, Plaintiff has not  
18 demonstrated that these terms are over “overly harsh” or “generates one-sided results.” The  
19 Court notes that this is not a particularly complicated case. The arbitration provision does not  
20 preclude discovery altogether, but merely restricts the time period for discovery. It is not clear  
21 that the 90-day period would provide insufficient time to conduct necessary discovery.

22 Nor has Plaintiff shown why requiring the arbitration to be conducted in Seattle is  
23 problematic. “[F]orum selection clauses are valid and should be given effect unless  
24 enforcement of the clause would be unreasonable.” *Nagrampa*, 469 F.3d at 1287 (quoting  
25 *Intershop Communications, AG v. Superior Court*, 104 Cal. App. 4th 191, 196 (2002)).  
26 Plaintiff bears the burden of demonstrating that the “place and manner” restrictions of the forum  
27 selection provision are “unduly oppressive,” or have the effect of shielding the Perkins Coie  
28 from liability. *Id.* Here, Plaintiff has not done so.

1 Plaintiff also argues that the Washington law selection clause deprives him of his wage  
2 claims under California law. The choice of law provision is one that must be decided in the  
3 first instance by the arbitrator. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515  
4 U.S. 528, 541 (1995). Moreover, the Court notes that the parties dispute whether or not  
5 Plaintiff was an employee or a partner. If the arbitrator determines that Plaintiff was not an  
6 employee, his claims could be moot. Additionally, the choice of law provision is not unique to  
7 the arbitration provision. The Partnership Agreement provides that the agreement “shall be  
8 governed by the laws of the State of Washington.” (McDowell Decl., Ex. A at § 10.3.) Thus,  
9 regardless of whether Plaintiff proceeds in this Court or in an arbitration, he would need to  
10 demonstrate that the choice of law provision is inapplicable or should not be enforced.

11 However, with respect to the confidentiality provision, Plaintiff has made a showing that  
12 this provision unfairly benefits Perkins Coie. Perkins Coie has institutional knowledge of prior  
13 arbitrations. In contrast, individual litigants, such as Plaintiff, are deprived from obtaining  
14 information regarding any prior arbitrations. Thus, Perkins Coie is the only party who would  
15 obtain any benefit from this provision without receiving any negative impact in return.  
16 Accordingly, the Court finds that the confidentiality provision is substantively unconscionable.  
17 *See Davis v. O’Melveny & Meyers*, 485 F.3d 1066, 1079 (2007), *overruled on another point in*  
18 *Kilgore v. KeyBank, Nat. Ass’n*, 673 F.3d 947, 960 (9th Cir. 2012) (finding similar  
19 confidentiality provision substantively unconscionable under California law); *Zuver v. Airtouch*  
20 *Communications, Inc.*, 153 Wash. 2d 293, 315 (2004) (finding similar confidentiality provision  
21 substantively unconscionable under Washington law).

22 Plaintiff further argues that the provision does not provide for a neutral arbitrator. The  
23 arbitration provision requires, if the parties cannot agree to an arbitrator, that the arbitrator shall  
24 be a partner in a law firm having a Seattle office with at least 100 lawyers. (Declaration of  
25 Lynette McDowell (“McDowell Decl.”), Ex. A.) Plaintiff contends that such an arbitrator  
26 would “necessarily be a peer of Perkins Coie,” and thus the neutrality of the arbitrator is “at  
27 risk.” (Opp. at 8.) However, the Court notes that, as a lawyer from a firm of an equivalent size,  
28 the arbitrator would also be a peer of Plaintiff. The Court finds that the mere fact that the

1 arbitrator may be one from a law firm of equivalent size and location as Perkins Coie is  
2 insufficient to demonstrate any bias against Plaintiff.

3       Next, Plaintiff argues that the arbitration provision is substantively unconscionable  
4 because it provides that the parties shall split the arbitrator fee and that the prevailing party is  
5 liable for the other party’s attorneys’ fees and costs. Plaintiff argues, based on *Amendariz*, that  
6 it is unconscionable to require him to bear any type of expense that he would not have to incur  
7 in court. However, as discussed above, the heightened standards set forth in *Amendariz* are  
8 inapplicable here. As the California Supreme Court noted, the *Amendariz* rule prohibiting the  
9 imposition of costs is a “judicially created exception to California Code of Civil Procedure  
10 section 1284.2, which provides that the parties to an arbitration agreement do share costs  
11 ‘[u]nless the arbitration agreement otherwise provides or the parties to the arbitration otherwise  
12 agree....’” *Boghos*, 36 Cal. 4th at 507-08 (quoting Cal. Code Civ. Proc. § 1284.2).  
13 Significantly, these terms in the arbitration provision apply equally to both Plaintiff and Perkins  
14 Coie. Accordingly, Plaintiff has not demonstrated that these terms are substantively  
15 unconscionable.

16       Similarly, relying solely on *Amendariz*, Plaintiff argues that the failure of the arbitration  
17 provision to require a written, reasoned opinion is unconscionable. Because *Amendariz* is  
18 inapplicable here, Plaintiff fails to demonstrate that such provision is substantively  
19 unconscionable. Therefore, the only aspect of the arbitration provision that the Court finds is  
20 substantively unconscionable is the confidentiality requirement.

21       Under both California and Washington law, the Court has discretion to either sever the  
22 unconscionable provision or provisions, or refuse to enforce the agreement in its entirety. *See*  
23 *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1005 (9th Cir. 2010); *Zuver*, 153 Wash. 2d at 320-321.  
24 The Court finds that severing the confidentiality provision is the appropriate remedy here.  
25 Accordingly, the Court hereby strikes the confidentiality provision but will enforce the  
26 remainder of the arbitration provision.

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**3. Stay or Dismissal.**

Perkins Coie has moved in the first instance to dismiss this action and asks for a stay as an alternative. It is within the Court’s discretion to determine whether dismissal is appropriate. *See Sparling v. Hoffman Construction Co.*, 864 F.2d 635, 637-638 (9th Cir. 1988). Where, as here, all of Plaintiff’s claims are arbitrable, the Ninth Circuit has approved dismissal. *Id.* The Court finds that a dismissal, as opposed to a stay, is warranted.

**CONCLUSION**

For the foregoing reasons, the Court **HEREBY SEVERES** the confidentiality provision, but is enforcing the remainder of the arbitration provision. Therefore, the Court **GRANTS** Perkins Coie’s motion and **DISMISSES** this action.

**IT IS SO ORDERED.**

Dated: July 30, 2012

  
\_\_\_\_\_  
JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE