UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JENLIH JOHN HSIEH, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 02B00005
PMC - SIERRA, INC., Respondent	)	Judge Robert L. Barton, Jr.

ORDER DENYING RESPONDENT'S MOTION TO COMPEL ARBITRATION AND FOR A STAY OF PROCEEDING

(*April 25, 2003*)

I. INTRODUCTION

On March 27, 2003, Respondent filed a Motion to Compel Arbitration and for Dismissal of Action, or in the Alternative, for a Stay of Proceedings Pending Arbitration (Motion to Compel). Respondent requests that the Court compel Complainant to arbitrate the causes of action brought before it because Complainant signed an employment contract containing an arbitration clause at the start of his employment. On April 7, 2003, Complainant filed an Opposition to Respondent's Motion to Compel Arbitration and Dismiss or in the Alternative for a Stay Pending Arbitration (Complainant's Response) with the attached affidavits of Complainant and Phillip J. Griego, Esq. Complainant argues that there is no agreement to arbitrate because Respondent never signed the employment agreement; that in any event Respondent waived any right to arbitrate when it elected to litigate this case until the eve of trial; the claims brought before this court are not arbitrable; and the arbitration agreement is both procedurally and substantively unconscionable. On April 10, 2003, Respondent filed a Reply Memorandum of Points and Authorities in Support of Respondent's Motion to Compel Arbitration (Respondent's Reply). Attached to the Reply was the Declaration of Marina Tsatalis, Esq., with nine exhibits. Respondent's motion to compel arbitration and dismiss the action, or alternatively, to stay the action pending arbitration is denied for the following reasons:

A. Respondent has waived its opportunity to invoke the arbitration clause under the employment contract;

B. The arbitration clause of the employment contract does not meet the minimum requirements for arbitration of unwaivable statutory rights under California law, and

C. The arbitration clause is both procedurally and substantively unconscionable.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

On September 11, 2000, Complainant began work with SwitchOn Networks, Inc. Joint Stipulations of Fact (JSF) No. 6. On the same day, Complainant signed an "Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" (Agreement). Paragraph ten of the Agreement is entitled "Arbitration and Equitable Relief." See Appendix A of this Order for a complete text of paragraph ten, see also Motion to Compel, Dec. of Marina Tsatalis, Ex. A. Significantly, the end of the Agreement states "[a]greed and [a]ccepted by: SwitchOn Networks, Inc.," with a lines for a signature and printed name and title. All of these lines are blank.

As of December 31, 2000, SwitchOn Networks, Inc. merged with Respondent, and SwitchOn Networks, Inc. ceased to exist as a separate entity. JSF No. 27.

Respondent terminated Complainant on March 26, 2001. JSF No. 44.

On April 3, 2001, Complainant filed a Charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) alleging a violation of 8 U.S.C. section 1324b based on citizenship status discrimination and national origin discrimination. Charge ¶ 4. In a letter to Complainant dated August 14, 2001, OSC informed him that although its investigatory 120-day period had expired, OSC was still investigating Complainant's allegations, and Complainant could file a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Complaint attachment.

On October 23, 2001, Complainant filed a Complaint with OCAHO alleging that Respondent had violated 8 U.S.C. section 1324b by engaging in national origin discrimination, citizenship status discrimination, and retaliation. Complaint, Part II ¶ 2, Part III ¶ 1. Complainant alleged that he was terminated because Respondent saved jobs for H1B employees, and he was replaced by an H1B employee. Id. at Part II ¶ 7. Referring to his retaliation claim, Complainant alleged that after he filed his Charge with OSC, Respondent sent a letter to the Equal Employment Opportunity Commission (EEOC) stating that his "job performance review was not acceptable." Id. at Part III ¶ 3.

Respondent filed an Answer on December 5, 2001, in which it denied the allegations that Complainant was fired due to national origin discrimination or citizenship status discrimination in violation of 8 U.S.C. section 1324b. Answer at 2. Respondent denied engaging in retaliation, but admitted sending a letter to the EEOC reporting that Complainant's performance was unacceptable. Id. at 3. Respondent contended that the statements in the letter were true. Id. In its Answer, Respondent asserted the affirmative defenses of good cause, legitimate action, and possessing legitimate nondiscriminatory reasons for Complainant's termination. Id. at 3-4. The Answer did not include the obligation to arbitrate as an affirmative defense and did not make any reference to the arbitration agreement.

Moreover, as recounted below, Respondent has engaged in a lengthy array of prehearing motions and pleadings, without ever mentioning arbitration.

On January 4, 2002, Complainant and Respondent filed a Joint Proposed Procedural Schedule, agreeing on important dates, such as completion of discovery, the deadline for dispositive motions, and the date the case would be ready for hearing.

On March 18, 2002, Respondent filed a Motion to Amend the Order Governing Prehearing Procedures, and move all litigation dates and deadlines back by one month. In response, the Court modified the Procedural Schedule. Order Modifying Procedural Schedule, April 1, 2002.

On June 28, 2002, Respondent filed a Motion to Accept Late Filing of Preliminary Witness List and Exhibit List. Respondent's late witness and exhibit lists were accepted by the Court. Order Granting Complainant and Respondent's Motions to Late File Exhibit and Witness Lists, July 17, 2002.

On July 29, 2002, Respondent filed its Amended Preliminary Witness and Exhibits Lists.

On September 11, 2002, Respondent wrote the Court a letter requesting that it refrain from signing a subpoena requested by Complainant. On September 12, 2002, Complainant wrote the Court a letter in response to Respondent's request. Before receiving Respondent's letter, the Court had already signed the above-referenced subpoena and took no further action.

On September 16, 2002, Respondent filed a Motion to Dismiss Complainant's Complaint on the grounds that Complainant had filed similar claims in California state court and that OCAHO did not have jurisdiction over Complainant's national origin cause of action. On September 30, 2002, Complainant filed a response to Respondent's Motion to Dismiss. Respondent filed a Request for Leave to File a Reply and Reply to Opposition to Motion to Dismiss on October 4, 2002.

The Court partially granted Respondent's Motion to Dismiss. The Court dismissed only Complainant's national origin discrimination claim. Order Partially Granting Respondent's Motion to Dismiss, Oct. 16, 2002. Because Respondent employs more than fifteen employees, and thus Complainant's claim of national origin discrimination would be covered by 42 U.S.C. §2000e-2, this Court does not have jurisdiction over Complainant's national origin discrimination claim pursuant to 8 U.S.C. section 1324b(a)(2)(B). Id. at 4-5.

On September 16, 2002, Respondent filed a Motion for a Protective Order to Limit the Number of Depositions Complainant May Take to Ten. On September 23, 2002, Complainant filed a response to Respondent's Motion for a Protective Order. The Court denied Respondent's Motion for a Protective Order. Prehearing Conference Report, Oct. 21, 2002, at 3-4.

On September 26, 2002, Respondent filed its Second Amended Preliminary Witness and Exhibit Lists.

On October 8, 2002, Respondent filed a Motion to Revoke the Deposition of Ryan, Swanson & Cleveland, and a Motion for a Protective Order Regarding the Deposition of Motiv Jiandani. Both of these motions were denied by the Court. Prehearing Conference Report, Oct. 21, 2002, at 5-7.

On November 15, 2002, Complainant filed a Motion to Compel Further Production of Documents or in the Alternative a Court Order to Enforce the Subpoena and Request for Attorneys' Fees, and a Motion to Compel Further Production of Documents and Request for Attorneys' Fees. On November 25, 2002, Respondent filed responses to these two motions. On December 6, 2002, Complainant filed an Addendum to Motion to Compel Further Production of Documents or in the Alternative a Court Order to Enforce the Subpoena and Request for Attorneys' Fees and an Addendum to his Motion to Compel Further Documents. On December 9, 2002, Respondent filed an Addendum to its Privilege Log. On December 23, 2002, Complainant filed a Supplemental Memorandum of Points and Authorities Supporting an Award of Fees Incurred in Obtaining Order to Produce Subpoenaed Documents.

On December 24, I granted Complainant's Motion to Compel Production of Documents or in the Alternative, a Court Order to Enforce the Subpoena because Respondent failed to establish that the documents were protected by the attorney-client privilege, and the attorney-client privilege had been waived as to these documents. The Court partially granted Complainant's Motion to Compel Further Production of Documents because Respondent's privilege log was inadequate and, after an in camera review, the Court found only a small portion of documents that were arguably protected by the attorney-client privilege. Order Ruling on Complainant's Motions to Compel Discovery, Dec. 24, 2002. Additionally, the Court found Respondent's assertion of privilege for at least four documents entirely frivolous. Id.

Also on December 24, 2002, I issued an Order Setting Revised Procedural Schedule which ordered the parties to file dispositive motions by January 27, 2003, and the Joint Proposed Final Prehearing Order (JPFPO) by February 24, 2003. Order Setting Revised Procedural Schedule, Dec. 24, 2002.

On January 7, 2003, after reviewing further documents in camera, the Court ordered Respondent to turn over eight additional documents, and one partially redacted document, to Complainant because they were not protected by the attorney-client privilege. Order Ruling on Complainant's Motion to Compel, Jan. 7, 2003.

Also on January 7, 2003, the Court received a Notice of Unavailability of Counsel from Respondent. The Notice informed the Court that from February 10 through February 28, 2003, Marina Tsatalis, lead counsel for Respondent, "will be unavailable for any purpose whatsoever, including, but not limited to, receiving notices of any kind, responding to ex parte applications on motions, appearing in court or attending depositions. Wilson, Sonsini, Goodrich & Rosati will receive facsimile transmissions, but they will not be reviewed or acted upon during this period."

On January 14, 2003, Respondent filed a Motion to Modify Order Setting Revised Procedural Schedule. Respondent requested that any oral argument on dispositive motions be scheduled after March 10, 2003, and that the JPFPO be due after the oral argument on dispositive motions. The Motion stated that Ms. Tsatalis' unavailability was due to her marriage and honeymoon.

On January 27, 2003, Respondent filed a Motion for Summary Decision. Respondent argued that Complainant has not demonstrated a prima facie case of citizenship status discrimination, Respondent has established a legitimate nondiscriminatory reason for terminating Complainant, and Complainant has not shown that the articulated legitimate nondiscriminatory reason for his termination was pretext for discrimination. Complainant filed his Response to Respondent's Motion for Summary Decision on February 10, 2003. The Court denied Respondent's motion for summary decision because genuine issues of material fact remained unresolved. Order Denying Respondent's Motion for Summary Decision, Feb. 27, 2003.

On January 28, 2003, the Order Ruling on Respondent's Motion to Modify Order Setting Revised Procedural Schedule vacated the date of February 24, 2003, for the filing of the JPFPO because a Motion for Summary Decision had been filed. Order Ruling on Respondent's Motion to Modify Order Setting Revised Procedural Schedule, Jan. 28, 2003, at 4. The Order provided that the case would proceed and any and all procedural deadlines would have to be met. Id.

On February 11, 2003, an Order Requiring Parties to File Stipulations of Fact was issued because Respondent provided a Statement of Undisputed Material Facts with its Motion for Summary Decision and Complainant disputed the majority of these facts. Order Requiring Parties to File Stipulations of Fact, Feb. 11, 2003, at 1. As stated in the Order, the Joint Statement of Undisputed Facts (Joint Statement) was due on February 25, 2003, and no extension would be granted. Id.

On February 12, 2003, Respondent filed a Motion to Schedule Conference Call with Judge Barton on or Before February 13, 2003, to discuss an extension to the due date for the Joint Statement. Respondent requested a ruling on the Motion the day it was filed.

On February 13, 2003, I issued an Order Denying Respondent's Request for Prehearing Conference. The Order reiterated that no extension would be granted for filing of the Joint Statement, and that two weeks would be ample time to meet with opposing counsel and file the Joint Statement with the Court. Order Denying Respondent's Request for Prehearing Conference, Feb. 13, 2003, at 3.

On February 25, 2003, Complainant and Respondent submitted the Joint Statement of Undisputed Material Facts, which listed only twenty-two undisputed material facts.

The original trial dates were agreed upon by the parties during the week of March 17, 2003. The trial was scheduled to begin on April 28, 2003, and end five to seven business days later.

Complainant and Respondent filed their JPFPO on March 17, 2003, which included Joint Stipulations of Fact, Joint Stipulations of Law, Joint Statement of Disputed Facts, Joint Statement of Disputed Issues, Complainant's and Respondent's Final Witness Lists, Complainant's and Respondent's Final Exhibit Lists, and Complainant's Requested Remedies and Relief.

On March 24, 2003, Complainant and Respondent filed their objections to the opposing party's exhibits.

On March 27, 2003, Respondent filed a Motion to Compel Arbitration and for Dismissal of Action, or, in the Alternative, for a Stay of Proceedings Pending Arbitration (Motion to Compel). This was the first time, in eighteen months following the filing of the Complaint, that Respondent sought to enforce the arbitration provision or even mentioned that there was an arbitration provision. In its motion, Respondent argues that this Court is an improper forum for Complainant's claims because Complainant signed an employment contract at the start of his employment with Respondent which contained an arbitration clause.

Complainant filed his Opposition to Respondent's Motion to Compel Arbitration and Dismiss or in the Alternative for a Stay Pending Arbitration (Complainant's Response) on April 7, 2003. Complainant argues that Respondent's motion is untimely, there was no arbitration agreement because Respondent did not sign the contract, Complainant's 8 U.S.C. section 1324b claims are inarbitrable, Respondent waived any right to arbitration, and the arbitration agreement is unconscionable.

On April 2, 2003, Complainant and Respondent participated in a lengthy Final Prehearing Conference (FPC). At the Conference, the parties discussed possible settlement, the JPFPO, pending motions, the admissibility of exhibits, the witness lists, and disputed factual and legal issues. Complainant indicated that he no longer wished to pursue his retaliation claim and the Court dismissed the retaliation claim. FPC Tr. at 19-20. The Court granted leave to Respondent to file a reply brief in support of its Motion to Compel Arbitration.

On April 10, 2003, Respondent filed a Reply Memorandum of Points and Authorities in Support of Respondent's Motion to Compel Arbitration (Respondent's Reply). Attached to the reply brief was a Declaration of Marina Tsatalis, with nine exhibits attached: Complainant's offer letter from Respondent, the American Arbitration Association's Rules for the Resolution of Employment Disputes, two arbitration agreements similar to Respondent's, and five Santa Clara County Superior Court orders regarding these arbitration agreements.

On April 14, 2003, Complainant's counsel copied the Court on a letter addressed to Respondent's counsel requesting that Respondent voluntarily withdraw its Motion to Compel Arbitration. Complainant contends that Respondent has no intention of arbitrating the claims before OCAHO because it has filed a motion in the pending civil action arguing that Complainant should be precluded from arbitration due to waiver and failure to exhaust administrative remedies. Complainant further states: "[i]f Respondent seeks dismissal of the OCAHO proceeding in favor of arbitration only to preclude Complainant from pursuing arbitration, Respondent's representation that it is willing to arbitrate is a sham." I am not aware of any response by Respondent to this letter.

On April 15, 2003, the Court received a fax from Complainant's counsel, served also upon Respondent's counsel, requesting a continuance of the trial because Respondent's brother recently passed away. The Court issued an Order Postponing Hearing on April 16, 2003. At the request of the parties, the hearing was not immediately scheduled, but on April 21, 2003, a telephone conference was held with counsel for both parties, during which I discussed new hearing dates and the availability of counsel and witnesses for those dates. On April 24, 2003, I issued an Amended Notice of Hearing, which provides that the hearing will commence on June 23, 2003, in San Jose, California.

III. ANALYSIS

A. Timeliness of Motion

At the FPC, the Court denied Respondent's Motion to Dismiss because it was not timely filed. FPC Tr. at 6-7. All dispositive motions had to be filed by January 27, 2003. Order Setting Revised Procedural Schedule, Dec. 24, 2002. However, Respondent's Motion to Compel Arbitration and Stay the Proceeding Pending Arbitration is not a dispositive motion; thus it is timely filed and is the subject of this Order.

B. Existence of a Contract

In Complainant's Response, he contends that there is no agreement to arbitrate between Complainant and Respondent because Respondent did not sign the Agreement, and there was a line for Respondent's signature indicating that the contract would not be valid without its signature. Complainant's Response at 1.

In its reply, Respondent argues that a contract between Complainant and Respondent existed because the employment contract was an offer to Complainant, and he accepted when he signed and returned the Agreement and began working. Respondent's Reply at 1-2. Respondent provided the Court with two arbitration agreements similar to the one at issue in this case and orders from the Santa Clara Superior Court holding them enforceable. Id., Dec. of Marina Tsatalis, Ex. C, D, E, F, G, H, I. The Court notes that these arbitration agreements are dissimilar from the Agreement in the present case because there was no line or space where the company's signature was contemplated.

The company's failure to sign and date the Agreement, when a signature line and date was specifically provided on the contract, suggests that the company did not intend to bind itself to the provisions therein, including the arbitration provision. Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Inv. Co., 68 Cal.App.4th 83, 89 (1998). However, for the purposes of adjudicating this motion, I will not decide this issue but rather assume arguendo that an employment contract exists between Complainant and Respondent.

C. The Federal Arbitration Act (FAA) and Pertinent Background

The FAA validates contractual provisions that agree to settle claims arising out of such contract or transaction through arbitration. 9 U.S.C. § 2 (2002). The FAA applies to maritime contracts/transactions or contracts/transactions involving commerce. Id. The FAA does not apply to employment contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2002). Traditional legal and equitable principles relating to the revocation of contracts may render an arbitration agreement void and unenforceable. 9 U.S.C. § 2.

In 1999, the Ninth Circuit held that the FAA was not applicable to employment contracts. Circuit City v. Adams, 194 F.3d 1070, 1071-72 (9th Cir. 1999) (Circuit City I). All of the federal Courts of Appeals, except for the Ninth Circuit, found that the FAA applied to employment contracts, save those enumerated in the statute. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (Circuit City II). In Circuit City II, the Supreme Court reversed the Ninth Circuit's decision in Circuit City I and held that the FAA does apply to employment contracts, except those applicable to the transportation workers listed in the statute. Id. The Supreme Court then remanded the case back to the Ninth Circuit.

On remand, the Ninth Circuit, applying ordinary principles of state contract law, found that the entire arbitration agreement at issue was both procedurally and substantively unconscionable under California state law. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893-96 (9th Cir. 2002) (Circuit City III).

Therefore, the import of the Circuit City trilogy is that, although the FAA applies to employment contracts, the validity and enforcement of arbitration agreements is subject to traditional state contract law principles.

D. Waiver of Enforcement of the Arbitration Agreement

Because this case arises under the jurisdiction of the Ninth Circuit, the case law of that Circuit is authoritative. The Ninth Circuit has held that federal law surrounding the FAA, and not state law, governs the standards for waiver of arbitration agreements. Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1269-70 (9th Cir. 2002).

In the Ninth Circuit, arbitration rights may be constructively waived if: (1) the waiving party has knowledge of the existing right to compel arbitration, (2) the waiving party has acted inconsistently with such an existing right, and (3) prejudice results from the waiving party's inconsistent acts. United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 765 (9th Cir. 2002). The Ninth Circuit has held that a party has a "heavy burden of proof" when demonstrating the elements of waiver. Sovak, 280 F.3d at 1270.

1. Knowledge of the Existing Right to Compel Arbitration

Being party to a contract calling for arbitration is evidence that a party knew of the right to compel arbitration. Hoffman Constr. Co. v. Active Erectors & Installers, Inc., 969 F.2d 796, 798 (9th Cir. 1992) (construction arbitration). The Agreement signed by Complainant states, "[t]his Agreement will be binding upon my heirs, executors, administrators and other legal representatives and will be for the benefit of the Company, its successors, and assigns." Motion to Compel Arbitration, Dec. of Marina Tsatalis, Ex. A at 7.

During the prehearing conference held on April 2, 2003, counsel for Respondent tacitly admitted that Respondent had knowledge of the arbitration provision in the Agreement. When asked by the Court why Respondent did not assert its right to compel arbitration sooner, Respondent's counsel replied that it was not their obligation to assert the issue, and there have been recent developments in the case law that "confirmed that this particular arbitration agreement is enforceable." FPC Tr. at 13. Respondent's counsel stated that she has twice litigated the identical arbitration agreement in Santa Clara Superior Court. Id. Additionally, when discussing the elements for waiver in Respondent's Motion to Compel Arbitration, Respondent does not assert that it did not have knowledge of its existing right to compel arbitration. Respondent's Motion to Compel Arbitration at 7-9.

Complainant, in his Response, contends that Respondent knew of its right to compel arbitration because it drafted the Agreement and gave it to Complainant. Complainant's Response at 7. Additionally, Complainant points out that as early as May 21, 2001, and December 6, 2001, Respondent referred to the Agreement during the investigation of OSC and the Equal Employment Opportunity Commission (EEOC). Id. In fact, in a letter dated December 6, 2001, Respondent replied to an information request from the EEOC stating, "[a]s noted, Mr. Hsieh signed an 'Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" on September 11, 2000." Ex. CX-U-3.

Respondent is a legal successor to SwitchOn, the party who signed the contract, and Respondent has indicated that it had knowledge of the arbitration clause prior to its assertion of the right to arbitrate. Indeed, Respondent made reference to the employment contract at the early stages of litigation, and thus it is clear that Respondent had knowledge of an existing right to compel arbitration long before it moved this Court to do so. Respondent has not alleged or produced evidence to the contrary.

2. Action Inconsistent With Invoking the Right to Arbitrate

A party's "extended silence and much-delayed demand for arbitration indicates a conscious decision to continue to seek judicial judgment on the merits of the arbitrable claims" and that choice is "inconsistent with the agreement to arbitrate those claims." Van Ness Townhouses v. Mar Indus. Corp., 862 F.2d 754, 759 (9th Cir. 1989) (internal quotation marks and citations omitted). In Van Ness, the Ninth Circuit found waiver of arbitration based on inconsistent actions when a party did not demand arbitration until two years after the commencement of litigation, participated actively in litigation, including pleadings, motions, and approved a pre-trial conference order. Id., accord Ingels v. Harris, 91 F.3d 152, 1996 WL 368131, at *1 (9th Cir.) (unpublished) (finding actions inconsistent with arbitration and waiver of arbitration when a party did not seek to arbitrate until two years after litigation began, participated in discovery, and filed a motion for summary judgment).

In an unpublished decision, the Ninth Circuit examined actions inconsistent with arbitration and stated in dicta, "the litigation of substantial issues going to the merits may constitute a waiver of arbitration." Hurst v. Prudential Sec. Inc., 21 F.3d 1113, 1994 WL 118097, at *5 (9th Cir.) (unpublished) (involving allegations of Title VII violations).

Although Ninth Circuit law governs whether Respondent has waived its right to compel arbitration in this case, decisions by other Federal Courts of Appeals constitute persuasive authority on the waiver issue. The First Circuit found waiver in the context of a union labor dispute, and held that a union had waived its right to arbitration by proceeding on the merits in court. Jones Motor Co. v. Chauffeurs Teamsters & Helpers Local Union No. 633 of N.H., 671 F.2d 38, 42 (1st Cir. 1982) (labor arbitration). The court stated "to require the parties to go to arbitration despite their having advanced so far in court proceedings before seeking arbitration would often be unfair, for it would effectively allow a party sensing an adverse court decision a second chance in another forum." Id. at 43 (complaint and answer had been filed, depositions were taken, pretrial conference held, cross-motions for summary judgment filed, oral arguments on these motions occurred, all with no mention of arbitration).

The Second Circuit found waiver of arbitration when a party did not assert the defense of arbitration in its answer, discovery had almost been completed, trial was four months away, and the party had filed dispositive motions. Com-Tech Assoc. v. Computer Assoc. Int'l, Inc., 938 F.2d 1574, 1576-77 (2d Cir. 1991) (commercial arbitration).

The Fourth Circuit found waiver of arbitration when a party had to respond to three motions to dismiss and a motion for partial summary judgment, four and a half years had past before requesting arbitration, eight discovery motions had been made and argued, and two trial dates had been set. Fraser v. Merrill Lynch, 817 F.2d 250, 252 (4th Cir. 1987) (securities arbitration).

The Seventh Circuit found waiver when a party waited ten months to demand arbitration, participated in the litigation by filing a motion for summary judgment, and, only after losing the motion, requested arbitration. St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prod. Co., Inc., 969 F.2d 585, 589 (7th Cir. 1992) (construction arbitration). The court determined that all of these actions were inconsistent with the intent to arbitrate. Id.

Complainant, in his Response, did not cite any case law for the proposition that Respondent has acted inconsistently with its request to arbitrate. Complainant did recount the events of the litigation, as well as statements made by Respondent's counsel, that evidence an intent to litigate rather than arbitrate. Complainant highlighted that Respondent has filed both a motion to dismiss and a motion for summary decision and did not mention arbitration in either motion. Complainant's Response at 8.

Complainant points out that Respondent stated in its Motion to Dismiss: "[t]he only forum where all the causes of action alleged by Complainant can be addressed at once is in the court system." Id., Respondent's Motion to Dismiss, Sept. 13, 2002, at 3 (emphasis in original). Additionally, Complainant points out that he filed a claim against Respondents in state court, and Respondent never asserted a request to arbitrate any of those claims.

A review of Respondent's behavior throughout the course of this litigation leads to the conclusion that it has acted in a manner inconsistent with an intent to invoke the right to arbitrate. See supra Part II (Relevant Background and Procedural History). Complainant's Charge was filed on April 3, 2001, and his Complaint was filed October 23, 2001. Therefore, Respondent has been on notice of the Complainant's action for almost two years. Respondent filed an answer with five affirmative defenses, none of which mentioned its right to arbitration. Respondent filed a motion to dismiss on September 13, 2002, and a reply brief to that motion, and did not mention its right to arbitration. Respondent initiated at least five discovery motions, engaged in the taking of depositions, and participated fully in discovery. Respondent filed a motion for summary decision without mention of arbitration, and has now filed a motion to dismiss based on arbitration, almost two years after Complainant's Charge was filed, and one month before the case was set for trial. In fact, as cited above, Respondent has expressly stated that the court system is the proper forum for Complainant's citizenship discrimination claim. Respondent has initiated the litigation of substantial issues going to the merits of the case and Respondent's actions are inconsistent with an intent to arbitrate.

Respondent cites three cases to support the proposition that a party may merely participate in the litigation to the extent necessary to protect its interests without waiving the right to arbitration. All three of these cases are entirely distinguishable from the instant case.

In the first case cited by Respondent, arbitration was not requested until a year after the litigation began. Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473, 1477 (9th Cir. 1984). However, an answer to the complaint had not yet been filed and discovery consisted of the taking of one deposition. Id. In this case, by the time Respondent sought arbitration the answer had been filed, Respondent filed both a motion to dismiss and a motion for summary decision, extensive discovery had already ended, and a trial date had been set.

In the second case cited by Respondent, the party requested arbitration as soon as it discovered that the dispute was subject to arbitration. Williams v. Cigna Fin. Advisors, Inc. 56 F.3d 656, 661-62 (5th Cir. 1995). In Williams, the party favoring arbitration removed the case to federal court, filed a motion to dismiss the complaint, requested arbitration, then answered the complaint. Id. at 662.

The Fifth Circuit found that the party did not substantially invoke the judicial process and did not waive its right to seek arbitration. Id. In this case, Respondents requested arbitration long after filing an answer and invoked the judicial process by moving for summary decision and completing discovery with no mention of arbitration. Further, Respondent did not move the Court to compel arbitration when it first learned of such right. Respondent has had knowledge of the arbitration clause and failed to request arbitration until approximately one month before the case was set for trial.

Respondent also cites a Second Circuit case in which waiver to arbitrate was not found after a party answered the complaint and filed a motion to dismiss with no reference to arbitration. Rush v. Oppenheimer & Co., 779 F.2d 885, 886-87 (2d Cir. 1985). In Rush, the delay in asserting the right to arbitrate was partly due to a change in the law by the United States Supreme Court. In addition, Rush differentiated itself from another case in which wavier was found because a party filed a motion for summary judgment and moved for arbitration four and a half months before the trial. In the instant case, Respondent has not demonstrated that there has been a change in the law that would justify Respondent's delay in asserting its request to arbitrate, Respondent has moved for summary decision, and Respondent waited until approximately one month before the case was set for trial to assert its right to arbitrate.

All of the cases cited by Respondent are wholly distinguishable from the present case. None of the cases cited by Respondent regarding a party's acts that are inconsistent with litigation are analogous to the facts of this litigation. Respondent's actions throughout this proceeding are inconsistent with invoking the right to arbitrate. Although Respondent argues that Complainant, not Respondent, had the obligation to seek arbitration, given that Respondent's predecessor never even signed or ratified the Agreement, Complainant reasonably could conclude that he could not compel Respondent to arbitrate the claims. Moreover, the party seeking arbitration has the obligation to assert that position, especially in a situation where it drafted the contract. See, e.g., Van Ness, 862 F.2d at 758, Jones, 671 F.2d at 42 ("it has long been held that parties are free to waive their rights to arbitration under a contract and proceed to present their contractual dispute to a court....courts can infer waiver from the circumstances."), Spear v. Cal. State Automobile Assoc., 2 Cal.4th 1035, 1043 (1992) ("...a party who does not demand arbitration within a reasonable time is deemed to have waived the right to arbitration.").

3. Prejudice to the Nonmoving Party

Prejudice is the "staleness of the claim, and more importantly, the subjection of [defendant] to the litigation process..., the discovery process, the expense of litigation...." Hoffman, 969 F.2d at 799. It appears that prejudice to a party may also include a party's detrimental reliance on litigation, instead of arbitration. Van Ness, 862 F.2d at 759. In Van Ness, the Ninth Circuit inferred prejudice because a party detrimentally relied on the other party's failure to move for arbitration. Id.

The Ninth Circuit found that there was no prejudice when a case never proceeded past the pleading stage, and in dicta stated that if the waiving party "permitted the case to proceed to discovery and to a trial, an argument of prejudice based on litigation costs would be much more compelling." United Computer Sys., 298 F.3d at 765. The Ninth Circuit also found no prejudice when only limited discovery had occurred. Lake Communications, 738 F.2d at 1477 (discovery consisted of one deposition).

However, the Ninth Circuit has refused to find prejudice when the case has undergone extensive discovery because that discovery may be used at later proceedings. Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 697-98 (9th Cir. 1986) (finding that there was no waiver because a request for arbitration would have been futile before the change in the law by the Supreme Court).

Other Courts of Appeals have held that it is prejudice enough when the nonmoving party has incurred expenses because of the moving party's delays in asserting the right to compel arbitration. Menorah Insurance Co., Ltd. v. INX Reinsurance Corp., 72 F.3d 218, 222 (1st Cir. 1995), Com-Tech, 938 F.2d at 1577-78 (finding prejudice because of the expense of engaging in depositions, defending dispositive motions, and waiting eighteen months to compel arbitration), Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1160 (5th Cir. 1986) (investor versus brokerage firm) (finding prejudice because of the expense of defending a motion to dismiss and a motion for summary judgment, as well as engaging in discovery).

Complainant argues that he has suffered prejudice from Respondent's delay in requesting arbitration because he has incurred substantial costs and attorneys fees during the course of this litigation, due in part, to a "position taken by Respondent that this court already described as 'frivolous.'" Complainant's Response at 11. Complainant also characterizes Respondent's motion as an attempt to "forum shop." Id.

Complainant has suffered prejudice due to Respondent's delayed request for arbitration. Complainant has expended resources defending a motion to dismiss, at least five discovery motions, a motion for summary decision, and now another motion to dismiss. In addition, during discovery, Respondent withheld a large number of documents under a claim of privilege and Complainant had to initiate court proceedings to force Respondent to turn the documents over to Complainant. Respondent's assertion of privilege for at least four of those documents was entirely frivolous. The fact that Complainant may potentially use the information gleaned from discovery in another proceeding does not outweigh the prejudice Complainant has suffered due to Respondent's delay in requesting arbitration. Complainant has detrimentally relied on Respondent's actions evidencing an intent to proceed with litigation. The expense of defending Respondent's motions, or bringing the discovery motions against Respondent, would not have occurred had Respondent asserted its request to arbitrate the dispute at an earlier stage of litigation.

Respondent cites a Ninth Circuit case to support its position that Complainant has not been prejudiced by the request for arbitration. Britton v. Co-Op Banking Group, 916 F.2d 1405, 1413 (9th Cir. 1990). Britton involved a pro se defendant who sought to assert his right to arbitration, while the plaintiffs pushed ahead with litigation. The court found that the pro se defendant had not waived his right to compel arbitration because he had written to the plaintiffs and requested arbitration early in the litigation. The plaintiffs expressly refused to arbitrate. The court found no prejudice because the plaintiffs were the parties who refused to arbitrate and risked expenditure of costs in the pursuit of litigation. In addition, the plaintiffs failed to demonstrate when the defendant learned of his right to compel arbitration. The court emphasized that the defendant was without legal counsel. In the present case, Respondent has active legal counsel who knew about the arbitration clause prior to one month before the case was set for trial and never evidenced an intent to do anything but litigate the case.

4. Waiver Provision in the Agreement

Respondent also argues that it has not waived its right to compel arbitration because of the clause at the end of the Agreement that states: "Waiver. No failure by either of the parties in exercising any right, power, or privilege under this Agreement will operate as a waiver thereof. The waiver by either of the parties of a breach of any provision of this Agreement will not operate or be construed as a waiver of any other subsequent breach." Motion to Compel at 7, Respondent's Reply at 18. Complainant argues that the waiver jurisprudence serves to prevent the abuse of judicial process and the private agreement does not deprive this Court from the power to regulate its process. Complainant's Response at 7. Neither party has cited relevant case law addressing the validity of this provision.

Respondent cannot avoid waiver of its right to arbitrate by seeking to rely on this provision. This waiver provision is internally inconsistent because it states that there shall be no waiver of any right, power, or privilege under the employment contract, but then states that waiver of any provision is not a waiver of any other breach. The terms of the contract itself contemplate that waiver may occur. According to well-established contract law, a contract, especially a contract of adhesion, is construed against the party who drafted it. Badie v. Bank of America, 67 Cal.App.4th 779, 801 (1998). The provision on waiver is unclear and ambiguous because it may be interpreted as both forbidding and allowing waiver. Construing the provision against Respondent, waiver of contract terms is contemplated and may occur. Additionally, the Court has serious questions about the conscionability of this waiver provision in this adhesive employment contract.

Complainant has met the heavy burden necessary to establish waiver. Indeed, it is hard to imagine a case with facts that more strongly support waiver of the right to arbitrate.

Complainant has demonstrated that Respondent has waived its right to compel arbitration by establishing that: Respondent had knowledge of an existing arbitration clause, Respondent has acted inconsistently with such right to arbitrate, and Complainant has suffered prejudice from Respondent's failure to move for arbitration earlier in the proceedings.

E. Validity of the Arbitration Agreement

As stated above, traditional legal and equitable principles relating to the revocation of contracts may render an arbitration agreement void and unenforceable under the FAA. 9 U.S.C. § 2 (2002). When determining the validity of an arbitration agreement, federal courts should apply ordinary state law principles governing contract formation. Circuit City III, 279 F.3d at 892, citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). The law of the state in which the employee worked is applicable when determining the validity of an agreement to arbitrate. Circuit City III, 279 F.3d at 892.

In California, arbitration is a favored process for **voluntary** dispute resolution; however "voluntariness has been its bedrock justification." Armendariz v. Foundation Health Psychcare Servs., Inc., 24 Cal.4th 83, 115 (2000), accord Kinney v. United Healthcare Servs., Inc., 70 Cal.App.4th 1322, 1332 (1999) ("[a]lthough there is a strong public policy favoring arbitration...that policy is manifestly undermined by provisions in arbitration clauses which seek to make the arbitration process itself an offensive weapon in one party's arsenal" (internal quotations and citations omitted)). Similarly, the AAA's Practical Guide to Resolving Employment Disputes emphasizes that successful employment Alternative Dispute Resolution (ADR) systems must be fair in fact and perception and knowingly and voluntarily agreed upon by the parties. Resolving Employment Disputes–A Practical Guide, June 1, 2002, available at http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules_Procedures\ADR_Guides\ResolvEmployDis12-02.html.

1. Minimum Requirements for Arbitration of Unwaivable Statutory Civil Rights

Complainant was employed by Respondent in California, and thus California law applies. The California Supreme Court has held that the 1991 Civil Rights Act does not prohibit mandatory employment arbitration agreements that include state or federal antidiscrimination claims. Armendariz, 24 Cal.4th at 96, accord Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (holding that claims under the Age Discrimination in Employment Act can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application). However, under California law, "arbitration agreements that encompass unwaivable statutory rights must be subject to particular scrutiny." Armendariz, 24 Cal.4th at 100 (emphasis in original).

Unwaivable statutory rights are derived from two California statutes rooted in public policy. Id. First, California Civil Code section 1668 states that contracts that exempt one from "responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code § 1668 (West 2002), cited in Armendariz, 24 Cal.4th at 100. Second, California Civil Code 3513 asserts that one can waive a law intended solely for his benefit, but "a law established for a public reason cannot be contravened by private agreement." Cal. Civ. Code § 3513 (West 2002), cited in Armendariz, 24 Cal.4th at 100. The California Supreme Court deemed the rights protected by the California Fair Employment and Housing Act (FEHA), such as employment discrimination on the basis of race, religious creed, color, national origin, sex, or age, as unwaivable statutory civil rights because these rights are protected for a public reason. Armendariz, 24 Cal.4th at 100-01. Armendariz stated that an employment contract that required employees to waive their rights under FEHA would be contrary to public policy, thus the rights protected under FEHA are unwaivable statutory rights. Id.

A mandatory employment agreement submitting unwaivable statutory rights to arbitration meets minimal requirements for validity if it: (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum. Armendariz, 24 Cal.4th at 102, citing Cole v. Burns Int'l Sec. Servs.,105 F.3d 1465, 1482 (D.C. Cir. 1997).

Because this list is inclusive, all five elements must be present for an arbitration agreement that submits unwaivable statutory rights to arbitration to be valid and enforceable. The arbitration agreement in Armendariz was governed by the California Code of Civil Procedure which provided that each party to arbitration paid his pro rata share of expenses and fees. Id. at 107. The California Supreme Court held that "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." Id. at 110-11 (emphasis in original). The court felt the rule was fair because it placed the cost of arbitration on the party that imposed it. Id. at 111. If the arbitration agreement, as written, forced the employee to pay any additional costs or fees, it would be unlikely that the employee would pursue arbitration due to the risk of exorbitant expense. Id. at 110.

That the employer is now willing to pay all fees associated with arbitration does not change the fact that a provision, at the time of its writing, was unconscionable and unenforceable. Id. at 125 ("[n]o existing rule of contract law permits a party to resuscitate a legally defective contract by merely offering to change it." (internal quotation marks omitted)), accord Mercuro v. Countrywide Secs. Corp., 96 Cal.App.4th 167, 181-82 (2002) (holding that an employer's attempt to modify the arbitration contract and pay for the costs failed to cure the fee-splitting provision and severing the provision would not solve the problem because the Agreement was permeated with unconscionability).

Applying California law, the Ninth Circuit in Circuit City III stated that an arbitration clause requiring the employer and the employee to split the fees for arbitration would alone "render an arbitration agreement unenforceable." Circuit City III, 279 F.3d at 894, accord Ferguson v. Countrywide Credit Indus., Inc, 298 F.3d 778, 785 (9th Cir. 2002). See Appendix B for a comparison of the arbitration agreement in Circuit City with the arbitration clause in the instant case.

The Agreement signed by Complainant does not meet the minimum requirements for arbitration of unwaivable statutory civil rights. Complainant is bringing a claim against Respondent for citizenship status discrimination in violation of 8 U.S.C. section 1324b. Pursuant to the law stated above, this claim is an unwaivable statutory civil right. FEHA and 8 U.S.C. section 1324b share similar purposes and goals. Both protect individuals from employment discrimination and both have the goal of preventing workplace discrimination to promote the public good. Additionally, an employment contract requiring an employee to waive his or her rights under 8 U.S.C. section 1324b would violate public policy. Therefore, the rights protected under 8 U.S.C. section 1324b are unwaivable statutory rights under California law.

Signing the Agreement was a condition of Complainant's employment ("I understand that I am offered employment in consideration of my promise to arbitrate claims."). Appendix A ¶ 10(c), Motion to Compel, Dec. of Marina Tsatalis, Ex. A at 6. Respondent's counsel has stated that Complainant had to agree to the terms of the Agreement in order to be employed by Respondent. FPC Tr. at 15. According to California law, the Agreement must meet the five requirements listed above.

The text of the arbitration clause of the Agreement states "the company and I shall each pay one-half of the costs and expenses of such arbitration, and each of us shall separately pay our counsel fees and expenses." Because the California Supreme Court held that requiring an employee to bear any cost or expense that he would not have to shoulder if he brought a claim in court rendered an arbitration agreement invalid, Respondent's arbitration provision would not meet the minimal requirements for a valid arbitration agreement.

Respondent contends in its reply brief that the arbitration clause is valid because Respondent has offered to pay all costs of the arbitration and the fee-splitting provisions may simply be severed from the Agreement. Respondent's Reply at 13-16. However, pursuant to the law cited above, this ex post facto offer to bear the expense of arbitration does not change the invalid wording of the arbitration clause of the Agreement as written, or that Complainant may have elected to request arbitration prior to litigation if the Agreement stated that costs and fees would be paid by Respondent. Additionally, severing the cost-splitting clause would not solve the overall invalidity of the arbitration clause because, as discussed below, the clause is permeated by unconscionability.

2. Unconscionability

To render a contract unconscionable, it must be both procedurally and substantively unconscionable. Armendariz, 24 Cal.4th at 114. However, procedural and substantive unconscionability do not have to be present in the same degree. Id. ("...the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable and vice versa."). Procedural unconscionability refers to the "manner in which the contract was negotiated and the circumstances of the parties at that time," Kinney, 70 Cal.App.4th at 1329, American Software, Inc. v. Ali, 46 Cal.App.4th 1386, 1390 (1996), while substantive unconscionability is the result of overly harsh or one-sided contract terms, Armendariz, 24 Cal.4th at 114.

a. Procedural Unconscionability

Procedural unconscionability occurs when there is oppression or surprise due to unequal bargaining power. Id. Procedural unconscionability examines the oppressive nature of a contract and the surprising nature of the contractual terms. Kinney, 70 Cal.App.4th at 1329. A contract may be procedurally unconscionable if it is either oppressive or its terms unfairly surprise a party to the contract. Armendariz, 24 Cal.4th at 114.

Determining whether a contract is procedurally unconscionable due to its oppressive nature begins by examining whether a contract is one of adhesion. Id. at 113. A contract of adhesion is one of standardized form, imposed and drafted by the party with superior bargaining power, and one that gives the party with less bargaining strength no chance for meaningful negotiation. Id. Contracts of adhesion "bear within them the clear danger of oppression and overreaching." Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 818 (1981). Because of this risk of oppression, courts and legislatures must act to prevent abuses. Id.

The California Supreme Court in Armendariz found the arbitration agreement at issue to be a contract of adhesion because "it was imposed on employees as a condition of employment and there was no opportunity to negotiate." Armendariz, 24 Cal.4th at 115. Further, the court noted its oppressive nature by stating "the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment and few employees are in a position to refuse a job because of an arbitration requirement." Id.

The Ninth Circuit in Circuit City III, relying on Armendariz, found an arbitration agreement was procedurally unconscionable because of the degree of superior bargaining power that the employer possessed over the employee. Circuit City III, 279 F.3d at 893, accord Ferguson, 298 F.3d at 783-84 (finding oppression from an inequality of bargaining power). See Appendix B.

A contract may also be found to be unconscionable if its terms unfairly surprise a party. Stirlen v. Supercuts, Inc., 51 Cal.App.4th 1519, 1532 (1997). Surprise and oppression are often intertwined as the California Court of Appeals points out in Stirlen: "...experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms." Id. at 1535.

Recently, the Ninth Circuit has refused to find arbitration agreements procedurally unconscionable that contain a provision allowing an employee to "opt out" of arbitration within thirty days of signing an employment agreement, because the arbitration agreement lacked the oppression of a traditional contract of adhesion and allowed the employee a meaningful opportunity to reject the contract terms. Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108 (9th Cir. 2002), Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199-1200 (9th Cir. 2002).

Complainant argues that the employment contract is procedurally unconscionable because it is a pre-printed form with no place for modification or handwritten terms. Complainant's Response at 19-20. He also argues that he was surprised by the section in the employment contract on arbitration because no one explained the significance of the contract's contents. Id.

The employment contract and, more specifically, the arbitration clause of the employment contract, is a contract of adhesion. The contract was presented to Complainant, as it was to other employees, as a standardized contract, with no meaningful opportunity for negotiation, and was a condition of Complainant's employment with Respondent. Indeed, the introductory paragraph of the arbitration provision states that the employee's assent is "[i]n consideration of my continued employment with the Company and my receipt of the compensation now and hereafter paid to me by the Company...." See Appendix A. There is no "opt-out" clause that would have allowed Complainant to voluntarily and knowingly reject the arbitration provisions of the employment contract.

At the FPC, Respondent's counsel acknowledged that "as a condition of [Complainant's] employment, basically [he had] to agree to these terms." FPC Tr. at 15. In addition, SwitchOn, Respondent's predecessor, stated in its offer letter to Complainant, "I have enclosed for your signature, our standard Employment, Confidential Information, Invention Assignment and Arbitration Agreement as a condition of your employment." Respondent's Reply, Dec. of Marina Tsatalis, Ex. A (emphasis added). Respondent acknowledges that SwitchOn's offer letter gave Complainant no choice if he wanted to work for SwitchOn: "execution of the Agreement was a condition of his employment." Respondent's Reply at 34.

The arbitration clause of the Agreement was procedurally unconscionable because of its oppressive nature. The hallmark of procedural unconscionability is an employer's superior bargaining strength. Pursuant to the law decided in Armendariz and its progeny, Respondent has bargaining power far superior to Complainant's. The Agreement, and more specifically the arbitration clause contained therein, was presented to Complainant as a "take it or leave it" contract with no opportunity for negotiation or chance to opt out of the arbitration provisions. Because the employment contract is procedurally unconscionable due to oppression, the Court need not reach whether Complainant was unfairly surprised by the terms of the contract.

In its reply brief, Respondent contends that Complainant has not established procedural unconscionability because he has failed to show oppression in the circumstances surrounding the Agreement. Respondent argues that the terms of the contract cannot be oppressive because Complainant has not alleged that he attempted to negotiate for a different arbitration agreement or request that the arbitration clause be excluded from the employment contract. Respondent's statements in its reply brief bolster the conclusion that the arbitration clause in the Agreement was a contract of adhesion. A contract of adhesion is defined as a standard contract which is drafted by the party with superior bargaining strength and gives the party accepting it no meaningful opportunity to negotiate its terms. Additionally, Respondent contends that he was a skilled professional and thus had the bargaining power to negotiate the terms of the Agreement. Simply because Complainant is a skilled professional does not mean that he has bargaining power or sophistication equal to that of a large corporation. Armendariz, 24 Cal.4th at 115 ("few employees are in a position to refuse a job because of an arbitration agreement"), accord Graham, 28 Cal.3d at 818-19 (holding that a legendary concert promoter lacked the bargaining power to negotiate a contract containing an arbitration clause with a musical performer who was a member of a union); Stirlen, 51 Cal.App.4th at 1534-35 (holding that a corporate executive did not have a realistic ability to modify terms of a standard employment contract, even though he negotiated stock options, retirement benefits, and a signing bonus).

The employment contract is an oppressive contract of adhesion without an "opt out provision," and therefore procedurally unconscionable.

b. Substantive Unconscionability

Substantive unconscionability occurs when a contract is one-sided or overly harsh. Armendariz, 24 Cal.4th at 114. A unilateral obligation to arbitrate is substantively unconscionable. Mercuro, 116 Cal.App.4th at 176-79, Kinney, 70 Cal. App.4th at 1332. Unless "business realities" justify the unilateral provisions of an arbitration agreement, they will be considered unconscionable. Stirlen, 51 Cal.App.4th at 1536-37. The justification for unilateral provisions in an arbitration clause must be something other than "the employer's desire to maximize its advantage based on the superiority of the judicial forum." Armendariz, 24 Cal.4th at 120.

In Armendariz, the California Supreme Court found an arbitration agreement substantively unconscionable because it lacked mutuality and limited the damages the employee could recover. The court said "it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness...." Id. at 117. Even though the arbitration agreement did not expressly authorize litigation of the employer's claims against the employee in Armendariz, the court found that it was the implication of the agreement and a lack of mutuality can be manifested as much by what the contract contains, as what it does not. Id. at 120. The arbitration agreement lacked mutuality because it required the arbitration of employee, but not employer, claims of wrongful termination. Id., accord Mercuro, 96 Cal.App.4th at 176 (holding that it is substantively unconscionable to require employees to arbitrate their most common claims while the employer may choose to litigate its claims against the employee). The court also found that the arbitration contract in Armendariz was substantively unconscionable because it limited the damages employees could recover. Armendariz, 21 Cal.4th at 121.

Applying Armendariz, the Ninth Circuit in Circuit City III found an arbitration clause substantively unconscionable due to a limitation on remedies, cost and fee-splitting between employee and employer, and lack of mutuality. Circuit City III, 279 F.3d at 896, Appendix B, accord Ferguson, 298 F.3d at 785 ("a fee allocation scheme which requires the employee to split the arbitrator's fees with the employer would alone render an arbitration agreement substantively unconscionable.").

Complainant argues that the arbitration clause of the Agreement is substantively unconscionable because of its unilateral provisions, Respondent's lack of justification for the one-sided nature of the Agreement, and the cost-splitting provision.

Comparing the arbitration clause in this case to the one at issue in Armendariz, Respondent's arbitration clause is more one-sided than the clause in Armendariz. See Appendix A. First, the arbitration clause in Armendariz used "I and Employer agree" when describing the terms of the arbitration agreement. The California Supreme Court held the provision of the agreement that states, "I agree," unconscionable because it lacked mutuality. The arbitration clause in the instant case, simply states "I agree," referring to Complainant, except when describing the cost-sharing provisions, where it states "the Company and I agree."

Second, the arbitration clause in this case waives "an employee's right to a jury trial," but does not waive an employer's right to a jury trial for claims against the employee.

Third, the arbitration clause states that Respondent "will have available, in addition to any other right or remedy available, the right to obtain an injunction from a court of competent jurisdiction" for a breach of the employer's right to protect confidential information, inventions, intellectual property, and the return of company documents. By the terms of the Agreement, the employee must consent to the issuance of the injunction and agree that no bond or security is required when obtaining the injunction. This provision allows Respondent to seek an injunction and "any other right or remedy available" from a court of law for the causes of action it would most likely pursue against Complainant. Complainant cannot even protest the issuance of the injunction or the necessity for a bond. The terms of the arbitration clause do not allow Complainant to seek any judicial intervention or remedy for its claims against Respondent.

Fourth, the employment contract containing the arbitration provision was signed by Complainant, but not signed by Respondent, even though there was a line for the company's signature. Although Respondent seeks to enforce the arbitration clause against Complainant, Complainant would not be able to enforce the arbitration clause against Respondent because it never signed the contract. See, e.g., Leodori v. Cigna Corp., 175 N.J. 293, 304-06 (2003) (holding that an arbitration provision could not be enforced against a party who does not sign or explicitly indicate his or her agreement to it).

Just as in Armendariz, this arbitration clause also places half of the costs of arbitration on the employee and does not provide a justification for the unilateral provisions that is grounded in business realities. The arbitration clause rationalizes its unilateral provisions by stating, "I agree that it would be impossible or inadequate to measure and calculate the company's damages from any breach of the covenants set forth [in the employment contract]." This provision is not a justification grounded in business necessities because Complainant's potential damages are just as likely to be speculative as Respondent's, and he does not have the benefit of the judicial system under the arbitration clause.

Respondent argues that Complainant has not established substantive unconscionability because the Agreement is mutual and the unilateral provisions and cost-splitting provisions can be severed. First, Respondent argues that the arbitration clause is mutual and points to this provision, "I understand that each party's promise to resolve claims by arbitration in accordance with the provisions of this agreement, rather than through the courts, is consideration for the other party's like promise." Respondent's Reply, at 13. This provision is not mutual. The "I understand" language is in the first person singular, not the first person plural. "I" refers to Complainant, the only party that signed the contract. Complainant is bound by this contract and provision, but Respondent is not bound because it did not sign the contract and the language says "I," not "we," or "the Company and I."

Second, Respondent argues that the unilateral provisions and cost-splitting provision do not render the Agreement substantively unconscionable because they can be severed. This argument puts the cart before the horse. As demonstrated by case law cited by Respondent in its reply, in order to sever provisions, they must first be found to be unconscionable. Id. Remedies for unconscionable contract provisions are discussed below. See supra Part G. Additionally, arguing that the unilateral provisions of the arbitration clause should be severed is inconsistent with Respondent's position that the Agreement is mutual.

For the reasons stated above, under California law, Respondent's arbitration agreement is substantively unconscionable because of its lack of mutuality, procedurally unconscionable because it is an oppressive contract of adhesion, and does not meet the minimum requirements for arbitration of unwaivable statutory civil rights due to a cost-splitting provision.

F. Arbitrability of 8 U.S.C. Section 1324b Claims

Complainant argues that citizenship discrimination claims brought under 8 U.S.C. section 1324b are not arbitrable because Congress created a complex system of administrative adjudication and has granted OCAHO sole and exclusive jurisdiction over these claims. Respondent argues that 1324b actions are arbitrable because other comparable statutes with administrative review are routinely referred to arbitration pursuant to an arbitration agreement. Respondent offered the National Labor Relations Act as an example. Respondent cited the Collyer doctrine for the proposition that OCAHO may defer its jurisdiction to arbitration. Respondent's Reply at 5-7. In Collyer, the National Labor Relations Board dismissed the complaint in favor of arbitration, but retained jurisdiction to assure the case had either been settled or submitted to arbitration and that the arbitration procedures were fair. Collyer Insulated Wire, 192 NLRB 837 (1971), 1971 WL 32499, at *11.

The Collyer decision is not an analogous example to claims brought before OCAHO because it primarily governs the relationship between the employer and a union, not an employer and an individual. The Collyer case was limited to "a dispute over the terms and meaning of [a] contract between the Union and [an employer]." Collyer, at *1. A union possesses far more bargaining power than an individual, and often a union's bargaining power is comparable to that of the employer.

As I stated in the Order Partially Granting Respondent's Motion to Dismiss issued on October 16, 2002, "OCAHO has exclusive, original jurisdiction to adjudicate allegations of section 1324b violations." 9 OCAHO no. 1083, at 3. I further concluded that "[t]hrough a reading of the statutory language, it is clear that Congress specifically vested the power to adjudicate complaints brought under section 1324b in administrative law judges: [h]earings on complaints under this subsection shall be considered by administrative law judges who are specially designated by the Attorney General as having special training respecting employment discrimination and, to the extent practicable, before such judges who only consider cases under this section." Id. at 4. Complainant contends that this logic applies equally well to the question of whether Congress intended private parties to by-pass this statutory mechanism in favor of private parties. Complainant's Response at 4. Complainant further argues that there is no provision in section 1324b for arbitration, and Congress could never obtain that objective if private parties could extract cases from this national framework and turn to private arbitrators having no special training or expertise. Id.

Complainant's contention is persuasive. However, because I find that Respondent waived its rights to compel arbitration, the arbitration agreement does not meet the minimum requirements for arbitration of unwaivable statutory civil rights, and the arbitration agreement is both procedurally and substantively unconscionable, I do not need to decide whether claims asserted pursuant to 8 U.S.C. section 1324b are arbitrable.

IV. CONCLUSIONS

Respondent's Motion to Compel Arbitration and for a Stay Pending Arbitration is denied because it has waived its right to compel arbitration, the arbitration clause of the employment contract does not meet the minimum requirements for arbitration of unwaivable statutory civil rights, and is both procedurally and substantively unconscionable.

Respondent has waived its right to compel arbitration because Respondent had knowledge of an existing right to arbitrate, acted inconsistently with invoking that right, and Complainant suffered prejudice because of the delay. Because Respondent has waived its right to arbitrate, there is no need for the Court to examine the terms of the arbitration clause in the employment contract.

However, because the arbitration clause does not meet the minimum requirements for arbitration of unwaivable statutory rights and is procedurally and substantively unconscionable, the entire arbitration clause of the employment contract is unenforceable.

The arbitration agreement contains a cost-splitting provision which prevents it from meeting the minimum requirements for arbitration of unwaivable statutory rights. An arbitration clause that places any cost or expense on the employee "poses a significant risk that employees will have to bear large costs to vindicate their statutory right against workplace discrimination, and therefore chills the exercise of that right." Armendariz, 24 Cal.4th at 110. Complainant may have been deterred from arbitrating his claims against Respondent because of the cost-splitting provision and the mere risk of having to bear large expenses in an arbitral forum.

The arbitration agreement is also procedurally and substantively unconscionable. The California Civil Code provides that "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." Cal. Civ. Code § 1670.5 (West 2002), cited in Armendariz, 24 Cal.4th at 122-23. Although a court has wide discretion to either sever unconscionable contract clauses or refuse to enforce the contract entirely, striking the entire contract should only be done when the contract is "permeated" by unconscionability. Armendariz, 24 Cal.4th at 122. Generally, courts will not enforce an entire contract if its central purpose is tainted with illegality. Id. at 124.

The Armendariz court rendered the entire arbitration agreement unenforceable. The court cited two reasons for doing so. First, the arbitration agreement contained more than one unlawful provision (an unlawful damages provision and an unconscionably unilateral arbitration clause). Id. Second, the agreement is so one-sided as to be permeated with unconscionability and unable to be cured by severance. Id. at 124-25. The court specifically stated "whether an employer is willing, now that the employment relationship has ended, to allow the arbitration provision to be mutually applicable, or to encompass the full range of remedies, does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy." Id. at 125.

Citing Armendariz, the Ninth Circuit in Circuit City III also rendered the entire arbitration agreement unconscionable because the unilateral provisions ran throughout the agreement. Circuit City III, 279 F.3d at 896. By severing or excising the offending clauses, the court stated that it would be impermissibly rewriting the contract. Id.

Because of the substantial one-sided nature of the arbitration clause, the cost-splitting provision, and the fact that Respondent did not sign the employment contract, the arbitration clause is unenforceable and cannot be reformed. In fact, a reasonable person in Complainant's position may conclude that he could not arbitrate because Respondent did not sign the employment contract. There is no way to sever certain unilateral or unfair portions without rendering the whole arbitration section of the employment contract nugatory or rewriting the entire section. The Court cannot take any remedial action that would rectify Respondent's failure to sign the employment contract. Further, Respondent's offer to correct some of the unenforceable provisions in the arbitration agreement, such as the unilateral judicial remedies provisions, cannot revive clauses of a contract that were invalid at the time of creation.

Respondent has waived its right to compel arbitration. Moreover, the arbitration clause in this case is unenforceable. Respondent's Motion to Compel Arbitration is denied.

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ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

APPENDIX A **SwitchOn, Inc. Agreement**	**Armendariz**
EMPLOYMENT, CONFIDENTIAL INFORMATION, INVENTIONS ASSIGNMENT AND ARBITRATION AGREEMENT This agreement is intended to formalize in writing certain understandings and procedures that have been in effect since the time I was initially employed with SwitchOn Networks, Inc. and will remain in effect as a condition of my continued employment with SwitchOn Networks, Inc., its subsidiaries, affiliates, successors or assigns (together the "Company"). In consideration of my continued employment with the Company and my receipt of the compensation now and hereafter paid to me by the Company, I agree to the following: . . . . 10. Arbitration and Equitable Relief (a) Arbitration. Except as provided in Section 10(b) below, I agree that any dispute or controversy arising out of, relating to, or concerning any interpretation, construction, performance or breach of this Agreement, shall be settled by arbitration to be held in Santa Clara County, California, in accordance with the Employment Dispute Resolution Rules then in effect of the American Arbitration Association. The arbitrator may grant injunctions or other relief in such dispute or controversy. The decision of the arbitrator shall be final, conclusive and binding on the parties to the arbitration. Judgment may be entered on the	I agree as a condition of my employment, that in the event my employment is terminated, and I contend that such termination was wrongful or otherwise in violation of the conditions of employment or was in violation of my express or implied condition, term or covenant of employment, whether founded in fact or in law, including but not limited to the covenant of good faith and fair dealing, or otherwise in violation of any of my rights, I and Employer agree to submit any such matter to binding arbitration pursuant to the provisions of title 9 of Part III of the California Code of Civil Procedure, commencing at section 1280 et seq. or any successor or replacement statutes. I and Employer further expressly agree that in any such arbitration, my exclusive remedies for violation of the terms, conditions or covenants of employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief.

pay one-half of the costs and expenses of such arbitration, and each of us shall separately pay our counsel fees and expenses. This arbitration clause constitutes a waiver of employee's right to a jury trial and relates to the resolution of all disputes relating to all aspects of the employer/employee relationship (except as provided in section 10(b) below). Including, but not limited to the following claims: i. Any and all claims for wrongful discharge of employment; breach of contract, both express and implied; breach of the covenant of good faith and fair dealing, both express and implied; negligent or intentional infliction of emotional distress; negligent or intentional misrepresentation; negligent or intentional interference with contract or prospective economic advantage; and defamation; ii. Any and all claims for violation of any federal, state or municipal statute, including, but not limited to, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination In Employment Act of 1967, the Americans With Disabilities Act of 1990, the Fair Labor Standards Act, yhe California Fair Employment And Housing Act, and Labor Section 201, et seq.; iii. Any and all claims arising out of any other laws and regulations relating to employment or employment discrimination. (b) Equitable Remedies. I agree that it would be impossible or inadequate to measure and calculate the Company's damages from any breach of the Covenants set forth in Sections 2,	

will have available, in addition to any other right or remedy available, the right to obtain an injunction from a court of competent jurisdiction restraining such breach or threatened breach and to specific performance of any such provision of this agreement. I further agree that no bond or other security shall be required in obtaining such equitable relief and I hereby consent to the issuance of such injunction and to the ordering of specific performance. (c) Consideration. I understand that each party's promise to resolve claims by Courts, is consideration for other party's like promise. I further understand that I am offered employment in consideration of my promise to arbitrate claims. . . . . 11. General Provisions. . . . . (e) Successors and Assigns. This Agreement will be binding upon my heirs, executors, administrators and other legal representatives and will be for the benefit of the Company, its successors, and its assigns. . . . . (g) Waiver. No failure or delay by either of the parties in exercising any right, power or privilege under this Agreement will operate as a waiver thereof. The waiver by either of the parties of a breach of any such provision of this Agreement will not operate or be continued as a waiver of any other or subsequent breach.	

APPENDIX B

	Circuit City III	SwitchOn, Inc.
Language	The Arbitration Agreement (AA) specifies that job applicants agree to settle "all previously unasserted claims, disputes, or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments to the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and law of tort." Circuit City at 891.	Arbitration and Equitable Relief (a) Arbitration. Except as provided in section10(b) below, I agree that any dispute or controversy arising out of, relating to, or concerning any interpretation, construction, performance or breach of this agreement, shall be settled by arbitration to be held in Santa Clara County, California, in accordance with the employment dispute resolutions rules then in effect of the American Arbitration Association. The arbitrator may grant injunctions or other relief in such dispute or controversy. The decision of the arbitrator shall be final, conclusive, and binding on the parties to the arbitration. Judgment may be entered on the arbitrator's decision in any court having jurisdiction. The company and I shall each pay one-half of the costs and expenses of such arbitration, and each of us shall separately pay our counsel fees and expenses. This arbitration clause constitutes a waiver of employee's right to a jury trial and relates to the resolution of all disputes relating to all aspects of the employer/employee relationship....Including, but not limited to, the following claims....

Submit all claims to binding arbitration?	YES, Circuit City at 891.	YES
Split the costs and fees of arbitration?	YES, Circuit City at 891.	YES
Employer required to arbitrate any claims against employee?	NO, Circuit City at 891.	UNCLEAR, the employee waives a right to a jury trial, but later in the arbitration section, "I understand that each party's promise to resolve claims by arbitration in accordance with the provisions of this agreement, rather than through the courts is consideration for other party's like promise. I further understand that I am offered employment in consideration of my promise to arbitrate claims." ALSO, in the Equitable Remedies section of the Arbitration agreement, the employee agrees to consent to the employer going to court and obtaining an injunction, consent to the order of an injunction, and waives all bond and security in relation to the injunction. ALSO, SwitchOn, Inc. never signed the Agreement.
Is arbitration agreement a predicate to employment	YES, employee cannot work at Circuit City unless he/she has signed the arbitration agreement. If the agreement is not signed, Circuit City will not consider the application. Circuit City at 891-92.	YES, the above language suggests that employment with PMC is conditioned upon signing an arbitration agreement.

When did employer assert the arbitration agreement?	SEEMINGLY IMMEDIATELY, after Adams filed discrimination claims in state court, "Circuit City responded by filing a petition in federal district court" to compel arbitration	A MONTH BEFORE TRIAL, POST DISCOVERY AND DISPOSITIVE MOTIONS, no mention in Answer.
Does employer impose a statute of limitations for arbitrating claims?	YES, Circuit City at 894.	NO