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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JAIMIE L. BEAVERS, an individual,

Plaintiffs,

vs.

FISHER CAPITAL, LLC, a Wyoming limited liability company, BROOKFIELD HOLDINGS, LLC, a Wyoming limited liability company, AMS CONSULTING SOLUTIONS, LLC, a Wyoming limited liability company, ALEXANDER SPELLANE, an individual, KEVIN HILL, an individual, and DOES No. 1 through 20,

Defendants.

CASE NO. 23SMCV03533

NOTICE OF RULING DENYING MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

Assigned to the Hon. Michael E. Whitaker

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on February 7, 2024, at 8:30 a.m. in Department 207 of this Court, located at 9355 Burton Way, Beverly Hills, CA 90210, the Hon. Michael E. Whitaker presiding, Defendant Fisher Capital LLC's motion to compel arbitration and stay proceedings, which was joined in by Defendant Alexander Spellane, came on for regularly noticed hearing, and that appearances were made by Thomas D. Mauriello, Esq. on behalf of Plaintiff Jaimie Beavers and Alexander Porter, Esq. and Marcy Blattner Micale, Esq. on behalf of Defendants Fisher Capital LLC and Alexander Spellane;

PLEASE TAKE FURTHER NOTICE THAT, after considering the parties' briefs, declarations, evidence, and argument at the hearing, the Court adopted in full its tentative ruling issued in this matter, a true and correct copy of which is attached hereto as **Exhibit A**.

Respectfully submitted,

Dated: February 7, 2024

By: /s/ Thomas D. Mauriello
Thomas D. Mauriello

MAURIELLO LAW FIRM, APC
Counsel for Plaintiff Jaimie L. Beavers

EXHIBIT A

HEARING DATE	February 7, 2024
CASE NUMBER	23SMCV03533
MOTION	Motion to Compel Arbitration and Stay Action
MOVING PARTY	Defendant Fisher Capital, LLC
OPPOSING PARTY	Plaintiff Jaimie L. Beavers

MOTION

On August 1, 2023, Plaintiff Jaimie L. Beavers ("Respondent") filed a complaint for damages against Defendants Fisher Capital, LLC, Brookfield Holdings, LLC; AMS Consulting Solutions, LLC; Alexander Spellane; and Kevin Hill, alleging causes of action for (1) breach of fiduciary duty; (2) negligence; (3) fraud and deceit, including fraud in the inducement; (4) constructive fraud; (5) negligent misrepresentation; (6) California Corporations Code §§ 25400, 25401 fraud in connection with the sale of securities; and (7) negligent infliction of emotional distress, stemming from the Defendants' alleged scheme to defraud Plaintiff of her recently deceased husband's retirement account.

Defendant Fisher Capital, LLC ("Defendant") moves to compel Plaintiff to arbitrate her claims and to stay the action pending resolution of the arbitration proceeding. Defendant Alexander Spellane has filed a joinder to Defendant's motion to compel arbitration. Plaintiff opposes the motion and Defendant replies.

MOTION TO COMPEL ARBITRATION – LEGAL STANDARDS

"[T]he advantages of arbitration include a presumptively less costly, more expeditious manner of resolving disputes. It follows a party to a valid arbitration agreement has a contractual right to have its dispute with another party to the contract resolved quickly and inexpensively." (*Henry v. Alcove Investment, Inc*. (1991) 233 Cal.App.3d 94, 99–100 [cleaned up].) Thus, "on petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2; see also

EFund Capital Partners v. Pless (2007) 150 Cal.App.4th 1311, 1320 [the language in section 1281.2 compelling arbitration is mandatory].) The right to compel arbitration exists unless the court finds that the right has been waived by a party's conduct, other grounds exist for revocation of the agreement, or where a pending court action arising out of the same transaction creates the possibility of conflicting rulings on a common issue of law or fact. (Code Civ. Proc., § 1281.2, subds. (a)-(c).)

"On a petition to compel arbitration, the trial court must first determine whether an agreement to arbitrate the controversy exists. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. The party seeking arbitration can meet its initial burden by attaching to the petition a copy of the arbitration agreement purporting to bear the respondent's signature." (*Bannister v. Marinidence Opco, LLC* (2021) 64 Cal.App.5th 541, 543-544 [cleaned up].) The party seeking to compel arbitration must also "plead and prove a prior demand for arbitration and a refusal to arbitrate under the agreement." (*Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 640-641.)

And while the moving party on a motion to compel arbitration "bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, [a] party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842 [cleaned up]; see also *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 ["The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability"].)

ANALYSIS

1. ENFORCEABLE ARBITRATION AGREEMENT

On July 15, 2021, Plaintiff entered into a transaction to purchase gold and silver coins from Fisher Capital. (Spellane Decl. ¶¶ 1-2 and Ex. 1.) Paragraph 12. e. of the agreement provides as follows:

e. **Arbitration of Disputes**: CUSTOMER UNDERSTANDS AND AGREES THAT BY SIGNING THIS AGREEMENT CUSTOMER IS AGREEING FOR HIMSELF/HERSELF, AND FOR CUSTOMER'S SUCCESSORS, ASSIGNS, HEIRS AND/OR ANY PARTY ACTING ON CUSTOMER'S BEHALF, THAT ANY CONTROVERSY, CLAIM OR DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE BREACH, TERMINATION, ENFORCEMENT, INTERPRETATION OR VALIDITY THEREOF, INCLUDING THE DETERMINATION OF THE SCOPE OR APPLICABILITY OF THIS AGREEMENT WILL BE RESOLVED BY BINDING, INDIVIDUAL ARBITRATION PURSUANT TO FISHER CAPITAL'S CHOICE OF ARBITRATION ASSOCIATION RULES FOR ARBITRATION OF CONSUMER-RELATED DISPUTES AND CUSTOMER HEREBY EXPRESSLY WAIVES TRIAL BY JURY. AS AN ALTERNATIVE, CUSTOMER MAY BRING A CLAIM IN A "SMALL CLAIMS", IF PERMITTED BY THAT SMALL CLAIMS COURT'S RULES. CUSTOMER MAY BRING CLAIMS ONLY ON HIS/HER OWN BEHALF. NEITHER CUSTOMER NOR FISHER CAPITAL WILL PARTICIPATE IN A CLASS ACTION OR CLASS- WIDE ARBITRATION FOR ANY CLAIMS COVERED BY THIS AGREEMENT. CUSTOMER ALSO AGREE NOT TO PARTICIPATE IN CLAIMS BROUGHT IN A PRIVATE ATTORNEY GENERAL OR REPRESENTATIVE CAPACITY, OR CONSOLIDATED CLAIMS INVOLVING ANOTHER PERSON'S ACCOUNT, IF FISHER CAPITAL IS A PARTY TO THE PROCEEDING. THIS DISPUTE RESOLUTION PROVISION WILL BE GOVERNED BY THE FEDERAL ARBITRATION ACT. IN THE EVENT THE FISHER CAPITAL ARBITRATION ASSOCIATION IS UNWILLING OR UNABLE TO SET A HEARING DATE WITHIN ONE HUNDRED AND SIXTY (160) DAYS OF FILING THE CASE, THEN EITHER FISHER CAPITAL OR YOU CAN ELECT TO HAVE THE ARBITRATION ADMINISTERED INSTEAD BY THE JUDICIAL ARBITRATION AND MEDIATION SERVICES. JUDGMENT ON THE AWARD RENDERED BY THE ARBITRATOR MAY BE ENTERED IN ANY COURT HAVING COMPETENT JURISDICTION. CUSTOMER UNDERSTANDS AND AGREES THAT BY ENTERING INTO THIS AGREEMENT, CUSTOMER AND FISHER CAPITAL ARE EACH WAIVING THE RIGHT TO TRIAL BY JURY OR TO PARTICIPATE IN A CLASS ACTION. IF THE

PROHIBITION AGAINST CLASS ACTIONS AND OTHER CLAIMS BROUGHT ON BEHALF OF THIRD PARTIES CONTAINED ABOVE IS FOUND TO BE UNENFORCEABLE, THEN ALL OF THE PRECEDING LANGUAGE IN THIS ARBITRATION SECTION WILL BE NULL AND VOID. THIS ARBITRATION AGREEMENT WILL SURVIVE THE TERMINATION OF YOUR RELATIONSHIP WITH FISHER CAPITAL. IF FOR ANY REASON A CLAIM PROCEEDS IN COURT RATHER THAN IN ARBITRATION CUSTOMER AND FISHER CAPITAL EACH WAIVE ANY RIGHT TO A JURY TRIAL AND AGREE THAT CUSTOMER AND FISHER CAPITAL SHALL LITIGATE EXCLUSIVELY IN THE COURTS LOCATED IN LOS ANGELES, CALIFORNIA.

(*Ibid.*) Defendant argues that the case should therefore be compelled to arbitration, pursuant to the arbitration clause in the purchase agreement.

Plaintiff counters (1) Plaintiff was fraudulently induced to sign the agreement containing the arbitration provision; (2) the provision leaves the arbitration forum up to the unilateral discretion of Defendant; (3) it does not provide the relevant arbitration rules; and (4) it appears to contemplate that arbitration will be conducted by an arbitration entity associated with or controlled by Defendant.

Defendant argues in reply that the issue of arbitrability should be delegated to the arbitrator pursuant to the delegation clause.

Before the Court can address the issue of delegation, it must first determine whether the parties indeed entered into a binding agreement to arbitrate.

Plaintiff argues she was fraudulently induced to the shipping and transaction agreement containing the arbitration provision. Specifically, Plaintiff contends:

(1) Defendant's employees who contacted Plaintiff used fake names when interacting with Plaintiff (Beavers Decl. ¶¶ 6, 8, 10);

(2) Defendants falsely informed Plaintiff that if she did not transfer her late husband's retirement funds into her name, "the government could take the funds" (Beavers Decl. ¶ 7, 18);

(3) Defendants also misrepresented to Plaintiff that her assets "would be safe from losing value" (Beavers Decl. ¶ 18);

(4) Defendants misrepresented that the coins Plaintiff was purchasing were exclusive, when they were not (Beavers Decl. ¶ 18);

(5) Defendants concealed from Plaintiff that the prices they charged Plaintiff for the coins "were exorbitantly above market rates" (Beavers Decl. ¶ 18.)

Thus, the evidence presented demonstrates that Plaintiff was induced to transact with Defendants, and agree to the resulting arbitration provision, under false pretenses. As such, the agreement is likely voidable, as the product of fraud in the inducement.

2. DELEGATION

Even if the arbitration agreement were valid and enforceable, the delegation clause is not.

"A delegation clause gives an arbitrator authority to decide even the initial question whether the parties' dispute is subject to arbitration." (*New Prime Inc. v. Oliveira* (2019) 139 S.Ct. 532, 538.) To be enforceable, a delegation clause must satisfy two prerequisites: (1) the language must be clear and unmistakable, and (2) the delegation must not be revocable under state contract defenses such as fraud, duress, or unconscionability. (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 240.)

a. **Clear and Unmistakable Language**

The delegation clause at issue provides:

> ANY CONTROVERSY, CLAIM OR DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE BREACH, TERMINATION, ENFORCEMENT, INTERPRETATION OR VALIDITY THEREOF, INCLUDING THE DETERMINATION OF THE SCOPE OR APPLICABILITY OF THIS AGREEMENT WILL BE RESOLVED BY BINDING, INDIVIDUAL ARBITRATION PURSUANT TO FISHER CAPITAL'S CHOICE OF ARBITRATION ASSOCIATION RULES FOR ARBITRATION OF CONSUMER-RELATED DISPUTES

(Spellane Decl. ¶¶ 1-2 and Ex. 1.)

Thus, it is unclear from the delegation clause exactly which arbitrator or arbitration company will determine the issue of arbitrability or resolve the parties' claims, or what rules shall apply to such arbitration, apparently leaving the decision to Defendant's subsequent unilateral determination.

The only further clues about the arbitrator and terms of arbitration is the following passage:

> IN THE EVENT THE FISHER CAPITAL ARBITRATION ASSOCIATION IS UNWILLING OR UNABLE TO SET A HEARING DATE WITHIN ONE HUNDRED AND SIXTY (160) DAYS OF FILING THE CASE, THEN EITHER FISHER CAPITAL OR YOU CAN ELECT TO HAVE THE ARBITRATION ADMINISTERED INSTEAD BY THE JUDICIAL ARBITRATION AND MEDIATION SERVICES.

(*Ibid.*)

Plaintiff has indicated that after searching, Plaintiff has been unable to find any such forum or association by the name of "Fisher Capital Arbitration Association." (Opposition at p. 7.)

Thus, there appears to be no real arbitrator or arbitration association to whom the Court could delegate the issue of arbitrability, or to whom Plaintiff could initiate arbitration proceedings.

Nor does the "backup" provision regarding JAMS save the delegation clause, because that provision may only be invoked one hundred and sixty days after Plaintiff files the "case" with a phantom arbitrator, an event which is impossible to occur, since the "Fisher Capital Arbitration Association" does not appear to exist. Moreover, the only case law Defendants cite in support of their position that the provisions about arbitrating before the apparently nonexistent "Fisher Capital Arbitration Association" should be severed and the case simply sent to JAMS instead is a nonbinding district court case, which is inapposite in any event because it analyzes the severability of unconscionable provisions, not salvaging language that is otherwise not "clear and unmistakable."

3. UNCONSCIONABILITY

Having determined that the delegation clause is unenforceable, the Court next turns to the issue of whether the arbitration clause is unconscionable.

"Unconscionability is ultimately a question of law for the court." (*Flores v. Transamerica Homefirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) "However, numerous factual issues may bear on that question." (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89.) As such, Respondent must show two elements to establish the unconscionability defense: (1) procedural unconscionability, which focuses on the manner in which the contract was negotiated, and (2) substantive unconscionability, which concerns whether the contract's terms are unreasonably one-sided. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-115 (hereafter, *Armendariz*).)

"The prevailing view is that procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree. Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves. In other words, 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." (*Armendariz, supra*, 24 Cal.4th at p. 114 [cleaned up].)

i. PROCEDURAL UNCONSCIONABILITY

Procedural unconscionability examines the "oppression that arises from unequal bargaining power and the surprise to the weaker party that results from hidden terms or the lack of informed choice." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 795.) Preprinted forms buried within a volume of documents offered on a "take or leave it basis" evidence a high degree of procedural unconscionability. (See *Dougherty v. Roseville Heritage Partners* (2020) 47 Cal.App.5th 93, 102-104 (hereafter, *Dougherty*).) Most consumer contracts are adhesive and therefore present some procedural unconscionability. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 915, (hereafter, *Sanchez*).) "[A] finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided." (*Ibid.*)

In addition to the facts listed above regarding fraudulent inducement, Plaintiff also asserts that:

(6) the Defendants contacted Plaintiff while she was grief-stricken from the recent loss of her husband, and therefore in a vulnerable emotional state, and leveraged this grief to manipulate Plaintiff by saying her husband "would be proud" of her for "moving decisively to protect" the retirement assets (Beavers Decl. ¶¶ 3, 7; 18);

(7) Defendant was also vulnerable because of her inexperience and lack of knowledge about investments and investing (Beavers Decl. ¶ 8);

(8) Defendants made a series of phone calls to Plaintiff "in relatively rapid succession," each time using "urgent and alarmist tones" as well as "threatening" and "bullying" (Beavers Decl. ¶¶ 7, 8, 10);

(9) Prior to signing, Plaintiff received all documents only by email and she had to sign them through DocuSign on her phone, as she does not own a computer (Beavers Decl. ¶ 12)

(10) Plaintiff's understanding was that Defendants were merely helping her transfer the assets into a new IRA account in her name, and as such, she instructed Defendants to keep the proceeds in cash (Beavers Decl. ¶ 13)

(11) Instead of following Plaintiff's instructions to keep the proceeds in cash, Defendants sent Plaintiff the July 15, 2021 "Purchase Invoice" to purchase gold and silver coins with the proceeds (Beavers Decl. ¶ 14)

Therefore, the Court finds that there was a high degree of procedural unconscionability in entering the agreement containing the relevant arbitration provision.

ii. SUBSTANTIVE UNCONSCIONABILITY

Substantive unconscionability refers to agreement terms which are overly harsh, unduly oppressive, unreasonably unfavorable, or so one-sided as to shock the conscience – which, for practical purposes, all mean

the same thing. (*Sanchez, supra,* 61 Cal.4th at p. 915.) With regard to demonstrating substantive unconscionability, an "old-fashioned bad bargain" or a contract term which "merely gives one side a greater benefit" is insufficient. (*Id.* at pp. 911-912.) The test for substantive unconscionability is whether the terms impair the integrity of the bargaining process or otherwise contravene public policy, or the terms "attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law" or "negate the reasonable expectations of the nondrafting party." (*Sonic-Calabassas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145; see also *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 247 ["outside the reasonable expectation of the nondrafting party or is unduly oppressive"]; *Dougherty, supra,* 47 Cal.App.5th at pp. 104-107 [arbitration agreement that curtailed plaintiffs' ability to recover statutory remedies, such as punitive damages and attorney fees, and contained limitations on discovery that risked frustrating plaintiffs' statutory elder abuse claims was substantively unconscionable].)

Here, the arbitration agreement provides (1) Defendant shall unilaterally choose the rules that govern the arbitration proceedings; and (2) the arbitration shall be held by "Fisher Arbitration Association," an entity which, not only does not appear to exist, but if it did, appears, by virtue of the naming, to be associated with or part of Defendant.

Thus, the terms are not only extremely one-sided in Defendant's favor, but also appear to impair the very integrity of the dispute resolution process, in contravention of public policy. As such, the arbitration provision also has a high degree of substantive unconscionability.

Therefore, even if there were a valid agreement, the arbitration provision is unconscionable and unenforceable.

CONCLUSION

For the reasons stated above, Defendant's motion to compel Plaintiff's claims to arbitration and to stay the proceedings is denied.

Defendant shall provide notice of the Court's ruling and file a proof of service of the same.

DATED: February 7, 2024

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MICHAEL E. WHITAKER

JUDGE OF THE SUPERIOR COURT

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Defendants.

CASE NO. 23SMCV03533

PROOF OF SERVICE

I declare that I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action, and I am employed in the County of San Diego, California. My business address is 1230 Columbia Street, Suite 1140, San Diego, CA 92101. On February 7, 2024, I served on the below listed parties, the following document(s):

1) NOTICE OF RULING DENYING MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS
2) Proof of Service

Alexander F. Porter, Esq.
Marcy Blattner Micale, Esq.
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865 South Figueroa Street, Suite 2400
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(***Counsel for Defendants Fisher Capital and*** *Alexander Spellane*)

[X] By placing a copy in a separate envelope, with postage fully prepaid, for each address named above and depositing each for collection and mailing pursuant to the ordinary business practice of this office, which mail is deposited with the U.S. Postal Service on the same day at San Diego, California.

[X] By transmitting the document(s) listed above, via email, pursuant to an agreement for email service.

[ ] For all addressees, in addition, by Overnight Mail by placing a Federal Express Standard Overnight envelope addressed to each of the persons on the service list attached hereto and depositing said envelope into a Federal Express pickup box.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 7, 2024, at San Diego, California.

Thomas D. Mauriello