Carrie M. Francis (309280)
carrie.francis@stinson.com
STINSON LLP
1850 North Central Avenue
Suite 2100
Phoenix, Arizona 85004-4584
Tel: (602) 279-1600
Fax: (602) 240-6925

Attorneys for Defendant

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Dan Rife, an individual,

Plaintiff,

v.

Cerner Corporation,

Defendant.

Case No. 23CV2303-W-MMP

REPLY IN SUPPORT OF DEFENDANT CERNER CORPORATION'S MOTION TO COMPEL ARBITRATION

(NO ORAL ARGUMENT PURSUANT TO LOCAL RULE 7.1.d.1)

Hearing Date: March 11, 2024

Hon. Thomas J. Whelen

I. INTRODUCTION

Plaintiff's Opposition to Defendant Cerner's Motion to Compel Arbitration ("Opposition") fails to provide adequate legal and evidentiary support for his argument that the MAA is unconscionable. Further, the issue of unconscionability is to be decided by the arbitrator, not this Court. Accordingly, the Court should grant Cerner's Motion to Compel Arbitration.

II. ARGUMENT

A. Any question of the MAA's unconscionability is for the arbitrator to resolve.

Plaintiff argues that the MAA is unconscionable; however, the MAA states "the Arbitrator will have the exclusive authority to resolve disputes regarding the formation,

interpretation, applicability, enforceability, or implementation of this Agreement, including claims that all or party of this Agreement is void or voidable." *See* Kobler Decl., Ex. A at 1. The United States Supreme Court has held such clauses to be enforceable. *See Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1108 (citing, *inter alia*, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010)). Accordingly, the arbitrator, not this Court, should make the final determination regarding the unconscionability of the MAA.

Plaintiff fails to address the delegation clause or provide any argument as to why that clause is unenforceable. The U.S. Supreme Court has held that delegation clauses are "viewed as an independent ('severable') contract" from the arbitration agreement, and judicial consideration of whether the delegation clause is enforceable is **only** triggered when a party raises arguments specific to the delegation clause. *See Nielsen Contracting, Inc.*, 22 Cal.App.5th at 1108 ("[A]n argument that the arbitration agreement or the underlying contract is unenforceable is not sufficient to trigger the court's obligation to resolve contentions regarding the enforceability of a severable delegation clause." (citing *Rent-A-Center*, 561 U.S. at 71-76)). Because Plaintiff did not raise any arguments regarding the delegation clause, the issue of unconscionability should be resolved through the arbitration process.

B. Portions of Plaintiff's declaration are speculative and inadmissible.

Based on the above, the unconscionability argument raised by Plaintiff should be decided by the arbitrator. However, if the Court is inclined to address Plaintiff's arguments, it cannot consider Paragraphs 9 and 10 of Plaintiff's Declaration because they are purely speculative.

Evidence that is irrelevant, unreliable, and speculative is inadmissible. *See Lucent Trans Elect. Co., Inc. v. Foreign Trade Corp.*, No. 18-cv-8638-FMO (KSx), 2019 WL 2620726, at *4-5 (C.D. Cal. May 21, 2019) (refusing to admit evidence because it was

irrelevant, speculative, lacking foundation, irrelevant, and amounted to hearsay). Courts routinely strike statements in declarations that are based on speculation. *See, e.g., Smith v. Pacific Bell Telephone Co., Inc.*, 662 F.Supp.2d 1129, 1221 (E.D. Cal. 2009) ("The statements contained in paragraph nine are speculative and argumentative. They are not admissible.").

In Plaintiff's declaration, he contends that he signed the MAA because it was his understanding that if he did not, he would no longer be eligible for a compensation increase associated with a promotion. (Doc. 8-1 at 2). This statement is entirely speculative. The MAA states only that consent to its terms "is a condition of my eligibility for any future *performance-based* compensation increases." *See* Kobler Decl., Ex. A at 1 (emphasis added). The MAA **does not** condition compensation increases related to promotions on consent to its terms. Any contention that Plaintiff would not have received a raise in conjunction with a future promotion if he did not sign the MAA is speculative and not based on the express language of the MAA. Therefore, the Court should not consider Paragraphs 9 and 10 of Plaintiff's declaration if it chooses to address whether the MAA is unconscionable.

C. Plaintiff has not shown that the MAA is unconscionable.

Plaintiff bears the burden of proving the defense of unconscionability. *See Espejo*, 246 Cal.App.4th at 1057-58 (quoting *Rosenthal*, 14 Cal. 4th at 413); *see also Aanderud*, 13 Cal.App.5th at 895 (citing *Tiri*, 226 Cal.App.4th at 244). Plaintiff must prove the MAA is **both** procedurally and substantively unconscionability. *See OTO, L.L.C. v. Kho*, 8 Cal.5th 111, 126 (2019). Procedural unconscionability requires a showing that the circumstances of contract negotiation and formation were unconscionable, "focusing on oppression or surprise due to unequal bargaining power." Substantive unconscionability turns on the "fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." *Id.* at 125 (cleaned up) (quoting *Pinnacle Museum Tower*

Ass'n v. Pinnacle Mkt. Devel. (US), LLC, 55 Cal.4th 223, 246 (2012)). Plaintiff's required showing on one depends on his showing on the other. *See OTO*, 8 Cal.5th at 126 (quoting *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal.4th 83, 114 (2000)).

If the Court chooses to further address Plaintiff's unconscionability argument, it should do so based on the limited admissible evidence set forth in Plaintiff's declaration. Based on this limited evidence, Plaintiff cannot meet his burden to establish unconscionability.

1. Only Minimal Procedural Unconscionability Exists.

Plaintiff argues that the MAA is procedurally unconscionable because he was asked to sign it after he was already employed by Cerner and because it conditioned future performance- and merit-based compensation increases and bonuses on his consent to it. (Doc. 8 at 5). However, arbitration agreements presented after employment has commenced are not per se unconscionable, and Mr. Rife had the ability to opt-out of the MAA. Accordingly, the MAA is not procedurally unconscionable.

The Ninth Circuit upholds arbitration agreements presented to employees after employment has commenced when the agreement allows the employee the freedom to opt-out. *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1107 (9th Cir. 2002); *see also Velazquez v. Sears, Roebuck and Co.*, No. 13cv680–WQH–DHB ORDER, 2013 WL 4525581, at *6 (S.D. Cal. Aug. 26, 2013); *Stover-Davis v. Aetna Life Ins. Co.*, No. 1:15-cv-1938-BAM, 2016 WL 2756848, at *4 (E.D. Cal. May 12, 2016).

In *Circuit City*, the employer instituted an alternative dispute resolution program at the plaintiff's store several years after the plaintiff's employment commenced. 294 F.3d at 1106. Employees were presented with a Dispute Resolution Agreement that provided all employment-related claims would be resolved through binding arbitration. *Id.* However, current employees could opt out of the program by signing and returning a form to the corporate headquarters. *Id.* There, the plaintiff did not return the form, and

the Ninth Circuit concluded the plaintiff's failure to exercise his right to opt out bound him to the agreement. *Id.*

Similarly, here, Plaintiff was not required to sign the MAA. In fact, it was even easier for Plaintiff to opt out of the MAA than it was in *Circuit City*. In *Circuit City*, the employees had to actively opt-out by submitting a form. Here, Plaintiff did not have to do anything at all to opt-out. Plaintiff was only required to take affirmative action with regard to the MAA if he chose to opt-in. Plaintiff exercised his right to opt-in by signing and submitting the MAA. *See* Kobler Decl., Ex. A. Moreover, he checked a box indicating that he "entered into th[e] Agreement *voluntarily* and not in reliance on any promises or representations by Cerner other than those contained in this Agreement." Kobler Decl., Ex. A at 4 (emphasis added).

Plaintiff's reliance on *Ajamian v. CantorCO2e, L.P.*, 203 CalApp.4th 771 (2012) is inapposite. In *Ajamian*, the court found procedural unconscionability because:

> Substantial evidence supports the court's finding. Ajamian, who had already been working as a broker for almost 10 months, had no realistic bargaining power and was required to sign the Employment Agreement to receive her promised compensation—for work she had already performed. Furthermore, the Employment Agreement was not the subject of any negotiation. Ajamian stated in her declaration that she wanted to make changes to the Employment Agreement and felt uncomfortable signing it, but felt she had no choice based on Margolis's statements.

Id. at 796. Here, Plaintiff's signature on the MAA was not required before he could receive anything currently promised to him or any compensation owed for work he already performed. Plaintiff's affidavit does not indicate that he felt uncomfortable signing the MAA or that he felt the terms of the MAA were non-negotiable. Accordingly, this case is entirely distinguishable from *Ajamian*.

Defendant does admit that the MAA is a contract of adhesion. However, "the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high." *See Serpa v. Cal. Surety Investigations, Inc.* (2013) 215 Cal. App. 4th 695, 704 (quoting *Ajamian v. CantorCO2e* (2012) 203 Cal. App. 4th 771, 796). As explained below, Plaintiff has not and cannot make that showing.

2. Plaintiff has not shown the MAA is substantively unconscionable.

Plaintiff argues the MAA is substantively unconscionable because it requires employees to exhaust administrative remedies prior to bringing discrimination claims. (Doc. 8 at 6). This claim has absolutely no merit. Plaintiff does not cite **any** support whatsoever for this argument, because there is none.

First, arbitration does not guarantee a party will not incur substantial costs in resolving their claims. “Such a system still 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 v. Foundation Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 110 (2000). Large costs alone are not a basis to find an arbitration agreement substantively unconscionable. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-91 (2000). Further, if Plaintiff seeks to argue that the MAA is substantively unconscionable due to prohibitive arbitration costs, he must show that he is actually subject to prohibitive costs. *Id.* The general argument that the MAA does not cover all costs he may incur vindicating his claims is not enough to show substantive unconscionability. *Id.*

Second, arbitration agreements are held substantively unconscionable due to costs when they impose *additional* expenses a party would not face if their claim was resolved through litigation. *Armendariz*, 24 Cal.App.4th 110-111 (“[W]e conclude 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."). As Plaintiff acknowledges, whether his claims are brought in this Court or through the arbitration process, he was still required to exhaust the administrative processes before bringing his claim. Therefore, the administrative costs associated with his claim would have been the same regardless of whether he filed this lawsuit or initiated arbitration.

Lastly, Plaintiff's argument that it is substantively unconscionable that he be required to first exhaust all administrative remedies before vindicating his claim in arbitration is baseless. Federal law—not Cerner—requires employees to pursue administrative remedies before bringing a lawsuit against their employer. *See Filing a Lawsuit*, U.S. Equal Employment Opportunity Commission, Filing a Lawsuit | U.S. Equal Employment Opportunity Commission (eeoc.gov). Cerner is not imposing any additional or uneven burden on Plaintiff by requiring that he file a charge of discrimination before bringing his claims—that is the law.

D. The MAA must be enforced, even if unconscionable, after severing any substantively unconscionable provision.

Plaintiff has, at most, show the MAA is minimally procedurally unconscionable; thus, he needed to prove the MAA is highly substantively unconscionable. *See Serpa*, 215 Cal.App.4th at 704 (quoting *Ajamian*, 203 Cal. App. 4th at 796). Plaintiff has failed to do so. Consequently, the MAA is enforceable.

To the extent Plaintiff has shown the MAA is substantively unconscionable, this Court must either enforce the entire agreement or sever that provision and enforce the rest of the agreement. Plaintiff has not proven, nor even argued, that the MAA is "permeated by unconscionability," which is the only circumstance in which this Court may refuse to enforce an entire agreement with an unconscionable provision. *See Farrar v. Direct*

Commerce, Inc. (2017) 9 Cal.App.5th 1257, 1274 (quoting *Armendariz*, 24 Cal. 4th at 122).

CONCLUSION

For the foregoing reasons, Cerner requests that the Court compel arbitration of the dispute and stay the pending litigation between the parties, and grant such other and further relief as the Court deems proper.

RESPECTFULLY SUBMITTED this 4th day of March, 2024.

STINSON LLP

By 

Carrie M. Francis
1850 North Central Avenue, Suite 2100
Phoenix, Arizona 85004-4584
Attorneys for Defendant