

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 21 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DARNAA, LLC,

No. 17-16233

Plaintiff-Appellant,

D.C. No. 3:15-cv-03221-WHA

v.

MEMORANDUM*

GOOGLE LLC, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Submitted November 15, 2018**
San Francisco, California

Before: SCHROEDER and WATFORD, Circuit Judges, and KORMAN,***
District Judge.

Darnaa, LLC posted a music video to YouTube in the hopes of amassing
public views, a metric used by the music industry to assess an artist's commercial

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes that this case is suitable for decision
without oral argument. Fed. R. App. P. 34(a)(2).

*** The Honorable Edward R. Korman, United States District Judge for the
Eastern District of New York, sitting by designation.

viability. Subsequently, YouTube accused Darnaa of artificially inflating the video's view count in violation of YouTube's Terms of Service—the agreement that Darnaa accepted before posting the video. Accordingly, YouTube removed Darnaa's video and associated view count from its website. Darnaa sued for breach of the implied covenant of good faith and fair dealing, alleging that YouTube failed to determine in good faith if Darnaa had manipulated the view count. The district judge dismissed the claim as barred by the agreement's limitation of liability provision, which forecloses damages arising from “any interruption or cessation of transmission to or from [YouTube's] services,” or “any errors or omissions in any content.” Darnaa appeals, arguing that this provision is unconscionable or otherwise invalid under California Civil Code § 1668. We review the district court's findings of law de novo and affirm.

1. The limitation of liability provision is not unconscionable.

[U]nconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. Both substantive and procedural unconscionability must be present in order for a court to find a contract unconscionable, but they need not be present in the same degree.

Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1210 (9th Cir. 2016) (internal quotation marks and citations omitted). As a general matter, “[I]mitation of

liability clauses ‘have long been recognized as valid in California.’” *Lewis v. YouTube, LLC*, 197 Cal. Rptr. 3d 219, 224 (Ct. App. 2015) (quoting *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 147 Cal. Rptr. 3d 634, 641-42 (Ct. App. 2012)).

Even though Darnaa had no opportunity to negotiate the terms of the agreement, the degree of procedural unconscionability resulting from its adhesive nature is low. *See Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1260-62 (9th Cir. 2017). A term is not oppressive where, as here, the customer has “reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable.” *Lennar Homes of Cal., Inc. v. Stephens*, 181 Cal. Rptr. 3d 638, 651-52 (Ct. App. 2014) (quoting *Dean Witter Reynolds, Inc. v. Superior Court*, 259 Cal. Rptr. 789, 798 (Ct. App. 1989)). Darnaa alleges that music industry practices have rendered YouTube the only viable choice for displaying videos. But the relevant standard is whether “reasonably available” alternatives exist, not equally dominant or popular alternatives. *See id.* at 651; *accord Song fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 62 (D.D.C. 2014) (identical contract not procedurally unconscionable because “[p]laintiffs could have publicized [their] video by putting it on various other file-

sharing websites or on an independent website”). Indeed, Darnaa’s complaint acknowledges that artists can display their music videos on various websites. Finally, the provision does not bear other indicia of undue surprise, as it is clearly identifiable and printed in all caps. *See, e.g., Kilgore v. KeyBank, Nat’l Assoc.*, 718 F.3d 1052, 1059 (9th Cir. 2013).

The clause is not substantively unconscionable, as it is not “unreasonably favorable” to YouTube, “unduly oppressive,” or conscience shocking. *See Poublon*, 846 F.3d at 1261 (quoting *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 748 (Cal. 2015)). While the limitation of liability provision precludes only the user from recovering damages, “a contract can provide a ‘margin of safety’ that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable.” *Sanchez*, 353 P.3d at 749 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 691 (Cal. 2000)). Because YouTube offers its video streaming services at no cost to the user, it has a valid commercial need to limit liability for actions taken to regulate its platform. On this basis, the California Court of Appeal has recently enforced the very same limitation of liability

provision of YouTube’s Terms of Service—the agreement at issue here. *Lewis*, 197 Cal. Rptr. 3d at 224; *accord Song fi, Inc.*, 72 F. Supp. 3d at 63.

2. California Civil Code Section 1668 (“Section 1668”) does not save Darnaa’s claim. Section 1668 forbids contractual terms “which have for their object . . . to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another.” CAL. CIV. CODE § 1668. As interpreted by California courts, Section 1668 generally does not prohibit parties from limiting liability for breach of contract, including breach of the implied covenant. *See Food Safety Net*, 147 Cal. Rptr. 3d at 642-43 (Section 1668 does not limit claims for breach of the implied covenant, which, “outside the context of insurance policies” are contractual rather than tortious); *N. Star Gas Co. v. Pac. Gas & Elec. Co.*, No. 15-cv-02575-HSG, 2016 WL 5358590, at *16 (N.D. Cal. Sept. 26, 2016) (same); *see also Cates Constr., Inc. v. Talbot Partners*, 980 P.2d 407, 416 (Cal. 1999) (action for breach of the implied covenant is an action sounding in contract). We see no reason to depart from this principle here.

Because we find that the limitation of liability provision bars Darnaa’s claim, we do not address defendants-appellees’ alternate grounds for affirmance.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

Form fields for case name, v., and 9th Cir. No.

The Clerk is requested to tax the following costs against:

Table with columns for Cost Taxable, REQUESTED, and ALLOWED. Rows include Excerpt of Record, Opening Brief, Answering Brief, Reply Brief, Other, and TOTAL.

* Costs per page: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees cannot be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk