

NOT FOR PUBLICATION**FILED**

UNITED STATES COURT OF APPEALS

MAR 22 2021

FOR THE NINTH CIRCUIT

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

CRISTINA BALAN,

No. 19-35637

Plaintiff-Appellee,

D.C. No. 2:19-cv-00067-MJP

v.

MEMORANDUM*

TESLA, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Submitted March 2, 2021**
Seattle, Washington

Before: RAWLINSON and BYBEE, Circuit Judges, and MOSKOWITZ,***
District Judge.

Appellant Tesla, Inc. (“Tesla”) appeals the district court’s order denying in part its motion to compel arbitration of Appellee Cristina Balan’s (“Balan”)

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

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

*** The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

defamation claims. Balan alleged that various post-termination statements Tesla made in a written response to a HuffPost article were defamatory. The district court held that Tesla's "statements about [Balan] seeking an alternative supplier with performance issues, writing irrelevant emails, engaging in employment-related misconduct, and resigning," in addition to "Tesla's statement that [Balan] was working on a 'secret project' during company time," all arose from or related to her employment or termination thereof, and thus fell within the scope of the parties' employment arbitration agreement. However, the district court found that Tesla's statements that Balan "illegally recorded internal conversations within Tesla" and "booked an unapproved trip to New York at Tesla's expense" were outside the scope of the arbitration agreement, and thus denied in part Tesla's motion to compel arbitration with respect to those statements. We have jurisdiction pursuant to 9 U.S.C. § 16(a)(1)(B). We reverse the district court's partial denial of Tesla's motion to compel arbitration.

"The district court's decision to grant or deny a motion to compel arbitration is reviewed de novo." *Bushley v. Credit Suisse First Bos.*, 360 F.3d 1149, 1152 (9th Cir. 2004).

1. The parties' arbitration agreement covers claims "arising from or relating to" Balan's employment, or the termination thereof. Therefore, the scope of the arbitration agreement encompasses any disputes that have "a significant

relationship to,” or at least “some direct relationship” with Balan’s employment or termination thereof. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) (“the language ‘arising in connection with’ reaches every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract”); *United States ex rel. Welch v. My Left Foot Children’s Therapy, LLC*, 871 F.3d 791, 798 (9th Cir. 2017) (“‘arising out of’ and ‘related to,’ mark a boundary by indicating some direct relationship”). Balan’s defamation claims are arbitrable if the underlying factual allegations “touch matters” covered by the defined scope of the arbitration agreement, with any doubts resolved in favor of arbitrability. *See Simula*, 175 F.3d 716 at 721 (“factual allegations need only ‘touch matters’ covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability”).

The district court characterized Tesla’s statement that Balan “booked an unapproved trip to New York at Tesla’s expense” as a statement that only implicated potentially criminal conduct. However, the statement also involves a dispute about Balan’s conduct in her capacity as an employee, which has a direct relationship to her employment, and thus falls within the scope of the arbitration agreement. Resolving the defamatory nature of the statement—whether any planned trip to New York was “unapproved”—requires some understanding of Balan’s employment, including whether she was bound by any company policies

and procedures to obtain advance approval when booking work trips, whether she actually received company approval for any planned trip, and whether the planned trip fell within the scope of her employment duties and responsibilities. Because the factual allegations regarding Tesla's statement go towards showing that Balan violated company policies and procedures, Balan's defamation claim touches on matters within the scope of the arbitration agreement, and is therefore arbitrable.

2. With respect to Tesla's statement that Balan "illegally recorded internal conversations within Tesla," while perhaps a closer case, the statement is at least susceptible to an interpretation that it has some direct relationship to Balan's employment, and all doubts are to be resolved in favor of arbitrability. *See id.* Resolving the defamatory nature of the statement—whether Balan's conduct was illegal—depends on the confidential nature of the recorded conversations and the privacy expectations of the involved employees who were recorded. This requires at least some understanding of Balan's employment with respect to her workplace environment, including the public or private nature of the office spaces where any recorded conversations took place, and any company policies regarding employees' expectations of privacy and confidentiality as to meetings conducted in office spaces during office hours, and in the ordinary course of business. Balan's defamation claim is related to her employment, and is therefore arbitrable.

The district court's partial denial of Tesla's motion to compel arbitration is

REVERSED and the case is **REMANDED**.¹ The parties shall bear their own costs on appeal.

¹ Balan's motion for judicial notice (Docket Entry No. 84) is **DENIED**.

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**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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